1. Agenda Packet

    Documents:

        REVISED STUDY SESSION PACKET.PDF

2. Handouts

    Documents:

        GARFIELD TWP COI.PDF
        ELMWOOD TWP COI.PDF

3. Presentation

    Documents:

        CONFLICT OF INTEREST PRESENTATION.PDF

GRAND TRAVERSE COUNTY BOARD OF COMMISSIONERS
STUDY SESSION

Wednesday, February 27, 2019
8:00 a.m.

Governmental Center, Commission Chambers
400 Boardman Avenue
Traverse City, Michigan 49684

A study session is held for review and discussion of information only.
This study session is being held to discuss the Conflict of Interest Policy and Ethics.

If you are planning to attend and you have a disability requiring any special assistance at the meeting, please notify the County Clerk immediately at 922-4760.

AGENDA

1. OPENING CEREMONIES OR EXERCISES

2. ROLL CALL

3. FIRST PUBLIC COMMENT

   Any person shall be permitted to address a meeting of the Board of Commissioners which is required to be open to the public under the provision of the Michigan Open Meetings Act. Public Comment shall be carried out in accordance with the following Board Rules and Procedures:

   Any person wishing to address the Board shall state his or her name and address.

   No person shall be allowed to speak more than once on the same matter, excluding time needed to answer Commissioners' questions, if any. The Chairperson shall control the amount of time each person shall be allowed to speak, which shall not exceed three (3) minutes. The Chairperson may, at his or her discretion, extend the amount of time any person is allowed to speak.

   Public comment will be solicited during the two public comment periods noted in Rule 5.4, Order of Business. However, public comment will generally be received at any time during the meeting regarding a specific topic currently under discussion by the board. Members of the public wishing to comment should raise their hand or pass a note to the clerk in order to be recognized, and shall not address the board until called upon by the chairperson. Please be respectful and refrain from personal or political attacks.

4. DISCUSSION
   a) Code of Ethics for Grand Traverse County Employees and Officials 5
   b) Voting – Abstention Due to Personal Interest 7
   c) Antrim County Conflict of Interest Policy 10
   d) Code of Ethics and Conduct for Emmet County Commissioners 19
   e) Ethics Handbook for Michigan Municipalities 25
   f) Model Ethics Ordinance for Local Units of Government 97

5. PRESENTATION BY CIVIL COUNSEL

6. SECOND PUBLIC COMMENT (Refer to Rules under Public Comment above)

7. ADJOURNMENT

GRAND TRAVERSE COUNTY ADMINISTRATION

Memo

To: **All Commissioners**
From: **Administration**
Date: **February 13, 2019**
Re: **Request for Study Session**

Date: February 27, 2019

Time: 8:00 a.m.

I would like to request a Study Session to be held on the above date at the Governmental Center.

The purpose is the Conflict of Interest Policy and Ethics.

Signature _____ Date: 2-14-19

Signature _____ Date: _____

Signature _____ Date: _____

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From:Grand Traverse County 231 922 4636 02/14/2019 10:45 #870 P.001/001

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Signature _____ Date: 2-14-19

Signature _____ Date: _____

CODE OF ETHICS FOR
GRAND TRAVERSE COUNTY EMPLOYEES AND OFFICIALS

DECLARATION OF POLICY - Where government is based on the consent of the governed, every citizen is entitled to have complete confidence in the integrity of his/her government. The public judges its county government by the way county employees and officials conduct themselves in the performance of their respective duties. Devotion to the public trust is an essential part of the obligation of public service. County employees and officials are the trustees of an important branch of our system of government in which the people must be able to place their absolute trust; for the preservation of their health, safety and welfare.

The proper operation of democratic government requires that county employees and officials be independent, impartial and responsible to the people. County employees and officials must avoid all situations where prejudice, bias, or opportunity for personal gain could influence their decisions. Even the appearance of improper conduct should be avoided.

The purpose of these standards is to provide each employee and official with a clear understanding of his/her conduct in the performance of his/her public responsibilities and to give the citizens a standard by which they may be assured that these responsibilities are being faithfully performed.

APPLICATION - The standards of ethical conduct set forth in the Code of Ethics shall be applicable without exception to all employees. Nothing in the Code shall be interpreted as denying any employee his/her rights under the law. In every proceeding with regard to these standards, fundamental due process shall be followed. Employees and officials must faithfully discharge their duties to the best of their ability without regard to age, race, creed, sex, national origin, or political belief. The public interest must be their primary concern and their conduct in official affairs should be above reproach.

An employee or official may express his/her personal views with respect to public issues, however, they shall not, by use of their position, represent their personal opinions as those of the county.

Public trust imposes the employees and officials the necessity to pledge themselves to the official use of manpower, property and funds under their care and to continued economy and efficiency in the performance of their duties.

CONFLICT OF INTEREST -

a. Confidential Information - An employee or official shall not divulge any confidential information to any unauthorized person or release any such information in advance of the time prescribed for its authorized release for his/her own personal gain or for the gain of others.

b. Personal Business - An employee or official shall not be a party, directly or indirectly, to any contract between himself or herself and the county, unless disclosure and approval is made as required by MCL 15.322 (Contracts of Public Servants with Public Entities).

c. Gifts and Favors - County employees or officials shall not, directly or indirectly, solicit, accept, or agree to accept any gift of money or goods, loans or services or other preferred arrangements for personal benefit under any circumstances which would tend to influence their work, make their decisions, or otherwise perform their duties or give the appearance of doing so. A county employee or official shall not grant or make available to any person any consideration, treatment, advantage or favor beyond that which it is the general practice to grant or make available to the public at large.

d. County Personnel or Property – Employees or officials shall not make use of county personnel, property, or funds for personal gain or benefit.

e. Representation of Private Interests – An employee or official shall not directly or indirectly solicit any contract between himself or herself and the county, committee, board, commission or authority he or she represents, unless disclosure and approval is made as required by MCL 15.322.

f. Supplementary Employment - A county employee or official shall not engage in or accept private employment or render services for private interest when such employment or service is incompatible or in conflict with the proper discharge of his/her official duties or would tend to impair their independence of judgment or action in the performance of his/her official duties.

g. Investments in Conflict with Public Responsibilities -- A county employee or official who participates in the making of loans, the granting of subsidies, the fixing of rates, or the issuance of valuable permits or certificates to any business entity shall not have, directly or indirectly, any financial or private interest in the business entity.

ENFORCEMENT - Any employee or official who violates the provisions of this Code shall be subject to disciplinary action up to and including discharge.

Note: This policy may differ for those employees who are members of recognized unions, organizations, or associations.

Approved Personnel Policy 4/92 (12/03) Amended 5/07

MEMORANDUM

TO: Herb Lemcool, Chairperson, Grand Traverse County Board of Commissioners

FROM: Bob Cooney, Prosecuting Attorney

DATE: December 17, 2013

RE: Voting – Abstention Due to Personal Interest

You have asked whether it was proper for Commissioner Lathrop to vote on a motion involving Drain Commissioner Kevin McElyea at last week's resource management and administration meeting. Specifically, the motion was a recommendation to approve two agreements, one with the Village of Fife Lake and another with Fife Lake Township. The purpose of the agreements is described in section one which provides in part as follows:

> The County, through its drain commissioner and prosecuting attorney's office, shall have the authority to enforce the Ordinance and the County Construction Code Board of Appeals is authorized to process appeals as provided in the ordinance.

During the discussion of the motion, the Drain Commissioner represented that he would provide his services "pro bono," that is, at no cost. I have also been informed that Lathrop and McElyea share a residence and own real property together.

First, there is no *lawful* prohibition against Lathrop voting on the matter. Michigan law contains two statutes which may prohibit a county commissioner from voting in certain circumstances. The first, MCL 15.322, prohibits public servants from contracting with the public entity they serve. That statute does not apply in this case because Lathrop is not a party to either contract. The second is MCL 15.181 which deals with holding two public offices that are incompatible. That statute does not apply as the issue does not concern the holding of two public offices.

Second, this Board has adopted a code of ethics policy which provides in pertinent part as follows:

> The proper operation of democratic government requires that county employees and officials be independent, impartial and responsible to the people. County employees and officials must avoid all situations where prejudice, bias, or opportunity for personal gain could influence their decisions. Even the appearance of improper conduct should be avoided.

Although it may be argued that the circumstances in this case give rise to a violation of the County's

code of ethics policy, as an elected official, a county commissioner is neither subject to discipline for violation of a county policy, nor prevented from voting on the matter.

As I have indicated above, there is no lawful duty to abstain from voting in this case. However, that does not end the inquiry. Pursuant to the County Commission's Board Rules, a commissioner has the right to abstain, and no member should vote on a question in which he has a direct personal or pecuniary interest not common to other members of the organization.[1] **Roberts New Rules of Order, 11th Edition**, § 45 (10-30) (adopted by reference, Grand Traverse County Board, Rules of order, § 12.1). However, no member can be compelled to refrain from voting in such circumstances. *Id*. at § 45 (30).

Further, it is of no consequence that the Drain Commissioner has indicated that he would perform his services at no charge. According to **Robert's Rules**, *supra*, the duty to abstain specifically applies to interests that are either "*personal* or pecuniary" (emphasis added). *Id*. at § 45 (10-30). Whatever the motivation of the Drain Commissioner in performing the work without additional compensation, the contracts involve the expenditure of County resources, including resources of the Prosecuting Attorneys Office, the Construction Code Board of Appeals and the Drain Commissioner's Office (at least as to equipment and supplies). The determination whether County resources should be expended upon an endeavor undertaken by the Drain Commissioner in his private capacity, no matter how meritorious, should be made without bias or prejudice and with only the public interest in mind. In summary, there is no state law that bars Commissioner Lathrop from voting on this matter, and no

[1] To further expound upon this standard, in general, it has been said that a public official may not use his or her official power to further his or her own interest and is not permitted to place himself in a position that will subject him to conflicting duties, that is, in a position where his or her private interest conflicts with his public duty, or cause him to act, or expose him to the temptation of acting, in any manner other than in the best interests of the public. 63C AM JUR 2D *Public Officers and Employees* § 246 (2010). A conflicting interest arises when a public official has an interest not shared in common with the other members of the public; there cannot be a conflict of interest where there do not exist, "realistically, contradictory desires tugging the official in opposite directions." *Id*. A "remote and speculative interest" will not be held to disqualify an official on conflict of interest grounds. When conflicts of interest arise between an office holder's private interests and public duties, it is proper that the office holder recuse himself from the matter in which the conflict arises. *Id*.

The test for disqualification of a public official due to a conflict of interest is fact-sensitive and depends on whether, under the circumstances, a particular interest had the *likely* capacity to tempt the official to depart from his or her sworn public duty. *Id*. At common law, the appearance of impropriety must be something more than a fanciful possibility. 3 McQuillian on Mun Corp, § 12.136 (3rd ed 2010).

enforcement mechanism for overturning the vote. The same is true of the County's code of ethics policy. Nevertheless, the Board Rules provide that Lathrop *should* abstain from voting if he has a direct personal interest not common to other members of the Board. Finally, only Lathrop can make the decision whether to abstain from voting, based upon the above rules.

The Board has two possible courses of action in this case: (1) do nothing and approve the recommendation of the resource management and administration committee at its regular board meeting on December 26th; or (2) any member of the Board, or a member of the public, may remove the item from the consent calendar, in which case a vote will be cast and Commissioner Lathrop will have the choice, based upon the above standards, whether to vote or abstain from voting.

Please feel free to contact me if you have any questions or concerns about this.

c: Dave Benda, Administrator/Controller

ANTRIM COUNTY CONFLICT OF INTEREST POLICY

SECTION I – AUTHORITY

Under the authority granted in MCL 46.11, the Board of Commissioners for Antrim County hereby adopts the following policy concerning conflicts of interest. This Policy is intended to supplement and not supersede existing Michigan State Law dealing with unethical conduct and/or conflicts of interest by County Commissioners or public officers. In addition to this Policy, County Commissioners and public officers remain bound by all state laws including, but not limited to, MCL 15.181 et. seq., the Incompatible Public Offices Act, MCL 15.321 *et. seq.*, the Contract of Public Servants with Public Entities Act and MCL 46.30 *et seq*, Michigan Campaign Finance Act, MCL 169.201 *et seq.*

SECTION II – PURPOSE

The purpose of this Policy is twofold: 1) to ensure the business of this County is conducted in such a way Commissioners or public officers will not gain a personal or financial advantage from his or her work for the County, and 2) to preserve public trust. It is also the intent of this Policy to insure that all decisions made are based upon the best interests of the County at large.

SECTION III – DEFINITIONS

For the purposes of this Policy, the following definitions shall apply:

A. **Conflict of Interest** means any of the following:

1. A direct or indirect personal interest of a Commissioner or public officer, or his or her spouse or other household member, in the outcome of a cause, proceeding, application or any other matter pending before the Board of Commissioners, public officers, or public body, in which he or she holds office or is employed. This also includes any child, stepchild, parent, grandparent, grandchild, sibling, aunt or uncle, brother or sister-in-law,

business associate, employer or employee of a Commissioner or public officer, or his or her spouse or other household member, who has a direct or indirect personal interest in the outcome of a cause, proceeding, application or any other matter pending before the Board of Commissioners, public officers, or public body, in which he or she holds office or is employed.

2. A direct or indirect financial interest of a Commissioner or public officer, or his or her spouse or other household member, in the outcome of a cause, proceeding, application or any other matter pending before the Board of Commissioners, public officers, or public body, in which he or she holds office or is employed. This also includes any child, stepchild, parent, grandparent, grandchild, sibling, aunt or uncle, brother or sister-in-law, business associate, employer or employee of a Commissioner or public officer, or his or her spouse or other household member, who has a direct or indirect financial interest in the outcome of a cause, proceeding, application or any other matter pending before the Board of Commissioners, public officers, or public body, in which he or she holds office or is employed.

3. A situation where a Commissioner or public officer has publicly displayed a prejudgment of the merits of a particular quasi-judicial proceeding. This shall not apply to a member's particular political views or general opinion on a given issue; and

4. A situation where a Commissioner or public officer has not disclosed ex-parte communications with a party in a quasi-judicial proceeding.

B. **County Commissioner** means a person elected or appointed to serve upon the Antrim County Board of Commissioners.

C. **Elected Official** means Sheriff, County Clerk, County Treasurer, Register of Deeds, Prosecuting Attorney, Drain Commissioner and County Surveyor.

D. **Emergency** means an imminent threat or peril to the public health, safety or welfare.

E. **Official act or action** means any legislative, administrative or quasi-judicial act performed by any Commissioner, public body or appointed public officer while acting on behalf of the County.

F. **Public body** means any board, council, commission or committee of the County.

G. **Public interest** means an interest of the County as a whole and is generally conferred upon all residents of the County.

H. **Public officer or public official** means a person appointed or hired to perform executive or administrative functions for the County, including appointed Department Heads and any person appointed to any public body.

I. **Quasi-judicial Proceeding** means and is limited to an adjudication proceeding when all are present and is:

a. Allowable either by statute or ordinance and held before a public body;

b. During which the legal rights of one or more persons to have an hearing before the public body are considered;

c. During which all parties have the opportunity to present evidence and question witnesses; and

d. When the adjudication proceeding results in an oral or written decision, an appeal of which is permitted by statute or ordinance. By way of example, this would include but not be limited to a hearing before the Construction Code Board of Appeal, Farmland and Open Space Preservation Board, or Board of Commissioners when sitting as an Appeals Board. It does not include any action or public hearing involving a non-adjudication determination in a legislative or policy-making capacity by the County Board of Commissioners, public officer or any public body.

SECTION IV – DISQUALIFICATION/PROHIBITION

A. A Commissioner or public officer shall not participate in any official action if he or she has a conflict of interest in the matter under consideration.

B. A Commissioner or public officer shall not personally, or through any member of his or her household, as set-forth in Section III.A, represent, appear for, or negotiate in a private capacity on behalf of any person or organization in a cause, proceeding, application or other matter pending before the public body in which the Commissioner or public officer holds office or is employed.

C. In addition to enforcement under Section VII, the Chair of the County Board shall have the authority to order a public officer to recuse his or herself from the matter. A majority vote of the County Board may override the County Chair's order of recusal.

D. By virtue of their public office, a Commissioner, elected official or a public officer shall not accept gifts or other offerings for personal gain or if prohibited by law. The term **"Gift"** shall not include promotional items of nominal value such as calendars, pens/pencils, office-related material or small seasonal items provided for the general use of all employees within an office or to the public and not made to an individual person. **"Gift"** shall not include "give away" items or prizes provided at conferences, training sessions, or by an association, if such items are generally equally available to all attendees or members. **"Gift"** shall not include any donation made to the County or elected official's office for the general use of the office or persons served by the office or County.

E. A Commissioner, elected official or public officer shall not use resources not available to the public, including, but not limited to, County staff time, equipment, supplies or facilities, for private gain or personal purposes.

SECTION V - DISCLOSURE

A. A public officer who has reason to believe that he or she has or may have a potential conflict of interest under this policy or under State Law, shall clearly state the scope and nature of the conflict of interest and recuse his or herself from the matter or take such other action as may be required by this policy or required under State Law.

B. A Commissioner who has reason to believe that he or she has or may have a conflict of interest under this policy, but believes that he or she is able to act fairly, objectively, and in the public interest in spite of the conflict of interest, shall, prior to participating in any official action on the matter, disclose to the public body at a public hearing the matter under consideration, the nature of the potential conflict of interest, and why he or she believes that he or she is able to act in the matter fairly, objectively, and in the public interest and may take such action as permitted by law, unless required by State law to recuse him or herself.

C. In quasi-judicial proceedings, individuals, unless otherwise prohibited by law, are not precluded from oral or written communication directly with a member of the decision-making body. Such ex-parte communications are not presumed prejudicial if the subject of the communication and the identity of the person, group, or entity with which the communication took place is disclosed and made a part of the record before final action on the matter occurs. Members of the decision-making body may make site visits and may receive information or expert opinion regarding quasi-judicial actions pending before them. Such activity shall not be presumed prejudicial to the action if the existence of the investigation, site visit, information, or expert opinion is made a part of the record before final action on the matter occurs. All decisions in a quasi-judicial action must be

supported by evidence in the record pertinent to the proceedings, irrespective of such communications.

D. A Commissioner, public official or public body, unless otherwise prohibited by law, may have written and oral written communication from any person.

E. A Commissioner, public officer or public official, unless otherwise prohibited by law, may conduct investigations and site visits and may receive information and expert opinions.

SECTION VI - RECUSAL

A. A Commissioner or public officer shall recuse him or herself from any matter in which he or she has a conflict of interest, unless such recusal is not permitted by State law.

B. Any person may request that a member recuse him or herself due to a possible conflict of interest. Such request shall not constitute a requirement that the member recuse him or herself, unless required by State Law.

C. A Commissioner or public officer who has recused him or herself from a proceeding shall not sit with the board, deliberate with the board, or participate in that proceeding as a board member.

D. If a previously unknown conflict is discovered, a public body may take evidence pertaining to the conflict and, if appropriate, adjourn to address the conflict.

E. The Board of Commissioners or a public body may adjourn if, after a recusal, it may not be possible to take action through the concurrence of a majority. The Board may then resume the proceeding with sufficient members present; however, in no case may a recusal deprive a Board of Commissioners or a public body from permanently achieving a quorum to take official action.

F. In addition to enforcement under Section VII, the County Chair shall have the authority to order a public officer to recuse him or herself from the matter. A majority vote of the County Board may override the County Chair's order of recusal.

SECTION VII – ENFORCEMENT
Consequences for Failure to Follow the Conflict of Interest Procedures by a Person *Other* Than a County Commissioner.

In cases where the conflict of interest procedures in Sections V and VI have not been followed, the County Board of Commissioners may take action to discipline an offending public officer. In the discipline of a public officer, the Board shall follow these steps in order:

A. The Chair shall meet informally, in private, with the public officer to discuss the possible conflict of interest violation, unless such meeting is not in accord with a collective bargaining agreement, in such case the collective bargaining agreement shall be followed.

B. The County Board or designated committee may meet to discuss the conduct with the public officer. The public officer may request that this meeting occur in a closed session. A closed session may be used for such discussion in accordance with the Open Meeting Act MCL 15.268, unless such meeting is not in accord with a collective bargaining agreement, in such case the collective bargaining agreement shall be followed.

C. If the County Board decides that further action is warranted, the County Board may admonish, suspend, terminate employment, or remove the offending public officer from any board, council, commission or committee. The public officer shall be given the opportunity to respond to such proposed action.

D. Nothing in this Section shall override any collective bargaining agreement.

SECTION VIII – ENFORCEMENT
Consequences for Failure to Follow the Conflict of Interest Procedures by a Person *Who Is* a County Commissioner.

A. Upon a majority vote, the County Board may request the offending Commissioner to recuse his or herself from the matter.

B. Upon a majority vote, the County Board may admonish the offending Commissioner.

C. Upon a majority vote, the County Board may request that the offending Commissioner resign from the County Board.

D. Upon a majority vote, the County Board may authorize such other civil legal action against such offending Commissioner as may be necessary and/or permitted by law.

E. The Chair or any person may refer the matter to the Prosecuting Attorney to determine if any violation of state criminal law may have occurred.

SECTION IX – EXCEPTION

Unless State law requires a recusal, the recusal provisions shall not apply if the County Board of Commissioners determines that an emergency exists and that actions of the public body otherwise could not take place. In such cases, a public officer who has reason to believe he or she has a conflict of interest shall disclose such conflict as provided for in Section V.

SECTION X – EFFECTIVE DATE

This Policy shall become effective immediately upon its adoption by the Antrim County Board of Commissioners.

Date: _____

CONFLICT OF INTEREST POLICY

Acknowledgement

The undersigned member of Antrim County Boards and Commissions, public body or public officers covered by this policy hereby acknowledges that he/she has received a copy of the Conflict of Interest Policy.

The undersigned also understands that he/she is bound by the policies and procedures described in this Policy.

_____
Signature

_____
Printed Name

Date: _____

Please return the following to:

Antrim County Coordinator/Planner Office
P.O. Box 187
Bellaire, MI 49615

CODE OF ETHICS AND CONDUCT
FOR EMMET COUNTY COMMISSIONERS
May 24, 2018

(A) Preamble.

(1) The citizens of Emmet County are entitled to have fair, ethical and accountable local government that has earned the public's full confidence for integrity.

(2) Furthermore, the effective functioning of democratic government requires that public officials, both elected and appointed, comply with both the letter and spirit of the laws and policies affecting the operations of government; public officials be independent, impartial and fair in their judgment and actions; public office be used for the public good, not for personal gain; and public deliberations and processes be conducted openly, unless legally confidential, in an atmosphere of respect and civility.

(3) To this end, the Emmet County Board of Commissioners adopts this Code of Ethics and Conduct to assure public confidence in the integrity of local government and its effective and fair operation.

(B) Code of Ethics and Conduct.

(1) Acts in the public interest. Recognizing that stewardship of the public interest must be their primary concern, County Commissioners will work for the common good of the people of Emmet County and not for any private or personal interest, and they will assure fair and equal treatment of all persons, claims, and transactions coming before the Board of Commissioners.

(2) Compliance with law. County Commissioners shall comply with the laws of the nation, the State of Michigan, and Emmet County, in the performance of their public duties. Commissioners shall also comply with the Rules of Procedure as adopted by the Board.

(3) Respect for process. County Commissioners shall perform their duties in accordance with the Rules of Procedures established by the County Board of Commissioners governing the deliberation of public policy issues and meaningful involvement of the public.

(4) Conduct of public meetings. County Commissioners shall prepare themselves for public issues, listen courteously and attentively to all public discussions before the body, and focus on the business at hand. They shall refrain from interrupting other speakers, making comments not germane to the business of the body, or otherwise interfering with the orderly conduct of meetings.

(5) Communication. County Commissioners shall publicly share substantive information that is relevant to a matter under consideration by the Board, which they may have received from sources outside of the public decision-making process.

(6) Full disclosure.

A. A County Commissioner in the performance of his/her public duties shall not act upon any matter in which he/she may have a material financial interest, or where he/she may have a legal or fiduciary duty to another organization or entity or personal relationship that may give the appearance of a conflict of interest, without disclosing the full nature and extent of the interest to the other members of the County Board of Commissioners on the official record. Such disclosure must be made before the time to perform their duty or concurrently with the performance of the duty.

B. The disclosure required by this subsection shall not supplant, but instead shall supplement any disclosure of a personal, contractual, financial, business, employment or pecuniary interest required by state statute and the Rules of Procedures 9.4.

(7) Gifts, favors, and loans.

A. A County Commissioner shall refrain from financial and business dealings that would tend to reflect adversely on the Commissioner's impartiality, interfere with the performance of his/her public duties or exploit his/her official position. A County Commissioner should not take any special advantage of services, goods or opportunity for personal gain that is not available to the public in general.

B. A County Commissioner, a family member of a County Commissioner, a Trust in which a County Commissioner or other family member may be considered as a beneficiary of a Trust, and an entity (corporation, partnership, sole proprietorship, LLC) in which the County Commissioner or other family member has a financial interest, shall refrain from soliciting **any** gifts, loans or favors except that a Commissioner and a family member may:

1. Accept a gift or honorarium, not exceeding a value of one hundred dollars ($100.00), for services rendered in the performance of their public duties or other activity devoted to the improvement of communities and the lives of citizens.

2. Accept ordinary social hospitality; a gift, bequest, favor or loan from a relative; a wedding or engagement gift; a loan in the regular course of business from a lending institution on the same terms as generally available to the public; and a scholarship, grant or fellowship awarded on the same terms as applied to other applicants.

3. Accept any other gift, favor or loan only if the donor is not a person or entity whose interests have come or are likely to come before the Board of Commissioners.

4. Solicit and accept campaign contributions in accordance with federal and state law.

(8) Confidential information. County Commissioners shall respect the confidentiality of information concerning the property, personnel or affairs of the County. They shall neither disclose nor divulge to an unauthorized person confidential information acquired in the course of their duties in advance of the time prescribed for its authorized release to the public without proper legal authorization, nor use such information to advance their personal, financial or other private interests.

(9) Use of public resources. Public resources, including County staff time, equipment, supplies, and facilities, not available to the public in general shall only be used for the benefit of the public. County Commissioners may not use public resources for personal or private use.

(10) Representation of private interests. In keeping with his/her role as stewards of the public interest, a County Commissioner shall not appear on behalf of the private interests of third parties, including a family member, a Trust in which a County Commissioner or other family member may be considered as a beneficiary of a trust, and an entity (corporation, partnership, sole proprietorship, LLC) in which the County Commissioner or other family member has an interest, before the Board of Commissioners or any board, committee, commission or proceeding of the County.

(11) Advocacy. County Commissioners shall represent the official policies or positions of the Board of Commissioners to the best of their ability when designated as delegates for this purpose. When presenting their individual opinions and positions, County Commissioners shall neither state nor imply that they represent the opinions or positions of the Board of Commissioners or Emmet County, and must affirmatively state that it is their own opinion or position, and not that of the Board of Commissioners. Commissioners shall always be mindful of the needs of the entire county, and not just the district they represent.

(12) Policy role of Board of Commissioners.

A. County Commissioners shall respect and adhere to the Board-Administrator structure of Emmet County government. In this structure, the County Board of Commissioners, by its votes taken at properly noticed public meetings, determines the policies of the County with the advice, information, and analysis provided by the administrator, the public, subordinate boards, committees and commissions, and County staff.

B. County Commissioners, individually or as a group, shall not interfere with the administrative functions of the County or the professional duties of County staff; nor shall they impair the ability of the County Administrator to implement Board of Commissioners policy decisions.

(13) Independence of Boards, Committees and Commissions. Because of the value of the independent advice of subordinate boards, committees, and commissions to the public decision-making process, members of the Board of Commissioners shall, except when the Commissioner is a member of the public body, limit their participation in the proceedings of such subordinate public bodies to the communication of requested information and providing factual information relevant to the discussion at hand and shall not otherwise attempt to unduly influence the deliberations or outcomes of the proceedings. The Board shall be vigilant to maintain a sense of independence, and monitor board appointments to ensure that no conflicts are present in committee appointments, keeping in mind any family, business, or personal relationships with committee members.

(14) Positive workplace environment.

A. County Commissioners shall support the maintenance of a positive and constructive workplace environment for County employees and for citizens and businesses dealing with the County. County Commissioners shall recognize their special role in dealings with County employees so as to in no way create the perception of inappropriate direction to staff nor give specific orders to subordinates of the County Administrator or Civil Counsel.

B. Because County Commissioner actions and comments contribute to the environment in which all County employees must work, in order to create and promote a positive work environment, no Board member shall give orders or direction to any subordinate of the County Administrator, either privately or publicly. Elected Officials may make inquiries or exchange information but cannot issue directives.

(15) Compliance and enforcement.

A. This Code of Ethics for Emmet County Commissioners expresses standards of

ethical conduct expected for members of the Board of Commissioners. County Commissioners themselves have the primary responsibility to assure that they understand and meet the ethical standards expressed in this code of ethics and that the public can continue to have full confidence in the integrity of government.

B. All County Commissioners have a responsibility to act when they learn of actions of another County Commissioner that appear to be in violation of the Code of Ethics. Upon being notified of reasonable suspicion of a violation of the Code of Ethics, the Chairperson shall set, or any three Commissioners may require the setting of, a public hearing at a regular or special meeting of the County Board of Commissioners to determine whether a violation of the Code of Ethics occurred and, if so, what sanctions shall be imposed for the violation.

C. The Board of Commissioners may impose sanctions on County Commissioners whose conduct does not comply with the County's ethical standards. Sanctions may include reprimand, formal censure, loss of committee assignment, restrictions on budget or travel, and removal from office by the governor in the manner and for the causes provided by law.

D. A violation of this code of ethics shall not be considered a basis for challenging the validity of a County Board of Commissioners decision.

(16) Implementation.

A. As an expression of the standards of conduct for County Commissioners expected by the public, this Code of Ethics and Conduct is intended to be self-enforcing. It therefore becomes most effective when County Commissioners are thoroughly familiar with it and embrace its provisions.

B. For this reason, ethical standards shall be included in the regular orientations for newly elected or appointed County Commissioners. At the first organizational meeting of the Board of Commissioners in January of each year, County Commissioners entering office shall sign a statement affirming that they have read and understand the Code of Ethics for Emmet County Commissioners.

C. In addition, the Board of Commissioners shall annually review the Code of Ethics and Conduct for Emmet County Commissioners.

Commissioner Statement of Acknowledgment.

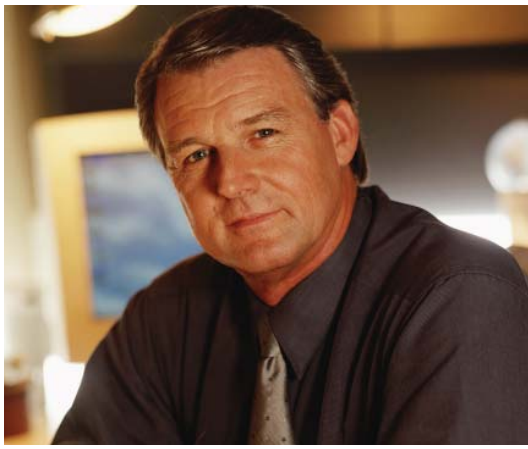
As a member of the Emmet County Board of Commissioners, I agree to uphold the Code of Ethics and Conduct adopted by the County Commission and conduct myself by the following model of excellence. I will:

- Recognize the worth of individual members and appreciate their individual talents, perspectives, and contributions;
- Help create an atmosphere of respect and civility where individual members, County staff, and the public are free to express their ideas and work to their full potential;
- Respect the dignity and privacy of individuals and organizations;
- Respect and maintain the nature of confidential and privileged information and opinions acquired as a result of my position;
- Conduct my public affairs with honesty, integrity, fairness and respect for others;
- Avoid and discourage conduct that is divisive or harmful to the best interests of Emmet County; and
- Keep the common good as my highest purpose and focus on achieving constructive solutions for the public benefit.

I affirm that I have read and fully understand the Code of Ethics and Conduct for Emmet County Commissioners:

Signature: Date:

Ethics Handbook for Michigan Municipalities



integrity ➤ fair dealing ➤ responsibility ➤ accountability ➤ openness

michigan municipal league
Better Communities. Better Michigan.

➤➤➤

Thank you

The Michigan Association of Municipal Attorneys wishes to thank the Michigan Municipal League Foundation for their generous financial support of the Ethics Handbook project. The Foundation contribution has greatly assisted with the publication and distribution of the handbook, ensuring that it will be available to local governments and interested parties throughout Michigan.

Ethics Handbook For Michigan Municipalities

Presented by
The Ethics Roundtable
of the Michigan Association of Municipal Attorneys

A publication of

michigan municipal league
Better Communities. Better Michigan.

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Dedication

This handbook is dedicated to the memory of William L. Steude, general counsel of the Michigan Municipal League from 1971 to 1997, and past chair of the Ethics Roundtable, a committee of the Michigan Association of Municipal Attorneys. Bill was a proponent of ethical conduct and civility in government at all levels, and this handbook was originally his idea. The essay on "Civility in Government" is his, and in it he considers the respect that is deserved by and owed to, both the public and its dedicated local government officials and staff. We have all benefited from Bill's belief in the necessity of the trustworthiness of government, and with this handbook we hope to advance that belief.

Foreword

The Michigan Municipal League, representing some 518 local governments, is proud to join the Michigan Association of Municipal Attorneys in presenting a comprehensive resource for local government officials interested in the topic of ethics as it applies to municipalities.

One of the hallmarks of municipal governance in Michigan is its strong tradition of ethical conduct in the provision of services for local communities. The actions of municipal elected and appointed officials adhere not only to a statutory framework, but also to professional codes of conduct, local provisions, local organizational culture and, perhaps most importantly, a strong sense of personal ethics borne of the civic pride that leads individuals to be municipal officials. The Michigan Municipal League has traditionally worked to articulate and support the tradition of ethical conduct in Michigan's municipalities. This handbook represents an important additional step. It is both a conceptual resource and a "how to" manual. It is comprehensive in that it addresses numerous facets of ethics. And, it documents the ways numerous municipalities have addressed ethics, in a formal sense, by adopting a local ethics ordinance.

One of the great attributes of municipal government in Michigan is that the government can be tailored to meet the needs of a particular community. The best way to address an issue in one community may be very different from a neighboring community—the topic of ethics included. Thus, this handbook does not seek to present a "model." Rather it discusses the concept of ethics as it applies to municipal government, highlights particular issues, and then presents how several communities have addressed those issues. It should be pointed out that for many municipalities it will be appropriate to adopt only selected provisions set forth in the handbook.

In making the choice to adopt an ordinance, a community should bear in mind that an ethics ordinance is a tool. While adopted with the intent of improving the government of the municipality, care has to be given to how this tool is used. That is, an ethics ordinance can be a shield—to shield the community from unethical conduct—or it can be used as a sword to unfairly attack municipal officials, and if so used, it can be a detriment to the community.

Ultimately, this handbook is a powerful resource for Michigan's municipal leaders to engage in community dialogue and deliberation to choose the best approach *locally* for maintaining high ethical standards in Michigan municipalities.

This handbook represents a great deal of devotion to this topic by a number of persons. Without their selfless contributions, it would not have been possible. In particular I would like to recognize and thank Daniel C. Matson, chair of the Ethics Roundtable whose guidance and persistence made the handbook a reality. Dennis A. Mazurek, senior counsel of Detroit's Law Department, who organized and analyzed the sample ordinance provisions, and Mary M. Grover, the editor of the handbook, who molded its disparate parts into a unified publication.

William C. Mathewson
General Counsel, Michigan Municipal League;
Secretary/Treasurer, Michigan Association of Municipal Attorneys

Preface

This handbook is offered as a guide for establishing ethical standards for the conduct of all persons in service to municipal governments in Michigan. A number of Michigan communities have adopted some form of statement about ethics which may appear in the local charter, in an ordinance, or in both. Other communities may be considering adopting some form of standards of conduct for their public officials. This publication is intended to provide assistance to municipal officials in their efforts to either create new ethics policies and procedures, or to update them in keeping with today's expectations regarding the conduct of elected officials, employees, and volunteers.

The Home Rule principle allows Michigan communities to tailor ethics standards to fit local needs and expectations. Each can adopt provisions that are appropriate for a particular community in order to promote public trust in public officials and in government. Elected and appointed officials, staff and volunteers may rely upon this stated framework within which they conduct the affairs of government.

The authors and reviewers of this handbook bring considerable experience to the effort as they have represented the interests of Michigan municipalities and have encountered a broad range of ethical issues and concerns that confront public officials. The publication is the outcome of many such experiences as identified by members of the Ethics Roundtable, a group formed by the Michigan Association of Municipal Attorneys. The Roundtable has focused on aiding local officials to understand and to resolve ethics problems within established legal and voluntary requirements.

With this reference, municipal officials may consider addressing a variety of areas of conduct that would be appropriate for their organizations. The reader may also examine a variety of options that are currently in use in a number of Michigan communities. These approaches are the result of extensive study and discussion, and they reflect local concerns and values.

It is strongly recommended that the municipal attorney be involved in each step of the process of developing, proposing, and adopting ethical standards. Numerous legal issues must be considered whenever local law of this nature is created, and particularly when enforcement is involved.

Ethical administration of government invites the citizen's confidence in, and respect for, government. Good governance is valued by the community. It is sustained by those who have dedicated themselves to public service, and it is reflected in the decisions made and the actions taken by that government. To that end, the Ethics Roundtable commends this handbook to all citizens of Michigan communities, and to those who serve them, in recognition of the need to promote, and to earn, the public trust.

I wish to acknowledge contributions to this work by members of the Ethics Roundtable of the Michigan Association of Municipal Attorneys, including the following: Dennis A. Mazurek, senior counsel of the City of Detroit Law Department, for his comprehensive research and analysis in authoring Chapter 3, the central chapter of the handbook. John J. Rae, former Midland city attorney, who brought erudite and insightful sharing of the meaning of ethics. Peter A. Letzmann, former Troy city attorney, and foremost seminar organizer and presenter to municipalities on many topics, always with ethical concerns in mind. Michael P. McGee, senior principal with Miller, Canfield, Paddock and Stone, PLC, who applies labor law considerations to the book. William C. Mathewson, general counsel, and Sue A. Jeffers, associate general counsel, of the Michigan Municipal League, who continue to field numerous inquiries regarding ethical issues from constituent municipalities. Dene Westbrook, Jeanette Westhead, and Breanne Bloomquist at the League for their design and production expertise. Mary M. Grover, of Traverse City, public sector facilitator, trainer and presenter of ethics programs on local, state, national and international levels, who served as editor. Many others have generously served as members of the Ethics Roundtable through its years of existence, and their meaningful participation in the ever-current ethics discussion has led to the completion of this handbook.

Daniel C. Matson, Chair
The Ethics Roundtable

Chapter 1: The Importance of Ethics for a Local Government

Essays

"Ethics" and Why it Matters

By John J. Rae

Why should a municipal government be concerned about ethics? At first blush this appears to be a question, the answer to which is so obvious, that it need not be asked. As is the case with so many things, however, things are, more often than not, more complicated than they appear to be.

Aside from the almost automatic response of many, who might say that ethics must mean some sort of standard of good behavior, there appears to be little agreement about what the word "ethics" really means. This has led, unfortunately, to the term becoming so loose in scope and meaning that it is in danger of becoming as floppy as words like *liberal*, or *conservative*, words which often convey whatever meaning the speaker or writer wants, but to the listener or the reader, the words may have a very different meaning.

In addition to the immediate barrier to understanding which this moveable meaning creates (or perpetuates), the standard of good behavior which is supposedly being followed is, by this confusion, in danger of becoming nothing more than a belief that one's personal opinion on the subject is no better or worse than the opinion of anyone else. The result is a kind of relativism around the word "ethics," which logically raises the question of whether there should really be any "ethics" standards in the first place.

A large part of the problem here is that the term "ethics" has a number of meanings assigned to it by any standard dictionary. For example, one reference includes all of the following:

1. the study of the general nature of morals and of the specific moral choices to be made by an individual in his relationship with others; i.e. the philosophy of morals or moral philosophy;
2. a set of moral principles or values;
3. the moral quality, fitness or propriety of a course of action; and
4. the rules and standards governing the conduct of a profession.

Also, the historical tension between the religious traditions in our pluralistic society, and the protections of individual rights under our governmental system, inevitably lead to even more disagreement over the subject of "ethics."

Given all of the foregoing, then why do we bother trying to establish any kind of rational system of ethics guidance for municipal government? The answer is that most people recognize civil society's need for something which will enable them to live together in a peaceful and productive way. This recognition is already reflected in our Constitution, public laws, statutes, ordinances and regulations. What is driving the renewed interest in codes of ethics, however, appears to be an ever-growing belief that these laws do not go far enough.

What a carefully crafted and defined "ethics" code or ordinance can do is to establish behavioral standards of integrity, fair dealing, responsibility, accountability, and disinterested conduct which are not specifically covered by existing laws, but which are an essential part of the fiduciary duty (the highest standard of conduct) which is almost universally recognized in this country as being owed to the public by its public servants and officials.

Civility in Local Government: The Civil Society

By William L. Steude

While the subject of civility in government is a different concept than that of ethics in government, there can be little doubt that there is a close relationship between the two. It is hard to imagine that true ethical behavior would not be characterized by civil behavior, even though the opposite might not always be the case. The authors of this publication believe that these concepts complement one another, and for this reason have decided to include this chapter. We can find no better explanation and exposition of the subject than was set forth by our mentor, teacher and friend, Bill Steude, in an article entitled, "Civility in Local Government: The Civil Society," which appeared in the April 2001 issue of the Michigan Municipal Review*. The article follows, in its entirety. – Editor*

The decline in civil conduct and discourse, public and private, needs no documentation. But a search over the Internet under "civility" produces much that supports the case for its sharp decline and a yearning for its restoration. Universities have commissions to promote civility on campuses. Churches offer civility pledges to candidates for public office. Congress even had a civility camp where members and their families gathered to improve the courtesy level in the U.S. House of Representatives. The City of Bloomington, Indiana, established a task force for a safe and civil city, promoting discussion of what it means to be a civil participant. Several state jurisdictions have promulgated civil codes for practicing attorneys.

President George W. Bush, in his 13-minute inaugural address, referred to "civility" four times. He said, "Civility is not a tactic or a sentiment. It is the determined choice of trust over cynicism, of community over chaos."

To be civil, in ordinary understanding, means to be polite, respectful, decent, tolerant, graceful in language and gesture, tone, exercising restraint toward others, cooling the hot passions of partisanship, adversarial and personalized argument, with magnanimity toward others.

The decline in civility in public affairs reflects the overall decline in American civility – in professional sports, the media, talk shows, politics, academics, interpersonal communication, even road rage. The loss of civility in our national life betrays more fundamental trends in our society and culture, argues Harvard Law Professor Stephen L. Carter in his recent book on civility.[1] He traces the historic, cultural and religious roots of civility that have withered or rotted and now account for the serious lapse in civil social behavior.

Civility probably cannot be codified into standards of behavior enforceable by penalty. In fact, civility codes for public officials may even set a lower threshold, and be an incentive for lowering, rather than raising standards, by setting what you can get away with, not how you should be.

There is no constitutional duty of a public official to be civil. But note Article I, Section 17 of the Michigan Constitution, in the same section in which the due process clause appears, which provides:

> "the right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed."

This "fair and just treatment clause" does not speak to civility, but civility can help set the tone for demonstrating fair and just treatment in hearings and investigations.[2]

However impossible it may be to mandate, civility might be inspired by conscientious attention to the trappings of a meeting of a public body, by the physical setting, by the rules of procedure and the conscious example of members of the public body themselves.

The trappings of a meeting

Opening ceremonies, such as a prayer by a member of the clergy in the community, the pledge of allegiance to the flag led by Girl or Boy Scouts or by veterans, and a formal roll call of the members can set the level of respect with which such formality is usually accorded.

Remember, a city commission or council is an elected legislative body whose members take exactly the same constitutional oath of office taken by the governor and by every other elected official in the state. If members and the public have the respect for one another and from one another that reflects that status, a certain formal level of discourse and decorum might maintain a higher level of civility.

The physical setting for the meeting, the furnishings and seating arrangements, and even the council's attire influence and can elevate expectations about public deportment at council meetings. A card table or fold up table with folding chairs for the council members seems to belittle the office and may invite an informality that can slide into uncivil discourse or worse.

Money spent on decent furnishings and the setting is well worth the cost. It reflects the level of respect accorded by the community toward its self-government and its elected representatives.

Rules of procedure

No deliberative body can efficiently conduct its business without rules. A governing body has a relatively free hand in designing its own rules of procedure as long as constitutional (First Amendment), statutory (Open Meetings Act), and local charter requirements are not violated. Although most municipal governments which have rules seem to have automatically adopted *Robert's Rules*, *Robert's* does not necessarily have to be the primary source for local rules of procedure.

Robert's Rules of Order are complicated, highly detailed, and are intended primarily for large legislative bodies or for meetings of large associations whose membership may number hundreds. Its procedures may be unnecessarily cumbersome for small governing bodies: the five-to-seven-member councils of most Michigan municipalities.[3]

For example, *Robert's* requires a second to support an ordinary motion and put it into debate, but a *small* body which meets weekly, fortnightly or monthly might opt not to require a second at all, but could proceed to debate directly if the rules permit it.

The complex details of parliamentary procedure may also confuse and frustrate elected officials and the public, particularly if the rules are seen as being manipulated for or against one side of an issue or the other, or are seen as being ignored, misunderstood or wrongly invoked. Such a use of the rules of procedure, or the perception of their *mis*use, will counter the very purpose of rules of procedure – to protect the minority and promote orderly deliberations and decisions, and will further undermine public confidence in government.

Truth in government depends on a set of procedural rules that are followed consistently, give equal opportunity for every member of the body to participate in making the decision, make for the most efficient procedure possible, and result in a decision by a majority of the body on the merits of the issue, not on manipulation of procedures.

A governing body ordinarily has the discretion to adopt its own simplified set of procedural rules, unless *Robert's Rules* or some other authority has been mandated by the municipal charter.[4] Such rules do not automatically command civility, but a good set of rules may minimize the perception that the rules are drawn, or bent, to control an outcome. If parliamentary maneuvering is seen as manipulating the proceedings, a frustrated council member or minority, or the attending public, can erupt in anger.

Civility and decorum is strained by the gadfly, the activist and the protester, who tend to distrust government and those in government. If they engage in abusive and baseless charges, or monopolize a meeting, the presiding official can rapidly lose the ability to maintain order, unless the council backs a zero tolerance policy toward such disruptive behavior.

Personal attacks generate counter attacks and lead to verbal duels and free-for-alls difficult to break, leaving civility and decorum in the dust. The presiding officer in that event may have no choice except to declare a brief recess so tempers and rhetoric may cool.

A rule against personal attacks, applicable equally to members of the body and the public, can help keep a discussion "problem centered" and not "person centered." A procedure to enforce a zero tolerance policy in progressive steps can be effectuated,

1. By reminding the speaker of the rule if a violation occurs.
2. If the misconduct persists, by calling the speaker to order, citing the rule—a formal warning which may cause the speaker to lose the floor, if the rule so provides (although it may also authorize restoring the floor to the speaker if the abuse ends and the body formally permits the speaker to resume); or
3. If the abuse still persists after warnings, the chair "names the offender"—a last resort step which has the effect of preferring charges. The presiding officer states what the offender has done. The body then decides how to penalize the member, if the offender is a member of the governing body. The rule could specify a range of penalties—e.g. reprimand, formal censure, or municipal civil infraction. If the offender is a member of the public, the presiding officer may order the offender to be escorted from the meeting room.[5]

A rule limiting the length of council meetings and speeches by elected officials and the public will contribute to keeping the deliberations on point. No good government is likely to occur in the late night hours of a meeting when the limits of patience strain the limits of civility.

Procedural rules that permit and promote flexible opportunities for public input may diffuse public frustration at being foreclosed from opportune comment and encourage constructive debate. For example,

- Schedule public comment time at the beginning of the meeting (or of a work session), rather than at the end of the meeting.
- Provide a short time for public comment at the first reading of an ordinance, rather than, or in addition to, at the second reading; (preliminary public comment may surface overlooked problems early and minimize any perception at the second reading that the work has already been done and gone too far to be altered and the issue already decided).
- Hold regular meetings explicitly for public participation separate from or in conjunction with and preceding the regular council meeting.

Titles and debate

How members of a governing body address one another and how the public is conditioned to address the council can promote the level of civility if formalities are observed. Using the "first name" may be appropriate in a casual street encounter or on the phone with a friend or neighbor who is a colleague on the council or a constituent, but it is not appropriate in a formal session of the governing body when addressing one another.

Titles may be a source of sensitivity to gender biased titles.

"Commissioner" when the legislative body is a commission is an easy gender-free title. "councilman" requires its counterpart, "councilwoman," but "councilmember" fits either, and "councilor" is a shorter alternative. "Trustee" will work for general law villages. "Madam" or "mister mayor," or just plain "mayor" works for cities. "Madam" or "mister president," or just plain "president" works for a village presiding officer.

If the title is not in the municipal charter, the rules of procedure can establish the titles, how to address one another, and the practice that members of the public should be requested to follow suit. For example, "Council members shall be addressed as "councilor."

Remember, a local government council is not only a local elected legislative body with chartered status. A council acquires a quasi-judicial character when it sits as a zoning board of appeals or other appellate hearing body. The decorum should reflect the quasi-judicial duty to be, and seem, judicious and dignified.

Judge Learned Hand was right: "(This) much I *think* I do know—that a society so driven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court need save; that a society which evades its responsibility by thrusting on the courts the nurture of this spirit, that spirit in the end will perish." The same might be said of civility.

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1. Stephen L. Carter, *Civility: Manners, Morals and the Etiquette of Democracy*, 1998, Basic Books.
2. Violation of fair and just treatment in a legislative hearing was the basis for a $7.6 million judgment against the Detroit Board of Education in an unpublished opinion of the Michigan Court of Appeals in *Jo-Dan Ltd. v. Detroit Board of Education*, No. 201406, July 14, 2000.
3. A Michigan Municipal League survey of councils disclosed 80 with 5 members; 2 with 6; 420 with 7; 11 with 8; 15 with 9; 3 with 10; and 2 with 11 members. Of 533 councils, 502, or 94%, had 7 or fewer members.
4. See *Suggested Rules of Procedure for Small Local Government Boards*, A. Fleming Bell II, Institute of Government, 2nd edition, 1998, presented to the IMLA 65th Annual Conference, 2000.
5. See David M. Grubb, "Maintaining Civility at Council Meetings," New Jersey Municipalities, March 1995, pp. 24, 47-48 for a good discussion of this. See also Webster's New World *Robert's Rules of Order*, *Simplified and Applied,* 1999, pp. 155-156.

Chapter 2: Things to Keep in Mind

Essays

Different Forms of Local Government; Different Routes to Adopting Ethics Standards for Your Community

By William C. Mathewson

For most people, using this handbook will be straight forward. Michigan municipal elected and appointed officials who are giving consideration to adopting ethics standards for their community can review the handbook to see how others have addressed this issue. Finding the preferred approach from the materials presented, an official can offer a route for adoption of ethics standards in his or her community. However, to enhance the handbook as a resource, especially for persons new to municipal government within Michigan or from outside the state, it may be helpful to pause for a moment to review the Michigan local government structure in which the adoption of ethics standards fits, once the decision has been made locally to do so.

This handbook, which is a collection of essays, makes reference to different legal routes for the incorporation of ethics standards in the governance of a Michigan municipality. Each is accurate but it is helpful to understand how each fits within the larger picture.

There are several forms of local government within Michigan. In addition to Michigan's eighty-three counties, there are home rule cities (HRC), home rule villages (HRV), general law villages (GLV), charter townships (CT) and general law townships (GLT). Michigan cities and villages maintain a strong tradition of home rule. However, with ethics as with other governmental concerns, the state can prescribe what will be the law on a particular subject matter so long as the state statute is consistent with the state constitution. Some state laws relate to local ethics provisions. Two examples are labor law and campaign finance.

But to date, the state Legislature has not chosen to enact a comprehensive statute that would control the way local units of government would enforce ethical conduct within their jurisdictions. This may not always be the case, as it has periodically been discussed, typically within the context of addressing ethics with respect to all governmental jurisdictions within the state, including state government. Thus, at present, local units of government have discretion in choosing the best approach to take to address ethical conduct within their unit of government.

For cities and villages in Michigan, this means that they may proceed in one of two ways. They can adopt an ethics provision in their city or village charter (the local equivalent of a constitution) coupled with the subsequent adoption of a local ordinance (the local equivalent of a statute) to carry out the intent of the charter provision. They can also adopt an ethics ordinance, without direct mention of the topic in the charter, under the authority granted in the Home Rule City Act, Home Rule Village Act or General Law Village Act to adopt ordinances to carry out the general grant of authority to these units of local government. If this were done, however, some sanction provisions might not be enforceable. (Perhaps a third way would be local guidelines, but they would not have the force of law and would not be legally enforceable.)

The essay by Bill Steude that follows this one discusses in some detail ethics provisions in the context of a municipal charter commission. This route is applicable to a city or home rule village that is being incorporated for the first time and thus has a charter commission to write its initial charter. Or, more likely, this route is one that would be taken by an existing city or home rule village that has chosen to convene a charter commission to review and offer new or revised sections of its existing charter for presentation to the electorate—which could include a provision regarding ethics.

Putting an ethics provision in the city's or village's local "constitution" (charter) could also take the form of a charter amendment. An amendment to the city's or village's existing charter could be offered to the citizens for their approval without convening a charter revision commission. An ethics amendment could stand alone or be one of a few amendments placed on the ballot for the electorate to consider. There are thus two ways to change an existing city or village charter: in cities or home rule villages

through the convening of a charter commission and presenting the proposed revised charter to the voters; or in cities and all villages by placing selected amendments on the ballot.

While a city or village charter can speak to or even require, addressing ethics, it need not do so. A city or village could adopt a binding set of ethics provisions in the form of an ordinance without the specific involvement of the charter. The majority of this handbook is devoted to setting forth samples and discussion of ethics provisions in ordinance form. This is appropriate because regardless of the approach taken in a charter, it is presumed that the implementation of ethical conduct/standards will be in the form of an ordinance. In fact, it would be impractical to put in a charter (again, the local equivalent of a constitution) the level of detail that is typical in an ordinance that addresses ethics.

With respect to cities and villages, a logical next question is why involve the charter of a city or village if a legally enforceable ethics ordinance can be adopted on its own, so to speak. There are various responses and ultimately the individual community will need to decide what the best approach is. That having been said, one reason is that some sanction provisions in an ordinance, such as removal from office, would not be enforceable if not authorized in the charter. Another reason for a charter provision is that it could be drafted to *mandate* that there be an ethics ordinance for the city or village. While it is beyond the scope of this publication to discuss the degree to which it is appropriate to require the legislative body (council or commission) to enact such an ordinance, if the citizens feel strongly enough about the topic of ethics they can require that the city or village adopt and enforce standards.

But whether a charter requires adoption of an ethics ordinance or speaks more generally about the topic, making reference in the charter is a clear expression of the intent of the electorate and should serve to guide the elected and appointed officials. Also, as a practical matter, a charter provision once adopted by the electorate will stand until changed by that electorate, unless the charter provision is nullified by state or federal law.

Conversely, care should be taken in putting an ethics (or any) provision in a charter. For instance, if the issue addressed is too topical, it may lose importance over time and the city or village will be saddled with a provision in its charter that is obsolete. The more relevant danger, however, is that the charter provision will be too detailed or too inflexible, thus restricting the appropriate implementation of the intent of the provision through the adoption, and if needed, subsequent revision of an ordinance. Again, further discussion of this aspect is beyond the scope of this particular essay. But suffice to say, care should be taken in drafting and adopting an ethics provision in a charter (or for that matter in ordinance form)...if for no other reason, as even with the best of intentions, such provisions may be subject to misuse, to unfairly attack a local official (sword) rather than protect (shield) the community.[1]

Each of the sample ordinances presented in this handbook happen to be from cities. Other local units of government in Michigan could adopt similar provisions. In the case of villages, under the Home Rule Village or General Law Village Acts, the considerations for doing so are equivalent to cities. With respect to general law villages' charter authority[2] while their basic governing document is a state statute (the GLV Act) it is deemed to be their charter. The Act does not speak to ethics provisions but general law villages have the authority to amend their charters (via amendment but not revision) and to adopt local ordinances, including provisions pertaining to ethics.

Charter townships and general law townships do not have home rule charters, but rather are respectively governed by specific state statutes augmented by somewhat limited authority to adopt local ordinances. Ethics ordinances could be adopted, with the above noted limitation regarding sanctions.

	HRC	HRV	GLV	CT	GLT
Charter Revision	X	X			
Charter Amendment	X	X	X		
Ordinance	X	X	X	X	X
Guidelines	X	X	X	X	X

In summary, then, local government officials who seek to address the topic of ethics within their local governments need to be cognizant of the fact that there are different routes that can be taken. For cities and villages, their respective charter may or may not address the topic, in the initial charter or later by revision (HRC, HRV) or amendment (HRC, HRV, GLV), but to the extent that enforceable specifics are desired they will be in the form of a city or village ordinance. And in the case of local governments without charters, ethics ordinances may be adopted to the extent of their respective ordinance adoption authority under state law. Finally, the local approach presumes that the state does not in the future seek to preempt local authority and impose ethics standards on government officials including those at the local level.

For a complete discussion of forms of local government, a good source of information is chapter one of *Local Government Law and Practice in Michigan*, published by the Michigan Municipal League and the Michigan Association of Municipal Attorneys. This chapter, by Stratton S. Brown and Cynthia B. Faulhaber, outlines each of the forms of local government and the authority that each has. Also, chapter seventeen, by Daniel C. Matson, sets forth the process of charter amendment and revision. Additional material regarding charter revision and amendment and other powers of cities and villages is available through the Municipal League's library. Information with respect to Michigan's townships is available from the Michigan Townships Association. Practical expertise on charter revision and amendment is available from municipal attorneys who specialize in that area of the law. Finally, the city, village, or township attorney for each jurisdiction is an essential resource when consideration is given to adopting standards for the local government to govern ethical conduct by its elected and appointed officials.

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1. See the following essay by Bill Steude, "Including Ethics Provisions in Charters: Advice for Charter Commissions"
2. There are 211 general law villages; new village incorporations must be as home rule villages.

Including Ethics Provisions in Local Government Charters: Advice for Charter Commissions

By William L. Steude

[Editor's note: In this essay the author primarily addresses the incorporation of an ethics provision through the charter revision process that applies to Home Rule cities and villages. See the preceding essay, "Different Forms of Local Government; Different Routes to Adopting Ethics Standards for Your Community."]

Revelations in the media about the conduct of some public officials have raised the consciousness of local voters and taxpayers about appropriate standards of conduct for government officials. In response, some local governments have voluntarily adopted ethics codes that focus on various aspects of the conduct of those entrusted with the public's business. In 1998 the Michigan Law Revision Commission published a report[1] calling for adoption of legislation that would provide an ethics code with uniform standards applicable to all public officials in local governments statewide. Charter commissions, authorized to draft or to revise the charter of a local government, often wonder *whether* to include ethics provisions, and *how far to go* in mandating adoption of an ethics code or ethical conduct.

Michigan law

The Home Rule Acts[2] neither mandate nor prohibit including a provision regarding ethical conduct or a code of ethics, so a charter commission could choose not to include ethics. In fact, most Home Rule charters in Michigan address ethics indirectly, or selectively, or not at all.

A Home Rule local government can enact an ethics ordinance without a specific charter provision authorizing it to do so. A broad powers provision in the charter could authorize the adoption of a comprehensive ethics code, as the Home Rule City Act permits a charter to provide,

> . . . for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to the constitution and general laws of this state.[3]

General approaches and alternatives

A charter is not an ordinance; rather, it is the basic local law by which the local government is to be governed for a period that may be as long as forty or fifty years. The job of a charter commission is to establish a prescriptive legislative framework for the community, a document that isn't caught up in issues that may be currently of public concern. A charter commission *can* include a detailed system of ethical standards and enforcement procedures in the charter. However, this approach will be time consuming, and it carries some risk of making the charter outdated if some of the details are nullified by subsequent preemptive state legislation. In general, charter commissions are advised to *avoid excessive detail in the charter*, and leave the task of developing the details, by ordinance and policy, to the local governing body.

One approach would be for the charter to provide an alternative to inaction by the governing body by authorizing citizen initiatives and referenda. By this means, local voters could initiate an ethics ordinance by petition, or originate or reject local ethics legislation through the ballot process.[4] The charter may also be amended by the legislative body or by initiative of the voters, to address ethics requirements.[5]

If the commission chooses to include an ethics provision in the proposed charter, it has a number of options to consider.

1. It can *authorize* the adoption of an ethics ordinance by the governing body, which then could enact a detailed code of ethics.
2. It can *mandate* that an ethics ordinance be adopted within a specific period of time after the charter is adopted.[6]

   A charter commission could also:

3. include in the charter a list of general principles or standards of conduct, without going into specific detail. For example, the list could refer to general standards of accountability, impartiality, integrity, confidentiality, conflicts of interest, or public trust. An ordinance could subsequently define these standards in greater detail, and provide procedures for enforcement.
4. take a traditional approach and address selective aspects of ethical conduct in the charter, focusing on particular problems that may have triggered community concerns, such as nepotism (the public employment of relatives), or specific areas of conflicts of interest, and require timely disclosure.[7]
5. specifically authorize or require in the charter the governing body to adopt a comprehensive ordinance with specific provisions governing the receipt of gifts, disclosure of conflicts of interest, moonlighting (i.e., a local government employee having a second job that might create a conflict of interest with the employee's public employment), pre-employment and post-employment limitations, and restrictions regarding nepotism, political activity, and representation before local government bodies.
6. have the charter authorize or require the establishment of an enforcement body, such as an ethics commission or board,

with responsibility to maintain and enforce the ethical standards of the charter and ordinances. Such a board or commission could assist local officials in determining the appropriate course of action when they are faced with uncertainty or conflict between ethical obligations. It could support public officials and employees in situations of unwarranted charges or criticism by adopting administrative rules, issuing advisory opinions, or recommending amendments to an ordinance or charter. It could also sanction unfounded complaints.

7. include a provision to require the governing body, and each local government board and commission established by charter, ordinance or law, to adopt standards of conduct for their respective members. The standards of conduct could be made subject to periodic review and approval by the governing body, or by the ethics board or commission if one is established.

8. include a provision to require that ethics education be included in orientation programs for newly elected officials, and in the training and continuing education of public employees.

Finally, the Michigan Municipal League maintains a charter database that is an excellent resource with examples of some of the approaches charter commissions have taken in recent years, to improve the ethical environment in the local government, and by extension, in the community.

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1. *Final Report to the Michigan Law Revision Commission on the Proposed Government Ethics Act of 1999*, Michael A. Lawrence, November 2, 1998; published in the MLRC 33rd Annual Report, 1998, p. 13119.

2. The Home Rule City Act 279 of 1909, MCL 117.1 et seq.; the Home Rule Village Act 278 of 1909, MCL 78.1 et seq.

3. MCL 117.4j.

4. State law would remain applicable to local officials and local governments. It governs conflicts of interest in public contracts, campaign finance, lobbying, the expenditure of public funds, codes of professional conduct governing the city manager, city attorney, public accountants, licensed engineers and other occupations, personnel policies and collective bargaining agreements affecting public employees.

5. See MCL 117.21, amendment by initiative for cities; and MCL 78.17, amendment by initiative for Home Rule villages.

6. One charter commission mandated enactment of a comprehensive ordinance within six months of the adoption of the charter. It was difficult to meet this deadline, and a longer period should be considered. A better approach is found in the Charter of the City of Jackson, Section 9.13: "Within two years after the effective date of this charter, the council shall adopt by ordinance a code of ethics by which all persons in the municipal service shall abide, whether compensated or voluntary." The Charter was adopted on November 4, 1997; the Ethics Ordinance was adopted November 16, 1999.

7. For example, Section 2-106 of the 1997 Detroit City Charter provides, "The use of public office for private gain is prohibited. The city council shall implement this prohibition by ordinance, consistent with state law. . . . The ordinance shall provide for the reasonable disclosure of substantial financial interests held by any elective officer, appointee, or employee who regularly exercises significant authority over the solicitation, negotiation, approval, amendment, performance or renewal of city contracts, and in real property which is the subject of a governmental decision by the city or any agency of the city. The ordinance shall prohibit actions by elective officers, appointees, or employees which create the appearance of impropriety."

Labor Considerations

By Michael P. McGee

Although a municipal government may have authority to adopt an ethics policy or ordinance, the government as a public employer also may have an affirmative obligation to negotiate over such a policy or ordinance if the public employer is unionized. Specifically, if the policy or ordinance has an impact on or concerns the union members' wages, hours, or other employment conditions ("mandatory subjects of bargaining"), the public employer must bargain with the union before the policy or ordinance may be adopted.

In the seminal case of *Detroit Police Officers Association v City of Detroit*, 391 Mich 44 (1974), the city adopted a residency ordinance after reaching impasse in contract negotiations with the union. The union filed an unfair labor practice charge, and the case proceeded to the Michigan Supreme Court which held that just because an employer may have a legal right to take such action, it does not mean it may do so in derogation of its obligation under the Public Employment Relations Act ("PERA"):

"The enactment of an ordinance, however, despite its validity and compelling purpose, cannot remove the duty to bargain under PERA if the subject of the ordinance concerns the "wages, hours or other terms and conditions of employment" of public employees. If the residency ordinance were to be read to remove a mandatory subject of bargaining from the scope of the collective bargaining negotiations, the ordinance would be in direct conflict with state law and consequently invalid. Const. 1963, art.7, §22. . . . Therefore, if as we will consider below, residency is a mandatory subject of bargaining, a city ordinance cannot foreclose collective bargaining on the subject." *Id.*

The Court concluded that a residency requirement is a mandatory subject of bargaining, but found that the city did not engage in an unfair labor practice because it did not adopt the ordinance until after it had bargained to impasse in good faith. The Court noted that "[i]n future negotiations, however, the city will again be required to bargain in good faith on the residency requirement if it is proposed as a bargaining issue by the [union]." *Id.*

Both the Michigan Employment Relations Commission (MERC) and subsequent appellate decisions have resulted in similar holdings circumstances other than residency. For instance, in *Pontiac Police Officers Association v City of Pontiac*, 397 Mich 674 (1976), the city refused to bargain over a union proposal regarding a grievance procedure for disciplined police officers. The city argued that because the city charter provided for a specific means by which discipline was to be imposed upon the officers, the charter provision controlled and there was nothing to bargain over. MERC disagreed, holding that the city committed an unfair labor practice by refusing to bargain because the grievance procedure was a mandatory subject of bargaining. On appeal, the Michigan Supreme Court affirmed MERC's ruling. See also *Local 1383, International Association of Firefighters, AFL-CIO v City of Warren*, 411 Mich 642 (1981) (a collective bargaining provision negotiated under PERA supersedes both a City Charter and the Michigan Constitution); *Senior Accountants, Analysts and Appraisers Association, UAW v City of Detroit*, 218 Mich App 263 (1996) (city cannot unilaterally implement pension provisions for union members without collective bargaining; the city could, however, through a City Charter Revision Commission, submit proposed changes to the electorate prior to collective bargaining as long the city did not implement or enforce the voter-approved changes until the employer satisfied its PERA collective bargaining obligations).

Neither the courts nor MERC have yet addressed the question of whether ethics regulation is a "mandatory subject of bargaining" under PERA. Ethics regulation typically does not implicate wages or hours, and thus the unanswered question is whether ethics regulation falls within the scope of "other terms and conditions of employment."

This will depend on the facts and circumstances of the particular regulatory scheme. It may be, for example, that the *standards* announced by an ethics policy (e.g., disclosure of conflicts of interest, prohibitions for receiving gifts, etc.) may be imposed in the exercise of normal management rights. *Consequences* for breaching the standards, on the other hand, to the extent they affect discipline or punishment, may very well fall within the scope of mandatory bargaining under *Detroit Police Officers Association*, *supra*, and its progeny.

Accordingly, before a municipal employer adopts or implements an ordinance or any type of ethics policy or regulation that may affect its unionized employees, or refuses to bargain with a union based on a conflicting governmental policy, the employer should first consult with legal counsel to evaluate compliance with applicable labor law.

Chapter 3: The Substance of a Local Government Ethics Ordinance

Essays

Definitions for an Ethics Ordinance

By Dennis A. Mazurek

Initial drafting considerations

An ethics ordinance should include definitions of some of the terms that will be used in its provisions. Many of these words will have a definition that is specific to the ordinance, rather than a more commonly understood meaning.

Charter requirements

Before drafting definitions, it must first be determined whether the local government charter requires that an ethics ordinance be organized around a central directive, and whether it must include specific definitions.[1] For example, the Detroit ethics ordinance was required to define the term "private gain," and it is organized around the central theme of prohibiting the use of public office for private gain.

Jurisdiction and scope

As with any ordinance, the drafters must determine the persons to be regulated by the ethics ordinance, and the scope of the regulation. The definitions will establish the persons and relationships that are intended to be regulated. The jurisdiction of an ethics ordinance could be extended to,

- elected and appointed officials,
- full-time and part-time employees,
- paid and unpaid members of boards and commissions,
- people who provide services under a personal services contract, and
- the spouses or domestic partners, children, and other relatives of any or all of the above.

The scope of the ordinance will also be reflected in the definitions. For example, the definitions could establish that the ordinance will regulate,

- certain confidential information,
- decisions, and
- ownership interests.

Universal and comprehensive

It is important that the definitions be universal and comprehensive, and in as clear language as possible. Universality means the definition could be applied to most, if not all, Michigan municipalities. Comprehensive means complete definitions that have a tight interrelationship to one another.

Examples of definitions

Although there are no "definitive" definitions, the following definitions would be applicable in most local governments. They are both universal and comprehensive, and the list itself is comprehensive, as well.[2]

Agency means any department, office, multi-member body, or other organization of the local government.

Appointee means one who holds either a compensated or an uncompensated position, including an individual who is appointed by the mayor, the legislative body, other elected officials, or a department, division or commission head.

Basic living expenses means shelter, utilities, and all other costs directly related to the maintenance of the common household of the common residence of the [spouse or] domestic partners and any other cost, such as medical care, where some or all of the cost is paid as a benefit because a person is another person's [spouse or] domestic partner.

City means the city of _____. [**Alternatively, village, township, or county** means the local government of _____.]

Clerk means the clerk of the local government of _____.

City council means the legislative body of the city of _____. [Alternatively, commission or board means the legislative body of the jurisdiction of _____.]

Commercial gain means the use by a public servant of any local government resource including, but not limited to, the local government's time, equipment, facilities, supplies or staff, which results or is intended to result in unauthorized income or other benefit to the public servant.

Confidential information means information that has been obtained by a public servant in the course of acting as a public servant, that is not available to members of the public pursuant to the Michigan Freedom of Information Act, being MCL 15.231 *et seq*, or pursuant to other law, regulation, policy or procedure recognized by law, and that the public servant is unauthorized to disclose, including:

1. any written information, whether in document or in electronic form, which could be exempted from disclosure pursuant to state law or to other pertinent law, regulation, policy or procedure recognized by law, unless the public servant disclosing the information is permitted by such authority to make disclosure; and
2. any non-written information which, if written, could be exempted from disclosure pursuant to state law or to other pertinent law, regulation, policy or procedure recognized by law, unless the public servant disclosing the information is permitted by such authority to make disclosure; and
3. information which was obtained in the course of or by means of a written or electronic record or oral report of a lawful executive or closed session, whether or not the disclosure of the information would violate state law, unless the public servant disclosing the information is authorized by state law to make disclosure, or unless the public servant disclosing the information has been properly authorized to make disclosure pursuant to an applicable law, regulation, policy or procedure, except that when such information is available through channels which are open to the public, this provision does not prohibit public servants from disclosing the availability of those channels.

Decision means:

1. a determination, action, vote, or other disposition upon a motion, proposal, recommendation, resolution, or ordinance by members of the governing body, or of a governing body of a local government agency; or
2. a determination, action or other disposition taken by an elected official with the authority to do so, or a local government agency in the performance of its public duties.

Domestic partner[3] means one of two adults who

1. have a common residence; and
2. agree to be jointly responsible for each other's basic living expenses incurred during the domestic partnership; and
3. are not married or are not a member of another domestic partnership; and
4. are not related by blood in a way that would prevent them from being married to each other in this state; and
5. are at least eighteen years of age; and
6. have chosen to share one another's lives in an intimate and committed relationship of mutual caring; and
7. are capable of consenting to the domestic partnership.

Exercises significant authority means having the ability to influence the outcome of a decision on behalf of the local government in the course of the performance of a public servant's duties and responsibilities.

Extraordinary circumstances means circumstances which, due to the unavailability of information that is critical to the disposition by the Board of Ethics of an advisory opinion request or of a complaint, have prevented the board from completing its investigation.

Have a common residence means that both domestic partners share the same residence. Two people can have a common residence even if one or both have additional residences, or if both domestic partners do not possess legal title to the common residence. Domestic partners do not cease to have a common residence if one leaves the common residence but intends to return to it.

Immediate family means:

1. a public servant's spouse or domestic partner, or
2. a public servant's relative by marriage, lineal descent, or adoption who receives, directly or indirectly, more than one-half of his or her support from the public servant, or from whom the public servant receives, directly or indirectly, more than one-half of his or her support; or
3. an individual claimed by a public servant or a public servant's spouse as a dependent under the United States Internal Revenue Code, being 26 USC 1 *et seq.*

Joint responsibility means that each domestic partner agrees to provide for the other partner's basic living expenses if the partner is unable to provide for himself or herself.

Local government means the governmental organization of a jurisdiction which is a subdivision of a major political unit, as a state; the governing organization of the jurisdiction of _____.

Mayor means the mayor of the city of _____.

Municipal government means a Michigan city or village, for the purposes of this handbook.

Ownership interest means a financial or pecuniary interest that a public servant has in the affairs of 1) any business entity in which the public servant or a member of his or her immediate family is an officer, director, member, or employee; 2) any business entity in which the public servant or a member of his or her immediate family controls, or directly or indirectly owns, in excess of 5% of the total stock or an interest totaling $50,000 or more in value; or 3) any person or business entity with whom the public servant has a contract.

Personal services contract means a contract for the retention of an individual to perform services on behalf of the local government for a fixed period and for fixed compensation.

President means the president of the village of _____.

Private gain[4] means any benefit which is accepted or received by a public servant, or is perceived by a reasonable person to be accepted or received by a public servant, as remuneration for the purpose of improperly influencing an official action in a specific manner or for refraining from the performance of an official action in a specific manner, or as inducement for the public servant to act in favor of some interest other than in the public interest.

To clarify, *unless the above-standard is violated*, the following types of benefits, monetary payments or reimbursements, gifts, awards or emoluments may be received by a public servant:

1. payment of salaries, compensation or employee benefits to a public servant by the local government, or the payment of salaries, compensation or employee benefits to a public servant by an employer or business other than the local government pursuant to a contract where the payment is unrelated to the public servant's status as a public servant;
2. authorized reimbursement by the local government to a public servant of actual and necessary expenses incurred by the public servant;
3. fees, expenses or income, including those resulting from outside employment, which are permitted to be earned by, or reimbursed to, a public servant in accordance with the Code, policies, rules and regulations of the local government;
4. campaign or political contributions which are made and reported by a public servant in accordance with state law;
5. admission or registration fee, travel expenses, entertainment, meals or refreshments a) that are furnished to a public servant by the sponsor(s) of an event, appearance or ceremony which is related to official local government business in

connection with such an event, appearance or ceremony and to which one or more members of the public are invited, or b) that are furnished to a public servant in connection with a speaking engagement, teaching, or the provision of assistance to an organization or another governmental entity as long as the local government does not compensate the public servant for admission or registration fees, travel expenses, entertainment, meals or refreshments for the same activity;

6. admission, regardless of value, to a charitable or civic event to which a public servant is invited in his or her official representative capacity as a public servant where any admission or other fees required of all persons attending the event are waived or paid for the public servant by a party other than the local government or the public servant;

7. an award publicly presented to a public servant by an individual or by a non-governmental entity or organization in recognition of public service, acts of heroism, or crime solving;

8. an award, gift or other token of recognition presented to a public servant by representatives of a governmental body or political subdivision who are acting in their official capacities;

9. a gift received from a public servant's relative or immediate family member, provided that the relative or immediate family member is not acting as a third party's intermediary or an agent in an attempt to circumvent this article;

10. a registration fee for a seminar or other informational conference that a public servant attends in a capacity other than as a speaker, panelist, or moderator, where such registration fee that is charged for the public servant's attendance is waived or paid for the public servant by a party other than the local government or the public servant;

11. expenses or gratuities, including but not limited to admission fees, lodging, meals or transportation, that are paid for a public servant and are related to the public servant's participation at a seminar, conference, speaking engagement or presentation in his or her official capacity as a speaker, panelist or moderator where such expenses or gratuities are waived or paid for, as the case may be, by a party other than the local government or the public servant, provided that, within five business days after the conclusion of the seminar, conference, speaking engagement or presentation, such public servant files with the clerk a statement which contains the following information for each expense that is paid for or waived or for each gratuity that is provided: a) a description of the expense or of the gratuity; b) the amount of the expense or of the gratuity; c) the date that the expense was incurred or that the gratuity was received; d) the date that the expense was paid or waived, or that the gratuity was received; and e) the name and address of the party who paid or waived the expense or who provided the gratuity;

12. meals or beverages provided to the public servant by an individual or by a non-governmental organization during a meeting related to official local government business;

13. anything of value, regardless of the value, presented to or received by a public servant on behalf of the local government where the thing of value is offered to, and accepted by, the local government;

14. a gift to a public servant that either is returned to the donor or is donated to the local government or to a charitable organization within thirty days of the public servant's receipt of the gift, provided that the public servant does not claim the donation as a charitable contribution for tax purposes;

15. complimentary single copies of trade publications, books, reports, pamphlets, calendars, periodicals or other informational materials that are received by a public servant;

16. compensation paid to a public servant for a published work which did not involve the use of the local government's time, equipment, facilities, supplies, staff or other resources where the payment is arranged or paid for by the publisher of the work;

17. compensation paid to a public servant for a published work which did involve the use of the local government's time, equipment, facilities, supplies, staff or other resources where the payment of the compensation to the public servant is lawfully authorized by a representative of the local government who is empowered to authorize such compensation;

18. receipt by the public servant of anything of value, where the payment, gift or other transfer of value is unrelated to, and does not arise from, a public servant's holding or having held a public position, and where the activity or occasion for which the payment, gift or other transfer of value given does not involve the use of the local government's time, equipment, facilities, supplies, staff or other resources in any manner or degree that is not available to the general public;

19. hospitality that is extended to a public servant by an individual, or by an organization, for a purpose unrelated to the official business of the local government, including a gift of food, beverage, or lodging; and

20. receipt by a public servant of a devise, bequest or inheritance.

Public servant means the elected mayor, president, members of the legislative body, any member of any local government agency, board, commission, or other voting body that is established by the local government Charter or by the Code, and any appointee, any employee, or any individual who provides services to the local government within or outside of its offices or facilities pursuant to a personal services contract.

Relative means a person who is related to a public servant as spouse or as any of the following, whether by marriage, blood or adoption: parent, child, brother, sister, uncle, aunt, nephew, niece, grandparent, grandchild, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half-brother, half-sister, brother-in-law, or sister-in-law.

Voting body means the governing body and any other local government authority, board, commission, committee, council or group, regardless of whether its function is legislative, administrative, quasi-administrative, or quasi-judicial or any combination thereof, which, in order to take any official action, even where the action is advisory, must act as a body on the basis of a vote of some or all of its members.

Summary and conclusion

A first step in drafting an ethics ordinance must be a consideration of and discussion about the following issues:

1. Does the local government charter *require* that the ethics ordinance be organized around a central directive, or contain specific definitions?

2. If the charter does not mandate the enactment of an ethics ordinance, and if it doesn't require that the ethics ordinance be organized around a central directive or theme, and if it does not require specific definitions, which of the definitions listed in this chapter should be included?

3. What kinds of ethical issues have occurred in the past, or might arise in the future, with the elected officials, appointees, employees, volunteers and independent contractors associated with the local government?

The answers to these and other policy questions will ensure that charter-mandated requirements will be met, and that the definitions will be tailored to the needs and the concerns of the community. The answers will also assist policy makers in building a consensus with local government elected officials, appointees, employees, volunteers and independent contractors, as well as with the public, in accepting and adhering to the ethics ordinance. It is, therefore, recommended that the drafters of the ethics ordinance favorably consider the above definitions as a starting point for debate.

1. For example, see the 1997 Detroit City Charter, Section 2-106, footnote.

2. The terms and the definitions are adapted from the ethics ordinance of the City of Detroit, Section 2-6-3 of the 1984 Detroit City Code.

3. The inclusion of "*domestic partner*" relationships is based on the reality that there are certain close personal, often intimate relationships involving non-married public servants which are equivalent to the personal relationships which exist between legally married spouses. The potential for public servants to be influenced by or on behalf of partners involved with them in such "domestic partner" relationships or arrangements is just as real as the potential for public servants to be influenced by or on behalf of spouses in legal marriages or family members. This article does not adopt any position regarding the propriety of such non-marital relationships among domestic partners. However, for purposes of implementing standards for the conduct of public servants in the performance of their duties for the local government, the article does attempt to include within its reach all public servants.

   The definition of domestic partner included in this section is modeled on the definition of domestic partner contained in Division 2.5 of the Family Code, Article 9 of Chapter 1, Part 5 of Division 5 of Title 2 of the Government Code, and Section 1261 of the Health and Safety Code of the State of California.

4. *Private Gain*: Section 2-106 of the 1997 Detroit City Charter expressly prohibits the use of public office for private gain. Accordingly, a major provision in this article is the prohibition against a public servant's acceptance or receipt of private gain as compensation for 1) the taking of an official action in a specific manner by the public servant (for example, a particular decision or vote in a specific manner), or refraining from the taking of an official action, as the result of an improper influence by another party; or 2) incentive or inducement for the public servant to act in favor of an interest other than the public interest. In the interest of maintaining honesty, integrity and impartiality in government, the goal of this provision is to ensure that public servants conduct government business in a manner that enhances public confidence and respect for city government, and places paramount importance on the public interest, rather than a public servant's own personal interest or the private interest of a third-party.

   Improper influence upon a public servant's official actions refers to 1) any action that would constitute a violation of federal or state laws regulating the conduct of public officials, such as state law prohibiting the acceptance by any executive, legislative or judicial officer of a bribe (Section 118 of the Michigan Penal Code, being MCL 750.118; or 2) facts, events or circumstances which give rise to an appearance of impropriety in the taking of an official action by a public servant, when such facts, events or circumstances are considered objectively according to a reasonable person standard.

   What constitutes private gain to a public servant may take many shapes and forms and may vary depending upon the facts and circumstances of a situation. Therefore, the above definition of private gain does not attempt to enumerate all forms or types of tangible economic gain, or circumstances or situations from which a public servant may derive tangible economic gain for himself or herself. Rather than attempt to list what is private gain that may not be accepted in all circumstances, the article attempts to illustrate for public servants the circumstances or types of remuneration, emoluments, gratuities or other items that a public servant may accept without violation of this article. The listing set forth in this section is based on the most typical situations which confront city public servants. However, this is not an exhaustive list, and there may be other types of economic benefit to a public servant that are permissible under this article.

Fundamental Standards of Conduct For an Ethics Ordinance

By Dennis A. Mazurek

Overview

Before deciding upon the standards of conduct to regulate, drafters of the ethics ordinance must first determine whether the local government charter requires that its ethics ordinance include certain standards of conduct. For example, the 1997 Detroit City Charter (Section 2-106) required enactment of an ethics ordinance which, at a minimum, regulated specific areas of conduct: prohibiting the use of public office for private gain; "reasonable" financial disclosure for some officers; and the avoidance of the appearance of impropriety.

If the charter does not mandate specific provisions or standards for the ethics ordinance, the drafters can be guided by the experience of ethics experts and the ten fundamental standards of conduct that follow. Human nature too often lures public officials and public employees into taking advantage of their positions of trust to use these positions inappropriately and to unfairly benefit themselves, their families or their friends. It is this competition between self-interest and the public interest that results in unethical (and sometimes illegal) conduct; it is this conflict that gives rise to formal, codified statements regarding ethical conduct.

Ethics ordinances from 18 local governments were surveyed for this publication: Bay City, Detroit, DeWitt, Farmington Hills, Flushing, Harper Woods, Jackson, Lansing, Livonia, Mason, Midland, Riverview, Rochester Hills, Royal Oak, Sterling Heights, Warren, Wyandotte, and Ypsilanti. Many of them include some or all of the ten fundamental standards. In alphabetical order, the standards are:

1. Conflicts of interest
2. Disclosure
3. Impartiality
4. Improper use of position
5. Incompatible employment
6. Nepotism
7. Personal interests
8. Political activity
9. Public information
10. Public property and personnel

A list of citations to these local governments' charter and ordinance provisions is in Appendix C.

These are the areas that are most often regulated because these are the areas in which misconduct by public officials most often occurs. In order to give drafters the benefit of learning from the language and the experience of existing ethics ordinances, excerpts from the ordinances of these communities are offered to illustrate different approaches to articulating the ten basic standards of conduct. In the pages that follow, each standard is presented with a statement of its purpose, along with a compilation of excerpts from ethics ordinances. In some instances the actual language is used; in others, the codes were used as references and the language is not verbatim. Variations that are used by different municipalities are noted in footnotes.

Editor's note: To aid the reader, ordinance language options are either in brackets within the text, or footnoted. The excerpts presented here reflect a community's thinking at a point in time, although the ethics ordinance may have subsequently been revised. Also, some stylistic changes were made for consistency with the rest of the text, eg. capitalization of the titles of officials.

1. Conflicts of interest

Purpose: The duty of a public servant is to represent the best interests of the public entity, and to serve the entity with the highest degree of loyalty. This standard is at the heart of any ethics ordinance. The absence of an easily understood standard regarding conflicts of interest diminishes the effectiveness of an ethics ordinance, and ignores the primary reason for having one. The fundamental concept is that a public official is not to exploit this position of power in unjust or inappropriate ways.

- A public servant shall not make a loan of public funds, grant a subsidy, fix a rate, issue a license, permit or certificate, [participate in the negotiation or execution of contracts] or otherwise regulate, supervise or participate in a decision that pertains[1] to an entity in which the public servant, or a member of his or her immediate family, has an ownership [or financial or personal] interest.[2] *(Bay City, Detroit, Harper Woods, Lansing, Rochester Hills, Warren)*

- A public servant [whether paid or unpaid] shall not solicit or accept [or receive, directly or indirectly] a[3] gift or loan of money, [compensation], goods, services[4] [contribution, reward, employment], [5] [6] [7] or other things of value[8] [9] which would tend to influence[10] the manner in which the officer or employee performs his or her official duties. [11] [12] [13] [14] [15] [16] [17] *(Bay City, DeWitt, Farmington Hills, Flushing, Harper Woods, Jackson, Lansing, Livonia, Mason, Midland, Riverview, Rochester Hills, Warren, Wyandotte, Ypsilanti)*

- A public servant shall not represent his or her individual [personal] opinion as that of the city.[18] *(DeWitt, Harper Woods, Lansing, Warren)*

- A public servant shall not solicit, demand, accept, or agree to accept from another person, a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, or preparation of any part of a program requirement or a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or any other advisory capacity in any proceeding or application, request for ruling, determination, claim or controversy, or other particular matter, pertaining to any program requirement or a contract or subcontract, or any solicitation or proposal thereof. *(Royal Oak)*

- A public servant shall not accept any payment, gratuity, or offer of employment to be made by or on behalf of a subcontractor under a contract to the prime contractor or higher tier subcontractor or any person associated therewith as an inducement for the award of a contract or order. *(Royal Oak)*

- A public servant shall not retain a person to solicit or secure a contract with the local government upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except for the retention of bona fide employees or bona fide established commercial selling agencies for the purpose of securing business. *(Royal Oak)*

- A public servant shall not be a party, directly or indirectly, to any contract with the city except for the renewal or negotiation of an employment or independent contractor contract with a city officer or employee, or a collective bargaining agreement or contracts with any bona fide union. *(Ypsilanti)*

- Except for personal employment agreements authorized by the governing body, a public servant shall not solicit, negotiate, renegotiate, or approve, directly or indirectly, any contract, or amendment of any contract, with the city and 1) himself or herself, 2) any partnership, limited liability company or unincorporated association, or other legal entity of which the officer or employee is a partner, member, owner or part owner or employee, 3) any corporation in which the officer or employee is an owner or stockholder of more than one percent (1%) of the total outstanding stock of any class where the stock is not listed on an exchange, or of value of $25,000 or more where the stock is listed on a stock exchange or of which the public servant is a director, officer, or employee, or 4) any trust of which the officer or employee is a beneficiary or trustee, or represents any party to such contract. *(Ypsilanti)*

2. Disclosure

Purpose: If a government is to be both transparent and accountable, the public must know of real and potential conflicts of interest. The general public, and those within the local government organization, are entitled to know about the relationships and circumstances which might influence a public servant's performance of duty, and which might diminish an official's independence and objectivity. Public disclosure makes it possible to evaluate the potential effects of these interests upon the public official, and to prohibit participation in decision making, in the public interest. Questions about which information, how much, and when to disclose it should be resolved in favor of full, and timely, public disclosure.

- A public servant [or his or her relative] shall not engage in business with the city, directly or indirectly, [or have any financial or personal interest in any business transaction with the city] without filing a complete [written] disclosure statement for each business activity, prior to engaging in the activity, and on an annual basis. *(Farmington Hills, Jackson, Midland, Sterling Heights)*
- A public servant shall not participate, as an agent or representative of the city, in approving, disapproving, voting upon, abstaining from voting, recommending or otherwise acting upon any matter[19] in which he or she [or a relative] has a direct or indirect financial[20] interest[21] without disclosing[22] the full nature and extent of their interest.[23] *(Detroit, Farmington Hills, Jackson, Midland, Riverview)*

3. Impartiality

Purpose: Public officials must assure the public that, except for publicly approved pay and related benefits, they receive no benefits or services that aren't available to any member of the public.

Intent and purpose

- It is the intent of this Code that a public servant, regardless of whether specifically prohibited by this Code, shall avoid any action which might result in, or create the appearance of,
  1. Using public office or employment for private gain.
  2. Giving improper preferential treatment to any person or organization.
  3. Impeding government efficiency or economy.
  4. A lack of independence or impartiality of action.
  5. Making a government decision outside of official channels.
  6. Affecting adversely the confidence of the public in the integrity of the local government.

  It is not the intent of this Code to limit the right or ability of any public servant to exercise his or her discretion in making legitimate policy decisions which are within their discretion so long as such action does not provide a special benefit to that person, relieve the public servant of a particular duty, or treat that person differently than other similarly situated residents in the community. *(DeWitt)*

Fair and equal treatment

- No public servant shall request, use or permit the use of any consideration, treatment, advantage or favor beyond that which is the general practice to grant or make available to the public at large. All public servants shall treat all citizens of the local community with courtesy, impartiality, fairness and equality under the law. *(DeWitt)*

4. Improper use of position

Purpose: To the public, an official is the governmental organization. An official's misuse of his or her position not only destroys public confidence in that public official, but it also destroys trust and confidence in the governmental organization as well. A public official must use the position and power of public office for the benefit of the community as a whole. Thus, a public official should not receive a greater benefit from his or her actions than anyone else in the community. Although this standard may seem unnecessary because the potential effect of the misconduct is so

obvious, a clear and specific statement establishes for all the assurance that abuse or exploitation of public office or public employment will not be tolerated.

- A public servant shall not make any policy statements which promise to authorize or to prevent any future action, agreement or contract, when, in fact, the public servant has no authority to do so. *(Lansing)*
- A public servant shall not act on behalf of the city in the making of contracts when, in fact, he or she has no authority to do so. *(Ypsilanti)*
- A public servant shall not make policies that affect the citizens of the community that are not authorized by the local government Charter, Code of Ordinances, governing body, an authorized agency of the local government, or its adopted policies. *(Wyandotte)*
- A public servant shall not use his or her official position in violation of federal or state law, or to obtain or to create the appearance to obtain a private gain for the public servant in return for improperly influencing a decision of the mayor, of the city council, of the city clerk, or of a member of a city authority, board, commission, committee, council or group, or other city agency. *(Detroit, Rochester Hills)*
- A public servant shall not use, or attempt to use, his or her official position to unreasonably secure, request or grant, any privileges, exemptions, advantages, contracts, or preferential treatment for himself or herself, a relative, his or her immediate family, or others. *(Farmington Hills, Jackson, Livonia, Mason, Midland)*
- A public servant shall not use his or her public office and employment for personal [private or economic] gain,[24] [25] [or use or attempt to use his official or her official position to secure special privileges or exemptions for himself or herself, or others, except as provided by law].[26] *(Bay City, Flushing, Lansing, Rochester Hills, Sterling Heights, Wyandotte, Ypsilanti)*
- A public servant shall not make or participate in making a decision in his or her capacity as a public servant knowing that the decision will provide him or her, a member of his or her immediate family, or a business with which he or she is associated, a financial benefit of more than an incidental nature which is distinguishable from the benefits to the public servant as a member of the public or as a member of a broad segment of the public. *(Ypsilanti)*
- A public servant shall not take any action or create the appearance of making a government decision outside official channels. *(Rochester Hills)*
- A public servant shall not take any action or create the appearance of impeding government efficiency or economy. *(Rochester Hills)*
- A public servant shall not take any action or create the appearance of giving preferential treatment to any organization or person. *(Rochester Hills)*
- A public servant shall not take any action, or create the appearance, that adversely affects the confidence of the public in the integrity of the city. *(Rochester Hills)*
- Public servants who are members of a city agency shall not take final action on any matter under consideration that is before the agency until the citizens' rights to address the agency have been provided for, subject always to the provisions of the Michigan Open Meetings Act. *(Wyandotte)*
- A public servant shall not interfere with the ordinary course of law enforcement within the city, and shall not suggest or request special favors or consideration or disposition of any law enforcement person of the city, including the city manager, chief of police, police officers, ordinance officers, city attorney or administrative staff, concerning any city law enforcement matter including, but not limited to, parking tickets, traffic tickets, ordinance tickets, or the enforcement of city codes. *(Ypsilanti)*

5. Incompatible or dual employment

Purpose: Dual employment or dual representation by a public official can cause a conflict of interest between the discharge of official duties and the requirements of another employer. Such a conflict might impair the official's independent judgment. However, it may be possible to permit a public servant to participate in discussion or decision making due to "necessity," as determined by the public body, provided that full, timely and public disclosure takes place prior to discussion and action.

- A public servant shall not engage in or accept employment, or render services, for a private or public interest where such employment or service is incompatible [or in conflict] with the [proper] discharge [or performance] of the public servant's official duties [and responsibilities] for the city, or where such employment or service is reasonably expected[27] to impair the public servant's independence of judgment or action in the discharge [performance] of his or her official duties [and responsibilities] for the city. *(Bay City, Detroit, DeWitt, Farmington Hills, Harper Woods, Riverview, Rochester Hills, Warren, Wyandotte)*
- A public servant shall not act, for compensation from any person other than the municipality, as an agent, attorney, or representative for another person, business or organization in any matter that is pending before a city agency [other than in the course of the duties and responsibilities of his or her office or employment pursuant to duties assigned by city employee unions] [other than himself or herself before the governmental body of which the public servant is a member or employee] . (*Detroit, Flushing, Lansing)*
- A public servant may represent another person, business, or organization before a city agency where such representation is a required part of the public servant's official duties. *(Detroit)*
- A public servant shall not engage in private employment with, or render services for, any private person who has business transactions with the city, without first making a full public disclosure of the nature and extent of such employment. *(Sterling Heights)*
- A public servant who, while a city employee, is participating directly or indirectly in the procurement process, shall not become or be the employee of, or perform a service for, any person who is contracting with the city. *(Royal Oak)*
- An elected public servant shall not engage in employment with any other agency or department of the city. *(Wyandotte)*

Note: Incompatible *public* offices

Daniel C. Matson

There are standards governing an official holding more than one public office at the same time, and they are found in the Incompatible Public Offices Act, (IPOA), 1978 PA 566 (MCL 15.181 *et seq.*). Section 1(b) of the Act defines "incompatible 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:
>
> 1. The subordination of one public office to another
> 2. The supervision of one public office by another
> 3. A breach of duty of public office

Perhaps the most difficult questions arise as to when a breach of duty of public office has occurred when more than one public office is held.

The Michigan Attorney General has issued numerous formal opinions regarding public officials holding incompatible offices simultaneously. Excerpts from opinions adopted by courts involving breach of duty include these interpretive statements:

A breach of duty arises when a public official holding dual offices cannot protect, advance, or promote the interest of both offices simultaneously. A public office is a public trust, and the courts have imposed a fiduciary standard upon public officials that requires disinterested conduct.

It is well established that a breach of duty creating an incompatibility exists when a person holding dual public offices is placed at opposite sides of a contract. An incompatibility can also result out of a non-contractual matter, such as when one office has to pass upon a matter affecting the other office. (OAG 1997, No. 6931, p 124 (February 3, 1997); *Macomb County Prosecutor v Murphy*, 233 Mich App 372, 381, 382 (1999).)

Section 3 of the IPOA allows certain limited exceptions to a person holding two or more incompatible offices at the same time. The exceptions do not apply to allow or sanction activity constituting conflict of interest prohibited by the Constitution or laws of Michigan.

If there is any question about whether or not holding more than one office is incompatible, it is advisable to seek an opinion from the municipal attorney *before* the problem arises.

6. Nepotism

Purpose: Whether deserved or not, the limitation or prohibition of public service by certain persons related by blood, adoption or marriage, to others within the governmental organization avoids actual and perceived favoritism or partiality. The very fact of the relationship creates the perception of unfairness. In smaller communities it may be common for related parties to work for, or to serve in, the local government, particularly in dual-income families. In these situations the perception of favoritism can be reduced if the local government requires that such relationships be fully and publicly disclosed.

- A public servant shall not cause the employment or any favorable employment action of an immediate family member, or participate in any employment decision about such family member.
- The spouse of any elected city official, or the city administrator, shall be disqualified from holding any appointive office. The immediate family members of any elected official, or the city administrator, or the spouses of any such family members shall be disqualified from holding full-time or permanent part-time employment exceeding ten hours per week with the city during the term served by the elected official or during the tenure of the city administrator. *(Livonia, Mason)*

7. Personal interests

Purpose: The existence of a private business relationship between a public official and the municipality presents the opportunity for real or perceived abuse of public office. To protect the interests of all, the relationship should either be avoided, or should be fully and publicly disclosed.

This standard is akin to incompatible employment in that the conduct is detrimental to the objectivity of the public servant. However, participation in discussions or actions may be permitted if there is a showing of "necessity," as determined by the public body, provided that full public disclosure, and explanation, takes place.

- A public servant shall not engage in any act [or business transaction which may cause him or her] [or his or her immediate family or business that he or she is associated with] to derive a personal profit or gain directly or indirectly as a result of his or her official position [or authority] or omission in the discharge of his or her official duties for private gain [or use his or her official position or authority to profit from a business transaction] [or act in an official capacity on matters in which he or she has a private financial interest clearly separate from that of the general public].
  (Bay City, Detroit, DeWitt, Flushing, Harper Woods, Lansing, Warren)
- A public servant shall not speculate or deal in equipment, supplies, materials, or property purchased by or sold to the city.
  (Rochester Hills)

- A public servant shall not hold a substantial financial interest, i.e., any stake, including stockholder, partner, joint venture, creditor, guarantor or director, in a firm which provides services or supplies, materials or equipment to the city, *excluding* holding an interest in a firm providing services or supplies, materials, or equipment to the city where, after reporting the conflict, 1) the contract for services or supplies, materials, or equipment is awarded pursuant to sealed bids, 2) the public servant is not involved, directly or indirectly, with making the decision on the award of the contract or with the city department for which the contract relates, and 3) the city council determines, after reviewing the circumstances, that the award of the contract would be in the best interests of the city. *(Rochester Hills)*

8. Political activity[28]

Purpose: Public officials do not waive their constitutional rights upon assuming a position in a municipal government. However, reasonable limits can be established so that there is no public subsidy of the political activity. Political activity by public officials and employees jeopardizes the goal that the governmental unit will be objective and fair, and treat all equally. Local government assets such as employees' time, materials and other resources belong to the public, and should not be used for personal or political purposes.

Public officials must use public assets for authorized purposes only, and not for personal political benefit, or for the political benefit of someone else. Political activity should not be permitted under any circumstance during business hours.

- A public servant shall not use any city time or property for his or her own political benefit or for the political benefit of any other person seeking elective office, provided that the foregoing shall not prohibit the use of property or facilities available to the general public on an equal basis for due consideration paid. *(Livonia, Mason)*

9. Public information

Purpose: Government insiders are often "those in the know," with access to information that may not be generally available. To avoid abuse of a public position, information must be used only as authorized, and not for personal benefit or advancement.

- A public servant shall not benefit financially[29] [or further his or her private economic interests or that of a relative or any other person] from confidential information acquired in the course of holding office or employment,[30] [31] [or knowingly use confidential information for actual or anticipated personal gain, or for the actual or anticipated personal gain of any other person].[32] *(Bay City, Detroit, DeWitt, Farmington Hills, Harper Woods, Jackson, Lansing, Midland, Rochester Hills, Royal Oak, Sterling Heights, Warren, Wyandotte, Ypsilanti)*
- Except as authorized by law, a public servant shall not knowingly disclose[33] to a third party [to any unauthorized person] confidential information that is acquired in the course of his or her employment [in the course of holding office][34] [35] [including, but not limited to, information provided, obtained or discussed in closed or executive sessions of city council][36] [in advance of the time prescribed [authorized] [by the governmental body] [department head, city manager or law] for its authorized release to the public], [except as otherwise required [provided] or permitted by law]. *(Bay City, Detroit, DeWitt, Harper Woods, Lansing, Rochester Hills, Warren, Wyandotte, Ypsilanti)*
- A public servant shall not use information protected from disclosure by the Michigan Freedom of Information Act which she or he has obtained by reason of such position or authority. *(Flushing)*
- A public servant shall not disclose any confidential information, without prior formal authorization of the public body having jurisdiction, concerning any city official or employee, or any other person, or any property or governmental affairs of the city. *(Sterling Heights)*

- A public servant shall not suppress or refuse to provide city reports or other information which is publicly available. *(Livonia, Mason)*
- A public servant shall not suppress any public city report, document, or information available to the general public because it might tend to affect unfavorably his or her private financial or political interest. *(Farmington Hills)*

10. Public property and personnel

Purpose: Public resources or assets that are not offered to the general public are not to be used by the public official or anyone else for private purposes. To do so subsidizes private activities with public dollars.

- [Unless judiciously and solely in accordance with prescribed constitutional, statutory, and regulatory procedures], a public servant shall not [request], [directly or indirectly] use [misuse] [or permit others to use] any city [publicly]-owned [or publicly-supported] real or personal property, [vehicle, equipment, material, labor or service], city funds, city personnel, or any other tangible city assets [under his or her care] [or control] for commercial gain [for personal [financial] gain or benefit] [or personal convenience or private advantage of himself or herself or any other person] [for private economic interest or that of a relative] [or for a member of his or her immediate family or a business entity with which he or she is associated] [or the private benefit of a third party]. *(Bay City, Detroit, Farmington Hills, Harper Woods, Jackson, Lansing, Livonia, Mason, Midland, Sterling Heights, Warren, Ypsilanti)*

Summary

When selecting the standards of conduct to be codified, drafters should consider:

1. Whether the local government charter requires that the ethics ordinance contain certain minimum standards of conduct;
2. Whether the charter requires that the ethics ordinance have a specific focus, for example, a requirement to prohibit or limit the acceptance of gifts;
3. Whether some or all of the standards of conduct that have been featured in this chapter should be included; and
4. What kinds of ethical issues have occurred in the local government in the past, or what kinds of ethical issues might arise in the future, with elected officials, appointees, employees, and independent contractors.

Answering these questions will ensure that charter-mandated requirements will be met, and that the standards of conduct will be tailored to the needs and the will of the community. Further, the discussion itself will increase awareness of ethical issues, and will help build a consensus among elected officials, appointees, employees, and independent contractors, as well as with the public.

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1. or relates
2. other than as a citizen, officer, or employee of the city
3. substantial
4. promise
5. or promise of future employment
6. for the benefit of a person or organization, other than the city
7. in the form of money, a loan, service, travel, entertainment, hospitality, or other thing of promise
8. for the benefit of a person or organization
9 or give anything of value
10. or would unduly influence
11. under circumstances where it can reasonably be inferred that the gift is intended to influence him or her in the performance of his or her official action or is intended as a reward for any official action
12. or duties
13. based upon an agreement or understanding that a vote or an official action or decision would be influenced thereby
14. to accept in a one-year period a gift or any other item exceeding $100 in value from people or business entities under circumstances which may tend to impair his or her independence of judgment or action in the performance of his or her official duties

15. or favors, gratuities, or special consideration from anyone currently doing business with the city, seeking to do business with the city, or who may currently be negotiating to do business with the city in the future, or who may otherwise is or may seek any actions or approval by the city unless specifically allowed by city policy, including soliciting or accepting, without reimbursement, meals, sporting event tickets, social amenities, or attendance at any event with any organization that does business or seeks to do business with the city unless specifically sanctioned as a city sponsored event,
16. or which is intended to influence a vote, decision, or other exercise of official authority in any matter involving the city
17. based upon an agreement that the vote or official action or the official action or decision of the public servant would be influenced thereby
18 or falsely represent his or her personal opinion to be the official position or determination of the governmental body which he or she is a member or employee
19. or in a decision or transaction
20. an economic
21. or benefit
22. on the public record
23. or without providing written notification to the city council, if an elected public servant, or to his or her immediate supervisor if a non-elected public servant.
24. or use the authority, title, or prestige of his or her public office for the attainment of a public servant's financial gain or that of a member of his or her immediate family's private financial benefit when inconsistent with the public interest
25. or engage in a business transaction in which the public servant may profit from his or her official position or authority
26. or make unauthorized use of his or her public position to obtain financial gain for himself or herself, a member of his or her immediate family, or a business [or entity] with which he or she is associated.
27. or tends to impair
28. The Michigan Campaign Finance Act, MCL 169.201 *et seq*., requires that candidates for public office make campaign contributions and expenditures public by filing appropriate reports.
29. or use for private gain
30. or obtained or may obtain by reason of his or her position or authority
31. or use or permit the use of confidential information to advance a financial or personal interest of himself or herself, or of any other person
32. or make unauthorized use of any confidential information received through holding such public position to obtain financial gain for himself or herself, a member of his or her immediate family or a business [or entity] with which he or she is associated
33. or divulge
34. in the course of holding his or her position
35. in the course of his or her service
36. to any person not authorized to obtain such information

Consequences for Violating the Ethics Ordinance

By Dennis A. Mazurek

Overview

This chapter discusses the range of penalties, or sanctions, which can be found in the ethics ordinances of the 18 local governments that were surveyed for this study. These municipalities have taken different approaches to responding to violations of their ethics ordinances, and to enforcement. It's important to remember there are many players on the municipal stage, such as elected and appointed officials, employees (full-time and part-time), volunteers, vendors, and contractors. Not all will come within the scope of an ethics ordinance. For those who are subject to an ethics ordinance, the range of sanctions runs from self-policing with no formal sanctions, to criminal penalties:

No sanction or penalty

Public admonition or reprimand

Public censure

Forfeiture of office and removal proceedings

Disciplinary action

Termination of contract (external vendors or contractors)

Municipal civil infraction

Cumulative sanctions

Misdemeanor

Felony

Review of decision

Those who are charged with drafting or developing an ethics ordinance can consider a wide range of penalty options, and the penalties can be tailored to fit the community.

Before thinking about penalties, however, the first step must be to decide whether the ethics ordinance should be "*aspirational*," whether it should have sanctions that are enforceable, or whether it should be something in between. An aspirational approach reminds officials of their mission in service to the public, sets forth what they should aspire to and how they should conduct themselves, but it stops short of imposing serious penalties for failing to live up to the standards. An approach that demands greater accountability states the standards of conduct that are expected, the consequences for violating the standards, and the means by which it will be enforced, which is usually through the local court system.

Ethics ordinances that lean toward the aspirational can be found in both large and small municipal governments, such as Detroit, Farmington Hills, Jackson, Mason, Midland, Riverview, and Rochester Hills. A more accountable approach can be found in the ethics ordinances of Bay City, Flushing, Harper Woods, Lansing, Livonia, Royal Oak, Sterling Heights, Warren, and Ypsilanti. Interestingly, two communities, DeWitt and Wyandotte, have combined the two approaches.

Considerations

To help drafters think through the kind of ethics ordinance they want for their community, the following considerations are proposed for discussion.

1. What does the local government charter say about enforcement?
2. Should the ethics ordinance be aspirational, establishing the standards of conduct that public officials should exemplify, or should the standards be enforceable, with penalties or sanctions imposed when violations occur?
3. If the standards of conduct are to be enforced, who will,
    a. Receive and process complaints?
    b. Investigate complaints?
    c. Decide whether a violation has occurred?
    d. Decide whether a sanction should be imposed?
    e. Enforce the sanction?
    f. Oversee the process?
    g. Provide advice about whether a proposed action violates the ethics ordinance?
    h. Provide training to all those to whom the ethics ordinance applies?
4. At what point in the process does the Michigan Freedom of Information Act provide the public with a right to know?
5. Should a body, such as a board of ethics, be created to respond to requests for advisory opinions and complaints?
6. Where discipline is contemplated, how will collective bargaining agreements be affected?
7. Will the local government be able to successfully prosecute its elected officials before its elected district court judges?
8. What effect will potential civil or criminal penalties have on employee morale?

9. Will civil or criminal penalties dissuade potential employees from seeking employment with the local government organization?
10. Does the political will exist to adopt an ordinance with serious sanctions?
11. Will the sanctions be fairly and uniformly applied?

A discussion of these questions is important to help policy makers understand what is being undertaken, and to develop a consensus for action. The process can be especially challenging when, in effect, the policy makers are proposing and enacting legislation to regulate themselves.

Responding to violations of an ethics ordinance

Eleven different kinds of responses to violations have been identified in the ethics ordinances of the 18 local governments that were surveyed. The enforcement sanctions are included below in the order of severity, from lesser to greater. Each example provides the actual language from the ordinance.

No sanctions

An aspirational ordinance is intended to encourage and promote the highest standards of ethical conduct and behavior by city officials and employees; it is not designed to be a punitive measure. It is anticipated that the issuance of advisory opinions by the Board of Ethics will conclude all matters originating as requests for advice, and substantially all matters originating as complaints. The Board of Ethics is not an adjudicative body and no finding of the Board should be deemed conclusive, nor should it subject any municipal official or employee to penalties. *(Mason)*

This chapter is intended to establish standards governing conduct in dealings with the city. Violations of this chapter shall not make the violator subject to a fine or incarceration. *(Rochester Hills)*

Public admonition

In the event the Board of Ethics determines that a violation of this article has occurred, the Board may adopt a resolution of public admonition [*Editor's note: mild rebuke or reprimand*] against a public servant which includes the mayor, members of the city council, the city clerk, any member of any city agency, board, commission, or other voting body that is established by the city charter or by the city code, and any appointee, any employee, or any individual who provides services to the city within or outside of its offices or facilities pursuant to a personal services contract regarding the violation. *(Detroit)*

Public censure of elected officials

Violation of this Ordinance by an elected official may result in censuring by unanimous vote of the remaining members of the city council. [*Editor's note: A censure is a strong disapproval or condemnation, expressed by a resolution passed by the governing body.*] *(Riverview)*

Forfeiture of office and removal proceedings

Where, based upon an investigation arising from a complaint, the Board of Ethics determines that there may be grounds for further investigation for possible forfeiture of or removal from office under the City Charter and applicable law, the matter may be referred by the Board to the city council for consideration of forfeiture or removal proceedings in accordance with the City Charter. *(Detroit)*

Depending upon the employment status of the city official or employee involved, or group concerned, and the nature of the action requested, all matters concerning the Conflict of Interest and Ethical Code shall be directed to either i) the mayor, the city council and the city attorney for elected and appointed officials, or ii) to the city manager and the city attorney for full and part-time appointed employees. In matters concerning the mayor, city manager or city attorney, the mayor pro tem will assume

the controlling authority position in place of the affected official. When requested, these authorities shall take appropriate action upon any complaint, request for information, or otherwise resolve matters concerning Conflict of Interest and the Ethical Code policy of the city. The appropriate action to be taken in any individual case shall be at the discretion of the controlling authority involved which may include, but is not limited to, taking [*Editor's note: or recommending*] appropriate disciplinary action, including removal from office or appointed position, in accordance with the City Charter, the City Code, state law, or the regulations or policies of the city. *(Farmington Hills, Jackson, Midland).*

The penalty or penalties imposed are not exclusive remedies under this ordinance and any and all statutory and Charter penalties or forfeitures may also be enforced. *(DeWitt, Sterling Heights)*

Any individual who believes that a violation exists as prohibited by this article may make a complaint which shall be a written formal signed complaint to the chief of police, who shall cause same to be investigated and referred to the city attorney for review and recommendation with a copy to the complainant. When requested, the above-listed authorities shall take appropriate action upon any complaint, request for information or otherwise resolve matters concerning a violation of said article. The appropriate action to be taken in any individual case shall be at the discretion of the above authorities, which may include, but is not limited to, taking appropriate disciplinary action, including removal from office or appointed position in accordance with the City Charter, Code of Ordinances or state law. *(Wyandotte)*

Disciplinary action

Where the Board of Ethics determines that a violation of this article by such public servant may present grounds for disciplinary action, the matter may be referred by the Board to such public servant's supervisor with a recommendation that the public servant's conduct be reviewed for disciplinary action. Any such disciplinary action must be carried out in accordance with the provisions of the City Charter and other laws, policies and procedures that are applicable to the position of the public servant and with the gravity of the offense. *(Detroit)*

Depending upon the employment status of the public servant or group involved, or group concerned, and the nature of the action requested, all matters concerning the Conflict of Interest and Ethical Code shall be directed to either i) the mayor, the city council and the city attorney for elected and appointed officials, or ii) to the city manager and the city attorney for full and part-time employees. In matters concerning the mayor, city manager or city attorney, the mayor pro tem will assume the controlling authority position in place of the affected official. When requested, these authorities shall take appropriate action upon any complaint, request for information, or otherwise resolve matters concerning Conflict of Interest and the Ethical Code policy of the City. The appropriate action to be taken in any individual case shall be at the discretion of the controlling authority involved which may include, but is not limited to, taking [*Editor's note: recommending*] appropriate disciplinary action, including removal from office, appointed position or employment, in accordance with the City Charter, the City Code, state law, or the regulations or policies of the city, or the requirements of any collectively bargained agreement. *(Farmington Hills, Jackson, Midland)*

Violation of this Ordinance by the city manager, or an officer or employee may result in disciplinary action, up to and including discharge, in accordance with city policies, applicable collective bargaining agreements, and employment contracts. *(Riverview)*

Any individual who believes that a violation exists as prohibited by this article may make a complaint which shall be a written formal signed complaint to the city of Wyandotte

chief of police, who shall cause same to be investigated and referred to the city attorney for review and recommendation with a copy to the complainant. When requested, the above-listed authorities shall take appropriate action upon any complaint, request for information or otherwise resolve matters concerning a violation of said article. The appropriate action to be taken in any individual case shall be at the discretion of the above authorities, which may include, but is not limited to, taking appropriate disciplinary action, including removal from office, appointed position or employment, in accordance with the City Charter, Code of Ordinances or state law. *(Wyandotte)*

Recommendation of termination of contract

Where the Board of Ethics determines that an existing city contract has been entered into in violation of the provisions of this article, after such determination and recommendation from the Board, the city may void or seek termination of the contract where legally permissible. *(Detroit)*

Municipal civil infraction[1]

This chapter is intended to encourage and promote the highest standards of ethical conduct and behavior by city officials and employees and is not intended to be a punitive measure. It is anticipated that the issuance by the Board of Ethics of advisory opinions will conclude all matters originating as requests for advice and substantially all matters originating as complaints. The Board of Ethics is not an adjudicative body and no finding of the Board shall be deemed conclusive nor, in and of itself, subject any city official or employee to penalties. In the event of legal proceedings alleging a violation of this chapter, then in accordance with the provisions of the City Charter, a violation of this chapter shall constitute a municipal civil infraction, and shall subject a person found responsible by a court of violating this chapter to a maximum civil fine of not more than one hundred dollars. *(Livonia)*

Misdemeanor

Any official, officer or employee who violates this ordinance shall be guilty of a misdemeanor, which shall be punishable by a fine not to exceed $500 or by imprisonment of not more than ninety days in jail or both, in the discretion of the court. *(Bay City, DeWitt, Ypsilanti)*

Any person violating any of the provisions in this article shall, upon conviction, be punished as prescribed in this Code. *(Sterling Heights)*

Any person convicted under the provisions of this ordinance shall be deemed guilty of misconduct. *(DeWitt, Sterling Heights)*

Violation of the provisions of this ordinance shall be a misdemeanor. *(Flushing, Harper Woods, Lansing)*

Failure of an elected official or appointee to file a disclosure form with the city clerk by March 28 of each year, or to file a conflict of interest disclosure form with the city clerk, shall be a misdemeanor and may result in a fine not to exceed five hundred dollars ($500.00) or imprisonment for not more than ninety days, or both. *(Wyandotte)*

Felony

To the extent that violations of ethical standards of conduct set forth in this Ordinance constitute violations of the Michigan Criminal Code they shall be punishable as provided therein. Such penalties shall be in addition to the civil sanctions set forth in this Ordinance. *(Royal Oak)*

Cumulative sanctions

The invocation of one subsection of this section does not preclude the application of any other subsection of this section or of any other applicable laws or policies. *(Detroit)*

The penalty or penalties imposed are not exclusive remedies under this ordinance and any and all statutory and Charter penalties or forfeitures may also be imposed. *(DeWitt, Sterling Heights)*

Review of Decision

Where the Board of Ethics finds that a decision of the mayor, the city council, the city clerk, an appointee, or other public servant was made in violation of this article, the board may recommend to the mayor, the city council, the city clerk, an appointee, or other public servant that such decision be reviewed in accordance with the applicable provisions of the City Charter and the City Code. Upon such recommendation, the decision may be reviewed by the mayor, the city council, the city clerk, appointee, or other public servant in accordance with the applicable provisions of the City Charter, the City Code, and any other applicable laws. *(Detroit)*

Conclusion

What will happen when it appears, or when it is determined, that the ethics ordinance has been violated? Is it enough to plainly say what the public official's duty to the public is? Is it enough to say, in a formal and public way, what the standards of conduct should be for those who serve the local government? Or should some kind of consequence, from private admonition to criminal penalty, flow from a violation of those standards?

In drafting an ethics ordinance, the selection of an appropriate sanction and enforcement process for a municipality is a difficult task. While it is advisable to avoid harsh and extreme punishment for incidental infractions, it is unwise to allow significant violations to go unpunished. At the same time, it is important to remember that Michigan statutes provide for the prosecution of criminal offenses.

While both the aspirational and accountable approaches to ethics ordinances are worthy of consideration, the aspirational approach affords greater control of the enforcement process than does a more punitive approach. With both, enforcement involves some type of sanction. The aspirational approach is grounded in the concept of self-policing, and minimizes reliance on overloaded district courts by keeping enforcement "in-house." On the other hand, the punitive approach ultimately plays out in the courts, where the imposition of sanctions is a matter left to the discretion of judges for whom a violation of an ethics ordinance may be no more compelling than a minor violation of any ordinance of the local government.

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1. There is an important legal distinction between a *municipal civil infraction* and a *civil infraction* as defined by statute. Consult the enabling act relevant to your jurisdiction to determine which class of infraction applies. Section 4L of the Michigan Home Rule City Act, MCL 117.4L, identifies certain statutes that will permit or prohibit their classification in either category.

Enforcement and Administration of an Ethics Ordinance

By Dennis A. Mazurek

Considerations

In designing systems for enforcement and administration of an ethics ordinance, the complexity of the task will depend on whether the drafters choose an aspirational approach to encouraging ethical behavior, or a more accountable and enforceable approach by which certain ethical conduct is required. The aspirational approach reminds public officials of the standards of conduct to which they should aspire, but it does not assign serious penalties for failure to abide by the standards. On the other hand, an approach that includes serious sanctions must set clear standards for required conduct, along with the consequences for violating the standards.

In thinking through an enforcement system, drafters should consider some basic questions.

1. Which segments of the municipal organization come within the jurisdiction of the ethics ordinance?

2. Should there be one enforcement system for elected and appointed officials, and a separate process for employees?
3. Who should be given authority to investigate and enforce the ordinance when the conduct of elected officials is questioned?
4. Should the group that will have responsibility for enforcement be part of the municipal organization, or should it be independent of the municipality?
5. Who shall appoint the members of that group, and how long should they serve?
6. How should the process balance an individual respondent's right to privacy, and the public's right to know? Can any part of the process remain private under the Michigan Freedom of Information Act?
7. How shall the enforcement system be funded? Should the ethics ordinance include a requirement that the municipality provide "adequate" resources for enforcement?

In general, an enforcement process and administrative system usually include:

a. Receipt and processing of complaints or allegations that the ethics ordinance has been violated;
b. Notice to the person(s) complained about;
c. Investigation of complaints;
d. An initial decision whether a violation may have occurred, or whether the complaint is without grounds and should be dismissed;
e. Gathering and recording of facts;
f. Hearing the respondent's version of the circumstances of the alleged misconduct;
g. Testimony from witnesses;
h. Deciding whether a sanction should be imposed, and if so, what sanction;
i. Implementing or enforcing the sanction;
j. Overseeing the enforcement process;
k. Keeping records of complaints and results;
l. Providing advice, or advisory opinions, about whether a contemplated action would violate the ethics ordinance; and
m. Providing periodic training to all who are within the jurisdiction of the ethics ordinance.

Overview

As always, a first step is to determine whether the local government charter requires a specific enforcement mechanism that must be codified in the ethics ordinance, and then implemented. An example of how a local government incorporated some of the elements listed above, Section 2-106(2) of the 1997 Detroit City Charter may be helpful. It mandates a comprehensive structure for enforcement and improvement of ethical standards, and a Board of Ethics is its primary enforcement and administrative mechanism.

Section 2-106(2) An independent Board of Ethics is created. The Board of Ethics shall consist of seven members:

1. Seven members of the public,
   a. Three of whom shall be appointed by the city council,
   b. Three of whom shall be appointed by the mayor; and
   c. One of whom shall be jointly appointed by the mayor and city
2. None of the Board members shall be removed by the respective appointing authority except for cause; [*Editor's note: "Cause" in this context might include breach of a duty relating to the office, e.g. misfeasance, malfeasance, or nonfeasance.*]
3. The term of membership of the Board shall be five years, and not more than two members' terms shall expire in any one year;
4. Each appointee may serve a maximum of two consecutive five-year terms, not to exceed a total of ten years.

Public members of the Board shall be residents of the city who are not elected officers, appointees, or employees of the city at any time during their Board membership. Members shall serve without compensation. All city elected officers, appointees, and employees shall be available for consultation with the Board of Ethics as it deems necessary. The Board of Ethics shall issue advisory opinions regarding the meaning and application of provisions of the Charter, city ordinances or other laws or regulations establishing standards of conduct for elected officers, appointees, or employees. Advisory opinions shall be rendered upon written request by an elected officer, appointee, or employee. Advisory opinions shall be published by the Board annually in a report to the mayor and city council. The opinions shall not disclose the identity of the elected officers, appointees, or employees concerned.

All meetings of the Board shall be open to the public, unless an individual involved in the matter to be addressed requests in writing that the meeting be closed, or unless otherwise provided by ordinance.

Consistent with state law, the Board of Ethics may recommend improvements in the standards of conduct to ensure the ethical behavior of city elected officers, appointees, and employees, or in the organization and procedures related to the administration and enforcement of those standards. The Board of Ethics shall be authorized by ordinance to conduct investigations on its own initiative, subpoena witnesses, administer oaths, take testimony, require the production of evidence relevant to a matter under investigation, appoint independent counsel when necessary, and to perform other functions essential to ensure the integrity of city government. The Board shall establish its rules and procedures, in accordance with Section 2-111 of this Charter. Funds sufficient to enable the Board to perform its duties shall be appropriated annually.

Examples of different enforcement systems

The ethics code enforcement mechanisms in the ordinances of 17 local governments in Michigan were surveyed and are highlighted below. These examples are from Bay City, Detroit, DeWitt, Farmington Hills, Flushing, Harper Woods, Jackson, Lansing, Livonia, Mason, Midland, Riverview, Royal Oak, Sterling Heights, Warren, Wyandotte, and Ypsilanti. Six different versions of enforcement systems were identified in these ordinances.

1. Boards of Ethics

The cities of Detroit, Lansing, Livonia, Mason, and Warren have enacted ordinances requiring a Board of Ethics. Although the Ethics Ordinance of the city of Detroit goes far beyond where most communities will want to go, it, again, provides a useful and detailed example of the various elements that drafters might want to consider.

Charter independence; duties; promulgation of rules.

a. The city of Detroit Board of Ethics is an independent body that was created by Section 2-106(2) of the 1997 Detroit City Charter for the following purposes:

   1. To render advisory opinions regarding the meaning and application of provisions of the 1997 Detroit City Charter, this article, and other laws or regulations which pertain to disclosure requirements and standards of conduct for public servants;

   2. To conduct investigations based upon a complaint in order to ensure the integrity of city government, through the subpoenaing of witnesses, the administering of oaths, the taking of testimony, compulsion of the production of relevant evidence, and, when necessary, the appointment of independent counsel; and

   3. To recommend a) improvements in the disclosure requirements that are found in Division 2 of this article, and the standards of conduct that are found in Division 3 of this article, and b) improvements in the administration and enforcement thereof, in order to promote an ethical environment within city government, and to ensure the ethical behavior of public servants.

b. In accordance with Section 2-111 of the 1997 Detroit City Charter, the Board of Ethics shall promulgate administrative rules to perform its duties as set forth in the 1997 Detroit City Charter and this article.

Limitations on Board's authority
The Board does not have the authority to reverse or otherwise modify a prior decision of the mayor, the city council, the city clerk, appointee, or other public servant.

Resources and staffing

a. A sufficient annual appropriation shall be provided to enable the Board of Ethics to perform its duties as set forth in the 1997 Detroit City Charter and this article, including hiring adequate staff.

b. The corporation counsel shall assign legal counsel from the city of Detroit Law Department who shall provide representation and advice to the Board on legal matters. The Board may refer a matter to the city attorney from the law department who represents the Board for appropriate action. Upon completion of review and consideration, the city attorney shall report his or her findings to the Board. Any retention of outside counsel on behalf of the Board of Ethics shall be governed by the provisions of section 6-408 of the 1997 Detroit City Charter.

Each city agency to cooperate and assist
As needed, each city agency shall cooperate in gathering information to assist the Board of Ethics in performing its duties.

Information provided to Board to remain confidential
Members of the Board of Ethics or any public servant who have access to any confidential information that is related to the functions or activities of the Board are prohibited from divulging such information to any person who is not authorized to possess the information.

Annual report

a. On or before April 1 of each year, the Board of Ethics shall issue simultaneously to the mayor and to each member of the city council a report that contains:

1. An analysis of all activities of the Board including the number of advisory opinions requested and the number issued, and the number of complaints filed and the disposition thereof during the preceding calendar year;

2. A compilation of opinions that have been issued during the preceding calendar year; and

3. The Board's recommendations, if any, a) for improvement of the disclosure requirements that are found in Division 2 of this article, and of the standards of conduct that are found in Division 3 of this article, and b) for improvement of the administration and enforcement thereof.

b. In addition, a copy of this annual report shall be submitted to the city clerk, each department director, each agency head and the municipal reference library.

2. Chief of police/city attorney

In the ethics ordinance of the city of Wyandotte, the chief of police and the city attorney direct the enforcement process.

a. Any individual who believes that a violation exists as prohibited by this article may make a complaint which shall be a written formal signed complaint to the city of Wyandotte chief of police, who shall cause same to be investigated and referred to the city attorney for review and recommendation with a copy to the complainant.

b The above listed authorities, when requested, shall take appropriate action upon any complaint, request for information or otherwise resolve matters concerning a violation of said article.

c. The appropriate action to be taken in any individual case shall be at the discretion of the above authorities, which may include, but is not limited to, any of the following:

1. Pursuing further investigation by the controlling authority;

2. Taking appropriate disciplinary action, including removal from office, appointed position or employment, in accordance with the Wyandotte City Charter, Code of Ordinances or state law;

3. Pursuing such other course of action which is reasonable, just and appropriate under the circumstances;

4. Pursuing criminal prosecution for failure to file the necessary disclosure forms required in this article;

5. Determining no action is required and stating the reasons therefore; and

6. Recovering the costs and expenses the city has incurred against an individual under the cost recovery provisions of Section 2-312.5.

3. City attorney

The Bay City ordinance provides that the city attorney shall head up the enforcement system.

All complaints concerning violations of this ordinance shall be made to the city attorney, who shall investigate and prosecute all allegations concerning or relating to violations of this ordinance.

4. City manager/city commission/ city council

Riverview and Royal Oak chose the city manager, city commission and city council to be the enforcement system.

The following sanctions shall not be construed to diminish or impair the rights of an employee under any collective bargaining agreement, nor the city's obligation to comply with such collective bargaining agreements.

a. Mayor and commissioners. The Royal Oak city commission shall have the authority to issue an oral or written warning or reprimand to one of its members for violations of the ethical standards in this Ordinance.

b. Employees other than elected officials. The city manager, or the city commission if the employee is appointed by the commission pursuant to the Charter, may impose any one or more of the following sanctions upon an employee for violations of the ethical standards in this Ordinance:

   1. Oral or written warnings or reprimands;

   2. Suspension with or without pay for specified periods of time; or,

   3. Termination from employment.

c. Non-employees. The city manager or city commission may impose any one or more of the following sanctions on a non-employee for violations of the ethical standards:

   1. Written warnings or reprimands;

   2. Termination of contract; or,

   3. Disbarment or suspension.

5. Mayor/city council/ city cttorney/city manager

The ordinances of Farmington Hills, Jackson, and Midland include the mayor, city council, city attorney, and city manager in the enforcement system.

a. All matters concerning the conflict of interest and ethical code shall be directed to one of the two following controlling authorities depending upon the employment status of the city of Farmington Hills official /employee involved, or group concerned, and the nature of the action requested:

   1. Elected and appointed officials of the city of Farmington Hills to the mayor, city council and city attorney.

   2. Appointed employees, full and part-time, of the city of Farmington Hills to the city manager and city attorney.

b. The above listed authorities when requested, shall take appropriate action upon any complaint, request for information, or otherwise resolve matters concerning conflict of interest and the ethical code policy of the city of Farmington Hills. The appropriate action to be taken in any individual case shall be at the discretion of the controlling authority involved which may include but is not limited to any of the following:

1. Referral of the matter to a higher authority.
2. Pursuing further investigation by the controlling authority.
3. Taking appropriate disciplinary action, including removal from office, appointed position or employment, in accordance with the Farmington Hills City Charter, City Code, state law, or the regulations or policies of the city of Farmington Hills.
4. Determining no action is required.
5. Pursuing such other course of action which is reasonable, just and appropriate under the circumstances.

c. The above listed controlling authorities may render written advisory opinions, when deemed appropriate, interpreting the Conflict of Interest and Ethical Code of Conduct as set forth in Section 3 above. Any city official /employee may seek guidance from the controlling authority upon written request on questions directly relating to the propriety of their conduct as officials and employees. Each written request and advisory opinion shall be confidential unless released by the requester.
    1. Request for opinions shall be in writing.
    2. Advisory opinions may include guidance to any employee on questions as to:
        a. Whether an identifiable conflict exists between his/her personal interests or obligations and his/her official duties.
        b. Whether his/her participation in his/her official capacity would involve discretionary judgment with significant affect on the disposition of the matter in conflict.
        c. What degree his/her personal interest exceeds that of other persons who belong to the same economic group or general class.
        d. Whether the result of the potential conflict is substantial or constitutes a real threat to the independence of his/her judgment.
        e. Whether he/she possesses certain knowledge or know-how which the city will require to achieve a sound decision.
        f. What effect his/her participation under the circumstances would have on the confidence of the people in the impartiality of their city officials and employees.
        g. Whether a disclosure of his/her personal interests would be advisable, and, if so, how such disclosure should be made so as to safeguard the public interest.
        h. Whether it would operate in the best interest of the people for him/her to withdraw or abstain from participation or to direct or pursue a particular course of action in the matter.

6. District court

Dewitt, Flushing, Harper Woods, Sterling Heights, and Ypsilanti have ethics ordinances featuring the district court as the head of the enforcement system.

Any person who shall be convicted, by a court of competent jurisdiction, of violating any of the provision(s) of this ordinance shall be guilty of a misdemeanor and shall be punished by a fine not to exceed five hundred dollars or by imprisonment of not more than ninety days, or both, in the discretion of the court.

a. In addition, any person so convicted by a court of competent jurisdiction shall forfeit any city employment or office held. The office shall be vacant upon conviction.
b. Any person convicted by a court of competent jurisdiction of a misdemeanor involving election fraud, or any felony, or a misdemeanor involving moral turpitude committed in the course of employment with the city, shall forfeit any city employment or office held. The office shall be vacant upon conviction.

Chapter 4: How to Proceed

Essay

Developing, Adopting and Implementing an Ethics Ordinance: The Process

By Daniel C. Matson

1. Getting started

A charter can be *silent* on the question of an ethics ordinance, or it can *mandate* the adoption of an ethics ordinance, along with a time certain for enactment. In either case, because there is much to consider about the content of an ethics ordinance, and because there is much to research, a reasonable amount of time for its development should be allowed. A period of one year seems to be adequate time for most communities to prepare and enact an ethics ordinance, although some require a longer time.

2. The study committee

A committee should be formed to review the initial draft of a proposed ethics ordinance or to draft the ordinance in consultation with a knowledgeable municipal attorney. It is helpful to involve people with municipal experience, people with a legal background, and people with broad experience in the community. It is helpful to include at least one elected official who serves on the legislative body and who is interested in the undertaking. This person may assist in formulating the ethics policy, and also by endorsing and presenting the ordinance to the legislative body for adoption.

3. Finding background materials and examples

This publication is intended to serve as a guide for the ethics ordinance study committee. It provides the basic standards of conduct that are found in many ethics ordinances, and it points to a number of ordinances currently in use in Michigan cities. The Michigan Municipal League database can identify more communities in which comprehensive ethics ordinances exist. In addition, the League will provide copies of ordinances upon request. Since no two communities will have the same perspective or approach toward codifying standards of conduct, it is strongly advised that the ethics ordinance of another local government not be adopted as is. One size doesn't fit all, and it is important that an ethics ordinance be tailored to the circumstances of the community and the municipality that will be asked to adopt and to abide by the ordinance.

4. Legal research and drafting

Ideally, the development of an ethics ordinance should have the benefit of legal advice every step of the way. This might be a luxury for some municipal governments, but legal review should occur periodically, or at least at the end of the drafting process, before the work product is offered to the public. Both Constitutional and statutory law must be consulted to ensure that the ethics provisions are valid subject matters for the ordinance, and are not preempted by higher law. Also, the ethics ordinance will affect various rights and duties of municipal employees, and collective bargaining agreements must be considered.

The municipal charter or a contract with the attorney may require the attorney to draft the document in its entirety because it is to be an ordinance, or may at least require the attorney's review prior to its presentation to the legislative body. Involving the attorney in the complete process is strongly recommended.

5. Adopting the ordinance

When the ethics ordinance committee is satisfied with its work product, and after it has had adequate legal review, the proposed ordinance is then submitted to the legislative body for consideration,

along with the committee's recommendation for adoption. Members of the committee may assist in the discussion during the public forum as the matter is debated. They can provide background information, explain the rationale for the standards of ethical conduct chosen, explain the committee's approach to the proposed ordinance, and facilitate an understanding of both the meaning and the effect of the provisions in the proposed ordinance.

6. Publication of the ordinance

The complete ordinance, or a summary of it, must be published in the manner required by state and local law. In addition, each person in service to the municipality (elected and appointed officials, full- and part-time employees, and volunteers serving on boards and commissions) should be given a copy of the ordinance. They should also be required to read it and be given an opportunity to raise questions about its effects. Depending upon the structure of the organization, it may be appropriate to have department heads review the ordinance with staff in special meetings scheduled for that purpose.

7. Living with the ethics ordinance

The ethics ordinance exists to provide a reasonable framework in which the local government servant is to function and meet public expectations. To be as effective as possible, on-going training and discussion should be available for all who come within the jurisdiction of the ordinance. The purpose of any ethics ordinance is, after all, to promote the trustworthiness of government. Those who serve *in* government, and those who are served *by* government, which is all of us, want to know that our government exists to promote the public good.

Appendix A:
The Contributors

The contributing authors and the editor of the Ethics Handbook are all attorneys at law and they are all current and longstanding members of the Ethics Roundtable of the Michigan Association of Municipal Attorneys. All are indebted to William L. Steude, as without his belief in the importance of ethical conduct in the affairs of government, this project would not have happened.

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The Forward and "Different Forms of Local Government; Different Routes to Adopting Ethics Standards for Your Community"

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Appendix B:
Some Ethics-Related Michigan Statutes

The following are Michigan statutes that have been referred to in the text, and that have implications for the development of ethics codes and ethics ordinances by local governments. The list is not intended to be comprehensive, but, rather, instructive.

Conflicts of Interests as to Contracts Act, Act 317, 1968 (MCL 15.321 *et seq*.)

Failure to uphold or enforce the law (MCL 752.11)

False statement of public finances (MCL 750.489)

Incompatible Public Offices Act (MCL 15.181)

Political Activities by Public Employees, Act 160, 1976 (MCL 15.401 *et seq*.)

Public moneys, manner of keeping, embezzlement, etc. (MCL 750.490)

Purchase of goods on public credit (MCL 750.490a)

Standards of Conduct and Ethics Act, Act 196, 1973 (MCL 15.341 et seq.)

Whistleblower's Protection Act, Act 469, 1980 (MCL 15.361-15.369)

Willful neglect of duty (MCL 750.478)

Appendix C:
Eighteen Local Government Ethics Ordinances

The text refers to eighteen municipalities' charters and ethics ordinances that were reviewed, and excerpts from them were offered as examples. The following is a listing of the citations for these charters and ordinances, some of which are available on the Michigan Municipal League website. Also included are citations for municipal charters that include provisions regarding ethics.

Local Government	Population[1]	Charter or Ordinance Citation
DeWitt	4,441	Charter Art. 8, §8.14; Code of Ordinances, Ch. 2, Art. VI, §2-191 *et seq.*
Mason	7,985	Ordinance 132, effective October 1, 1999
Flushing	8,110	Ch. 37 of Ordinances, §3701 Code of Conduct, A through G; and §3702 Financial Disclosure; adopted 1993
Riverview	12,744	City Code of Ordinances, Ch. 2, Div. 3, Secs. 2-71 through 2-78
Harper Woods	13,621	Ordinance 96-3: Article VIII, Secs. 2-275 through 2-280, City Code of Ordinances
Ypsilanti	21,832	Ypsilanti City Code, Chapter 46, Articles II and III, adopted May 22, 1995
Wyandotte	26,940	Ord. No. 1235, Sec. 1; revised July 18, 2005
Jackson	34,879	Charter, §9.13 Ethics Ordinance, adopted Nov. 4, 1997; Ordinance 99-25, adopted Nov. 16, 1999
Bay City	34,879	Charter, Article 7, §§7.1-7.3; Code of Ordinances, Chapter 2, §2.30 *et seq.*
Midland	41,760	Ordinance No. 1337: Ch. 32, Secs.32-1 through 32-6, City of Midland Code of Ordinances, dated January 22, 1996
Royal Oak	58,299	Ch. 45, Royal Oak City Code, adopted in 1993, and amended in 1998 and 2004
Rochester Hills	69,995	Ch. 50, Ethics, Secs. 50-1 through 50-7, effective February 13, 1996
Farmington Hills	80,223	Code of Ethics, adopted December 11, 1989
Livonia	97,977	Ethics Ordinance, §2.200.010 through §2.200.100, adopted 1997
Lansing	115,518	Charter, Ch. 5, §§5-501-5-505; Ordinance 290.01-290.12 (1966)
Sterling Heights	128,034	Code of Ethics for Public Officials and Employees, Ord. No.165, §1.01, with Guidelines, effective December 18, 1974
Warren	135,311	Article VIII, Code of Ethics, §§2-371 through 2-381, adopted September 11, 1991
Detroit	886,671	Detroit City Charter, §2-106 et seq., 1997 Detroit City Charter; Detroit Code, Article VI Ethics, §2-6-1 *et seq.*

1. Source of population data: U.S. Census Bureau, 2005 population estimates

Appendix D:
Ethics Resources for Local Governments

Aaron, Henry J., Thomas E. Mann and Timothy Taylor. *Values and Public Policy.* Brookings Institution Press, Washington, D.C., 1994.

Bell, A. Fleming, II. *Ethics in Public Life, Adapted from Ethics, Conflicts, and Offices: A Guide for Local Officials*. Institute of Government, the University of North Carolina at Chapel Hill, 1998. The book explores what ethics and the public trust mean, and presents ways that the ethical climate of government can be improved.

Berman, Evan M., Jonathan P. West, and Stephen J. Bonczek, eds. *The Ethics Edge.* Washington, D.C.: International City/County Management Association, 1998. A collection of articles covering contemporary insights and current ideas on management practice in ethics.

Bok, Sissela. *Lying: Moral Choice in Public and Private Life.* Pantheon Books, a division of Random House, Inc., 1978. A inquiry into the practice of lying, the avoidance of the hard questions, and the resulting damage.

Bowman, James S., ed. *Ethical Frontiers in Public Management.* Jossey-Bass Publishers, San Francisco, 1992. The book presents current research that defines the moral environment found in public management, examines how and why thinking about government ethics needs to be revitalized, and offers theoretical strategies to bring that renewal to fruition.

Denhardt, Kathryn G. *The Ethics of Public Service: Resolving Moral Dilemmas in Public Organizations.* Greenwood Press, New York, 1988.

Dworkin, Ronald. *A Matter of Principle.* Harvard University Press, Cambridge, MA, 1985.

Elliott, Kimberly Ann, ed. *Corruption and the Global Economy.* Institute for International Economics, Washington, D.C., 1997. In some parts of the world, corruption threatens to slow or reverse trends toward democratization and international economic integration.

Ethics in Action Training Package. Washington, D.C.: International City/County Management Association, 1999. Designed to help local government leaders and staff explore ethics issues together. Using case studies, exercises, real local government examples, and mini lectures, the training package addresses how all staff can make ethical decisions all the time and how to build and maintain an ethical local government.

Fisher, Roger, Elizabeth Kopelman, and Andrea Kupfer Schneider. *Beyond Machiavelli: Tools for Coping with Conflict.* Harvard University Press, 1994. The authors look systematically at what is wrong with the world, present a theory on how conflicts ought to be handled, and suggest practical skills for bringing that theory to bear on the real world. They bring a perspective that is applicable on the world stage, and at the dinner table.

Fisher, Roger, and William Ury. *Getting to Yes: Negotiating Agreement without Giving In.* Houghton Mifflin Company, 1981. What is the best way for people to deal with their differences? Being respectful, and separating the people from the problem goes a long way.

Glazer, M.P., et al. *The Whistleblowers: Exploring Corruption in Government and Industry.* Basic Books, New York, 1989.

Institute for Local Government, *Ethics Law Compliance Best Practices, A Check List,* 2005. See http://www.cacities.org/resource_files/23862.finalcompliancebooklet.pdf

Kellar, Elizabeth K., ed. *Ethical Insight, Ethical Action: Perspectives for the Local Government Manager.* Washington, D.C.: International City/County Management Association, 1988. The book covers the inevitable tensions between personal and organizational ethics, and several of the articles deal specifically with the nature of responsibility in public organizations.

Kellar, Elizabeth K., and Mary Slawson. *Ethos: Multimedia Ethics Training for Local Governments CD-ROM*. Washington, D.C.: International City/ County Management Association, 1999. An interactive training program featuring 21 real-life ethics scenarios with options for resolutions. The participant watches a scenario, chooses a response, and learns the preferred response.

Lewis, Carol W. *The Ethics Challenge in Public Service: A Problem-Solving Guide.* Jossey-Bass Publishers, San Francisco, 1991. The author offers practical tools and techniques that public managers can use in making ethical choices in the ambiguous, pressured world of public service.

Lewis, Carol W. *Scruples & Scandals: A Handbook on Public Service Ethics for State and Local Government Officials and Employees in Connecticut.* The Institute of Public Service and the Institute of Urban Research, The University of Connecticut, 1986. The book looks further than Connecticut, and is meant to provide a useful, practical examination of the formal procedures and processes by which we seek to encourage, if not ensure, "good" or "right" behavior.

McCollough, Thomas E. *The Moral Imagination and Public Life: Raising the Ethical Question.* Chatham House Publishers, Chatham, NJ, 1991.

Richter, William L., Frances Burke and Jameson W. Doig, eds. *Combating Corruption, Encouraging Ethics: A Sourcebook for Public Service Ethics*. American Society for Public Administration, Washington, D.C., 1990.

Sabato, Larry J., and Glenn R. Simpson. *Dirty Little Secrets: The Persistence of Corruption in American Politics.* Times Books, New York, 1996.

Salkin, Patricia E., ed. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials.* Section of State and Local Government Law, American Bar Association, 1999. The book is a compilation of essays, articles, and research, intended to help government lawyers focus on some of the ethical considerations that arise in the practice of law in the public sector.

Speers, JoAnne, *2000-2006: A California Ethics Odyssey.* A report distributed by the International Municipal Lawyers Association at its 2006 Mid Year Seminar held April 23-25, 2006 in Washington, D.C.

Steinberg, Sheldon S., and David T. Austern. *Government, Ethics, and Managers: A Guide to Solving Ethical Dilemmas in the Public Sector.* Praeger, New York, 1990.

Zimmerman, Joseph. *Curbing Unethical Behavior in Government.* Greenwood Press, Westport, Connecticut, 1994. The book stresses the importance of action to ensure open government as a deterrent to improper conduct, a facilitator for its detection, and a promoter of a moralistic political culture.

Appendix E:
Professional Associations' Codes of Ethics

American Association of School Administrators
aasa.org

American Institute of Certified Planners
planning.org

American Planning Association
planning.org

American Public Works Association
(Standards of Professional Conduct)
apwa.net

American Water Works Association
(Members' Code of Practice, and Policy on Conflicts of Interest)
awwa.org

Association of Government Accountants
agacgfm.org

Government Finance Officers Association
gfoa.org

International Association of Assessing Officers
iaao.org

International Association of Chiefs of Police
(Also at ethics.iit.edu/codes)
theiacp.org

International City/County Management Association
icma.org

Michigan Association of Planning
planningmi.org

Michigan Government Finance Officers Association
migfoa.org

Michigan Local Government Management Association (adopted the ICMA Code of Ethics)
mlgma.org

Michigan Municipal Treasurers Association
(Code of Professional Ethics)
mmta-mi.org/pdf/profcodeethics

National School Boards Association
nsba.org

State Bar of Michigan
Rules of Professional Conduct
Code of Judicial Conduct
michbar.org

michigan municipal league

Better Communities. Better Michigan.

MODEL ETHICS ORDINANCE

For Local Units of Government

Attorney General Mike Cox

INTRODUCTION

While Michigan has several statutes governing the various aspects of ethics in government at both the state and local levels, local governmental entities may, by ordinance, establish and enforce ethics regulations for local public officials and public employees to the extent provided by law and/or charter.

The power to adopt ordinances is a governmental function conferred by the Legislature upon local governmental units for the governance of their local affairs. OAG, 2003-2004, No 7150, p 107, 108 (March 1, 2004). Included in a local government's ordinance authority is the power to enforce ordinances, generally by fines not to exceed $500.00 or penalties of up to 90 days in jail. Examples of the Legislature having authorized local governmental units to adopt and enforce ordinances are contained in sections 3(k) and 4i of the Home Rule City Act, MCL 117.3(k) and MCL 117.4i; Chap VI, sections 1 through 14 of the General Law Village Act, MCL 66.1 - MCL 66.14; section 24(b) of the Home Rule Village Act, MCL 78.24(b), section 21(5) of the Charter Township Act, MCL 42.21(5); sections 1 through 7 of the Township Ordinances Act, MCL 41.181 – MCL 41.187; and MCL 46.11(j) for counties.

A well drafted ethics ordinance should provide clarity to public officials and employees as to behavior necessary to instill trust and faith in government on the part of the public.

> [E]thics in government is not merely the absence of corruption but the presence of trust . . . . Ethics laws and enforcement efforts aimed solely at deterring corruption fail to apprehend that simple truth. Indeed, they foster the notion, unjustified in fact, that public officials are inherently dishonest. Such a policy not only fails to achieve its narrow goal of combating corruption but also destroys trust in municipal officials and thus ultimately undermines both the perception and reality of integrity in government. The purpose of ethics laws lies not in the promulgation of rules nor in the amassing of information nor even in the punishment of wrongdoers, but rather in the creation of a more ethical government, in perception and in fact . . . .
>
> In the end, the touchstone of integrity in government . . . reside[s] in the willingness of good citizens to serve in state and local government. Laws and agencies that chill that willingness to serve do far more harm than good. When, however, good citizens clamor to join the ranks of state and local officials, the ethical health of the state and local communities run strong.

Mark Davies, *1987 Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Reform*, 11 PACE L. Rev. 243, 266-267 (1991).

An ethics ordinance may be aspirational and/or punitive. An aspirational ordinance provides guidance to public officials and employees as to expected and prohibited conduct. An ethics ordinance that is also punitive provides civil and/or criminal penalties for violations of the

ethics ordinance. In drafting an ethics ordinance, consideration must also be given to collective bargaining agreements.

This office has developed this model ordinance as a means of assisting local officials in drafting an ethics ordinance for their local unit of government. While the adoption of such an ordinance is not required by state law, the information contained on this site is designed for local officials seeking to adopt an ethics ordinance. The various chapters and standards of conduct in this model ordinance are offered as suggestions and options for the governing body of a local unit to consider when drafting its own ethics ordinance. The governing body of each governmental unit should seek the advice of its legal counsel when drafting its ethics ordinance.

CHAPTER ONE - PURPOSE AND DEFINITIONS:

Section 1 - 1. Purpose. The purpose of this ordinance is to set forth standards of conduct for the officers and employees of the [type of unit]. The ordinance also provides references to certain state statutes that regulate the conduct of officers and employees of local government. The ordinance provides for an Ethics Ombudsperson to assist the [name of unit's governing body] in the administration of this ordinance. A Board of Ethics is established to hear complaints against officers and employees of the [type of unit] and, when there is a reasonable basis to believe that the respondent has violated Chapter Two of this ordinance, to refer those complaints for prosecution and/or a disciplinary hearing by the appointing authority. The ordinance provides for penalties for violations of this ordinance.

Commentary. If a unit chooses not to provide for an Ethics Ombudsperson or for a Board of Ethics, this section should be adjusted accordingly. If an Ethics Ombudsperson is not provided for, there would be no separate chapter establishing that office. If the Board of Ethics is not established, there should be in its place another Chapter entitled "Filing and Disposition of Complaints."

Section 1 - 2. Definitions.

"Employee" means a person employed by the [type of unit], whether on a full-time or part-time basis.

"Gift" means any gratuity, discount, entertainment, hospitality, loan, forbearance, or other tangible or intangible item having monetary value including, but not limited to, cash, food and drink, travel, lodging, and honoraria for speaking engagements related to or attributable to government employment or the official position of an officer or employee.

"Government contract" means a contract in which the [type of unit] acquires goods or services, or both, from another person or entity, but the term does not include a contract pursuant to which a person serves as an employee or appointed officer of the [type of unit].

"Governmental decision" means a determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, ordinance, or measure on which a vote by the

members of a legislative or governing body of a public entity is required and by which a public entity formulates or effectuates public policy.

"Immediate family" means a person and a person's spouse and the person's children and step-children, by blood or adoption, who reside with that person.

"Officer or Official" means a person who holds office, by election or appointment within the [type of unit] regardless of whether the officer is compensated for service in his or her official capacity.

"Official action" means a decision, recommendation, approval, disapproval or other action or failure to act which involves the use of discretionary authority.

"Prohibited source" means any person or entity who:
(1) is seeking official action (i) by an officer or (ii) by an employee, or by the officer or another employee directing that employee;
(2) does business or seeks to do business (i) with the officer or (ii) with an employee, or with the officer or another employee directing that employee;
(3) conducts activities regulated (i) by the officer or (ii) by an employee, or by the officer or another employee directing that employee; or
(4) has interests that may be substantially affected by the performance or non-performance of the official duties of the officer or employee.

CHAPTER TWO – STANDARDS OF CONDUCT

Section 2 – 1. Gift Ban. Except as permitted by this ordinance, no officer or employee of the [type of unit] shall intentionally solicit or accept any gift from any prohibited source or which is otherwise prohibited by law or ordinance.

Section 2 – 2. Exceptions. Section 2 – 1 is not applicable to the following:

(1) Opportunities, benefits, and services that are available on the same conditions as for the general public.

(2) Anything for which the officer or employee pays the fair market value.

(3) Any contribution that is lawfully made under the Campaign Finance Laws of the State of Michigan.

(4) A gift from a relative, meaning those people related to the individual as father, mother, son, daughter, brother, sister, uncle, aunt, great aunt, great uncle, first cousin, nephew, niece, husband, wife, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, half sister, and including the father,

mother, grandfather, or grandmother of an individual's spouse and the individual's fiancé or fiancée.

(5) Anything provided by an individual on the basis of a personal friendship unless the recipient has reason to believe that, under the circumstances, the gift was provided because of the official position or employment of the recipient and not because of the personal friendship. In determining whether a gift is provided on the basis of personal friendship, the recipient shall consider the circumstances under which the gift was offered, such as: (i) the history of the relationship between the individual giving the gift and the recipient of the gift, including any previous exchange of gifts between those individuals; (ii) whether to the actual knowledge of the recipient the individual who gave the gift personally paid for the gift or sought a tax deduction or business reimbursement for the gift; and (iii) whether to the actual knowledge of the recipient the individual who gave the gift also at the same time gave the same or similar gifts to other officers or employees.

(6) Food or refreshments not exceeding $[amount to be determined by unit's governing body] per person in value on a single calendar day; provided that the food or refreshments are (i) consumed on the premises from which they were purchased or prepared, or (ii) catered. For the purposes of this Section, "catered" means food or refreshments that are purchased ready to consume which are delivered by any means.

(7) Food, refreshments, lodging, transportation, and other benefits resulting from outside business or employment activities (or outside activities that are not connected to the official duties of an officer or employee), if the benefits have not been offered or enhanced because of the official position or employment of the officer or employee, and are customarily provided to others in similar circumstances.

(8) Intra-governmental and inter-governmental gifts. For the purpose of this ordinance, "intra-governmental gift" means any gift given to an officer or employee from another officer or employee of [type of unit], and "inter-governmental gift" means any gift given to an officer or employee by an officer or employee of another governmental entity.

(9) Bequests, inheritances, and other transfers at death.

(10) Any item or items from any one prohibited source during any calendar year having a cumulative total value of less than $[amount to be determined by unit's governing body].

Each of the exceptions listed in this Section is mutually exclusive and independent of every other.

Commentary. The dollar amount limitations permitted in Section 2 – 2 should be determined by each local unit based upon the standards of each municipality and the cost of such items in the area. For example, the State of Illinois places limits of $75 and $100 in subsections (6) and (10) respectively. However, a rural area of northern Michigan is not likely to be subject to a cost of living similar to that in Chicago or Detroit and the limits should reflect the local standards.

Section 2 – 3. Disposition of gifts. An officer or employee does not violate this ordinance if he or she promptly takes reasonable action to return a gift from a prohibited source.

Section 2 – 4. Confidential Information. A public officer or employee shall not divulge to an unauthorized person, confidential information acquired in the course of employment in advance of the time prescribed by [name of governing body of local unit] or the [name of specific officer] for its authorized release to the public.

See: Freedom of Information Act (FOIA), 1976 PA 442, MCL 15.231 *et seq.* - Suppression of or refusal to provide public records of the [type of unit] is governed by the FOIA, the Records Retention Schedule of the local unit as approved by the State Archivist, and MCL 750.491 (Public records; removal, mutilation or destruction; penalty).

Section 2 – 5. Personal Opinion. An officer or employee shall not represent his or her personal opinion as that of the [type of unit].

Section 2 – 6. Public Resources. An officer or employee shall use personnel resources, property, and funds under the officer's or employee's official care and control judiciously and solely in accordance with prescribed constitutional, statutory, and regulatory procedures and not for personal gain or benefit.

Section 2 – 7. Personal Profit. A public officer or employee shall not engage in a business transaction in which the public officer or employee may profit from his or her official position or authority or benefit financially from confidential information which the public officer or employee has obtained or may obtain by reason of that position or authority. Instruction which is not done during regularly scheduled working hours except for annual leave or vacation time shall not be considered a business transaction pursuant to this subsection if the instructor does not have any direct dealing with or influence on the employing or contracting facility associated with his or her course of employment with this [type of unit].

Section 2 – 8. Incompatibility and Conflicts of Interest. Except as otherwise provided in Const 1963, statute, or in Section 2 - 10, an officer or employee shall not engage in or accept employment or render services for a private or public interest when that employment or service is incompatible or in conflict with the discharge of the officer or employee's official duties or when that employment may tend to impair his or her independence of judgment or action in the performance of official duties. The simultaneous holding of more than one public position under certain circumstances is contrary to the requirements of the Incompatible Public Offices Act, MCL 15.181 *et seq*. However, the simultaneous holding of certain public positions is specifically authorized by the Michigan Constitution of 1963 or state statute.

See: Incompatible Public Offices Act, 1978 PA 566, MCL 15.181 *et seq.*

See: Const 1963, Article 7, Section 28. Local officials are specifically authorized to serve on the governing bodies of intergovernmental entities.

Section 2 – 9. Personal and financial interests. Except as provided in Section 2 – 10, an officer or employee shall not participate in the negotiation or execution of contracts, making of loans, granting of subsidies, fixing of rates, issuance of permits or certificates, or other regulation or supervision relating to a business entity in which the officer or employee has a financial or personal interest.

See: Conflict of Interest Act, 1968 PA 317, MCL 15.321 *et seq.* This Act governs the solicitation by and participation in government contracts by officers and employees of the [type of unit] and preempts all local regulations of such conduct. However, the Conflict of Interest Act does not apply to contracts between the [type of unit] and its officers and employees which are based on the [type of unit]'s powers to appoint officers and hire employees.

See: State Ethics Act, 1973 PA 196, MCL 15.341 *et seq*. Section 2 of this Act, MCL 15.342, set forth the standards listed in Sections 2 - 4 to 2 - 9 of this ordinance. However, no sanctions are imposed for violation of these standards by officers and employees of local units of government. Hence, the need for this ordinance to impose sanctions for the violation of these standards of conduct.

Section 2 – 10. State Conflict of Interest Act, Validity of Contracts, and Voting on, Making, or Participating in Governmental Decisions.

(1) This ordinance shall not in any manner vary or change the requirements of 1968 PA 317, being sections 15.321 to 15.330 of the Michigan Compiled Laws which governs the solicitation by and participation in government contracts by officers and employees of the [type of unit] and preempts all local regulation of such conduct.

(2) This ordinance is intended as a code of ethics for the [type of unit]'s officers and employees. A contract in respect to which a public officer or employee acts in violation of this ordinance, shall not be considered to be void or voidable unless the contract is a violation of a statute which specifically provides for the remedy.

(3) Subject to subsection (4), sections 2 - 8 and 2 - 9 shall not apply and an officer shall be permitted to vote on, make, or participate in making a governmental decision if all of the following occur:

(a) The requisite quorum necessary for official action on the governmental decision by the [name of unit's governing body] to which the officer has been elected or appointed is not available because the participation of the officer in the official action would otherwise violate sections 2 - 8 and 2 - 9.

(b) The officer is not paid for working more than 25 hours per week for [type of unit].

(c) The officer promptly discloses any personal, contractual, financial, business, or employment interest he or she may have in the governmental decision

and the disclosure is made part of the public record of the official action on the governmental decision.

(4) If a governmental decision involves the awarding of a contract, Sections 2 - 8 and 2 - 9 shall not apply and a public officer shall be permitted to vote on, make, or participate in making the governmental decision if all of the following occur:

(a) All of the conditions of subsection (3) are fulfilled.

(b) The public officer will directly benefit from the contract in an amount less than $250.00 or less than 5% of the public cost of the contract, whichever is less.

(c) The public officer files a sworn affidavit containing the information described in subdivision (b) with the [name of unit's governing body] making the governmental decision.

(d) The affidavit required by subsection (c) is made a part of the public record of the official action on the governmental decision.

Section 2 – 11. Political Activities of Public Employee or Public Officer.

(1) Employees of local units of government running for office, political campaigning by employees, and limitations on officers and employees seeking support from other employees for those campaigning for public office and for or against ballot proposals are regulated by the Political Activities by Public Employees Act, MCL 15.401 *et seq*. Complaints may be filed with the Michigan Department of Energy, Labor and Economic Growth. MCL 15.406. Violation of the provisions of this Act by employees and appointed officers are subject to appropriate disciplinary action, up to and including termination by the appointing authority. Violations of the ordinance are also subject to the sanctions listed in Chapter Five.

(2) Michigan Campaign Finance Act, MCL 169.201 *et seq*. Complaints regarding compliance with this Act may be filed with the Michigan Department of State.

See: Political Activities by Public Employees Act, 1976 PA 169, MCL 15.401 *et seq.*

See: Michigan Campaign Finance Act, MCL 169.201 *et seq.*

Section 2 – 12. Anti-nepotism. Unless the [name of governing body] shall by a two-thirds (2/3) vote, which shall be recorded as part of its official proceedings, determine that the best interests of the [type of unit] shall be served and the individual considered by such a vote

has met the qualifications for appointive office or employment, the following relatives of any elected or appointed officer are disqualified from holding any appointed office or employment during the term for which said elected or appointed officer was elected or appointed: spouse, child, parent, grandchild, grandparent, brother, sister, half-brother, half-sister, or the spouse of any of them. This Section shall in no way disqualify such relatives or their spouses who are bona fide appointed officers or employees of the [type of unit] at the time of the election or appointment of said officer to elective [type of unit] office.

Section 2 – 13. Representation Before Governmental Body.

An official or employee of the [type of unit] shall not represent any other person in any matter that the person has before the [type of unit] when the officer or employee appoints or otherwise supervises the board, commission, officer or employee responsible for handling the matter.

Section 2 - 14. Transactional Disclosure. Whenever an officer or employee is required to recuse himself or herself under Chapter Two of this ordinance, he or she:

(a) shall immediately refrain from participating further in the matter,

(b) shall promptly inform his or her superior, if any, and

(c) shall promptly file with the Board of Ethics, if any, and clerk of the [type of unit] a signed Affidavit of Disclosure disclosing the reason for recusal. The clerk shall send copies of the Affidavit of Disclosure to all of the members of the governing body of the [type of local unit] and the Affidavit shall be attached to the minutes of its next meeting.

See: Model Affidavit of Disclosure – Transactional Form

Section 2 - 15. Annual Disclosure Statement.

The following elected and appointed officers and employees shall file an annual disclosure statement: [list should include members of the unit's governing body, other elected and appointed officers and employees, such as the directors and deputy directors of administrative departments, members of the zoning board of appeals and planning commission, and those who regularly exercise significant discretion over the solicitation, negotiation, approval, awarding, amendment, performance, or renewal of government contracts].

The annual disclosure statement shall disclose the following financial interest of the officer or employee or his or her immediate family in any company, business, or entity that has contracted with the [type of unit] or which has sought licensure or approvals from the [type of unit] in the two calendar years prior to the filing of the statement:

(a) Any interest as a partner, member, employee or contractor in or for a co-partnership or other unincorporated association;

(b) Any interest as a beneficiary or trustee in a trust;

(c) Any interest as a director, officer, employee or contractor in or for a corporation; and

(d) Legal or beneficial ownership of [percentage to be determined by the unit's governing body] % or more of the total outstanding stock of a corporation.

The annual disclosure statement shall include a summary listing each business transaction with the [type of unit] involving a financial interest described in this section of the [type of unit] officer or employee and/or the immediate family of the officer or employee during the two prior calendar years.

If there is no reportable financial interest or transaction applicable to the officer or employee and/or the immediate family of the officer or employee, the annual disclosure statement shall contain a certification to that effect.

See: Model Affidavit of Disclosure – Annual Form

Commentary. It is understood that many local units of government do not have the need, the resources or the expertise to maintain an Ethics Board or Ethics Ombudsperson. However, for those local units who wish to create these vehicles for implementing an ethics ordinance, Chapter Three and Chapter Four (Alternative 1) offer these options.

CHAPTER THREE – ETHICS OMBUDSPERSON

Section 3 – 1. The [chief executive officer or other designated officer if the local unit does not have a chief executive officer], with the advice and consent of the [governing body] shall designate an Ethics Ombudsperson (EO) for the [type of unit].

Section 3 – 2. The EO may recommend to the [type of unit's governing body] that an advisory opinion be sought from the attorney for the [type of unit] regarding any requirement of this ordinance and its application to the officers and employees of the [type of unit].

Section 3 – 3. The EO shall promptly advise the governing body of the [type of local unit] of any problems encountered in the implementation of the ordinance and as to any recommendations that he or she may have for improvement of the ordinance. The EO shall perform such other duties as may be assigned by the [governing body].

CHAPTER FOUR (ALTERNATIVE 1) - BOARD OF ETHICS

Section 4 – 1. There is hereby created a board to be known as the Board of Ethics of the [type of local unit]. The Board shall be comprised of three members appointed by the [chief executive officer or other designated officer if the local unit does not have a chief executive officer] with the advice and consent of the [type of local unit's] governing body. No person shall be appointed as a member of the Board who is related, either by blood or by marriage up to the degree of first cousin, to any elected officer of the [type of unit]. [For entities in which officers are elected on a partisan basis, insert the following: No more than two members of the Board shall belong to the same political party at the time such appointments are made. Party affiliation shall be determined by affidavit of the person appointed.] Members shall serve without compensation.

Section 4 – 2. At the first meeting of the Board, the initial appointees shall draw lots to determine their initial terms of 3, 2, and 1 year(s), respectively. Thereafter, all board members shall be appointed to 3-year terms by the [chief executive officer or other designated officer if the local unit does not have a chief executive officer] with the advice and consent of the [name of unit's governing body]. Board members may be reappointed to serve subsequent terms.

At the first meeting of the Board and thereafter at the discretion of the Board, the board members shall choose a chairperson from their number. Meetings shall be held at the call of the chairperson or any 2 board members. A quorum shall consist of two Board members, and official action by the Board shall require the affirmative vote of two Board members.

The business of the Board, including its hearings, shall be conducted at a public meeting held in compliance with the Open Meetings Act, 1976 PA 267, MCL 15.261 *et seq.*

Section 4 – 3. The [name of unit's governing body], may remove a Board member in case of incompetency, neglect of duty or malfeasance in office after service on the Board member by certified mail, return receipt requested, of a copy of the written charges against the Board member and after providing an opportunity to be heard in person or by counsel upon not less than 10 days' notice. Mid-term vacancies shall be filled for the balance of the term in the same manner as original appointments.

Section 4 – 4. The Board shall have the following powers and duties:

(1) To promulgate procedures and rules governing the performance of its duties and the exercise of its powers.

(2) Upon receipt of a signed, notarized, written complaint against an officer or employee, to investigate, conduct hearings and deliberations, issue referrals for disciplinary hearings and refer violations of Chapter Two of this Ordinance or state or federal criminal statutes to the attention of the appropriate attorney with a request for the filing of the appropriate criminal prosecution or civil infraction enforcement. The Board shall, however, act only upon the receipt of a written complaint alleging a violation of this ordinance and not upon its own initiative.

(3) To receive information from the public pertaining to its investigations and to seek additional information and documents from officers and employees of the [type of unit].

(4) To request the attendance of witnesses and the production of books and papers pertinent to an investigation. It is the obligation of all officers and employees of the [type of local unit] to cooperate with the Board during the course of its investigations. Failure or refusal to cooperate with requests by the Board shall constitute grounds for discipline or discharge of appointed officers and employees of the [type of local unit].

(5) The powers and duties of the Board are limited to matters clearly within the purview of this ordinance.

See: Model Ethics Complaint Form

Section 4 – 5. (a) Complaints alleging a violation of this ordinance shall be filed with the Clerk of the [type of local unit]. The Clerk or member of the Clerk's staff shall attend the Board meetings and act as secretary for the Board.

(b) Within 3 business days after the receipt by the Clerk of a complaint, the Clerk shall send by certified mail, return receipt requested, a notice to the respondent that a complaint has been filed against him or her together with a copy of the complaint. Within 3 business days after receipt by the Clerk of a complaint, the Clerk shall send by certified mail, return receipt requested, a notice of confirmation of receipt of the complaint together with a copy of the complaint to the complainant. The notices sent to the respondent and the complainant shall also advise them of the date, time, and place of the Board hearing to determine the sufficiency of the complaint and to establish whether there is a reasonable basis to believe that the respondent has violated Chapter Two of this ordinance. The Clerk shall also concurrently send copies of the foregoing complaint and notices to the members of the Board.

(c) The Board shall conduct a hearing to review the sufficiency of the complaint and, if the complaint is deemed sufficient to allege a violation of Chapter Two of this ordinance, to determine whether there is a reasonable basis to believe that the respondent has violated Chapter Two of this ordinance based on the evidence presented by the complainant and any additional evidence provided to the Board at the hearing pursuant to its investigatory powers. The complainant and respondent may be represented by counsel at the hearing. Within a reasonable period of time after the completion of the hearing which may be conducted in one or more sessions at the discretion of the Board, the Board shall issue notice to the complainant and the respondent of the Board's ruling on the sufficiency of the complaint and, if necessary, as to whether they find that there is a reasonable basis to believe that the respondent has violated Chapter Two of this ordinance.

If the complaint is deemed sufficient to allege a violation of Chapter Two of this ordinance and the Board finds that there is a reasonable basis to believe that the respondent has violated Chapter Two of this ordinance, then the Clerk shall notify in writing the attorney designated by the [type of local unit's governing body] and shall transmit to the attorney the

complaint and all additional documents in the custody of the Board concerning the alleged violation, with the Board's request for the filing of appropriate criminal or civil proceedings. The Clerk shall also provide these documents to the respondent's appointing authority within the [type of unit] with the Board's request for the commencement of appropriate disciplinary action consistent with any applicable collective bargaining agreement, civil service commission rules or employment regulations of the [type of local unit].

(d) Sections 2b - 2e of the State Ethics Act, MCL 15.341 *et seq*, set forth protections for officers and employees who act as whistleblowers regarding the conduct of the [type of unit's] officers and employees. Additional whistleblower protections are set forth in the Whistleblowers' Protection Act, 1980 PA 469, MCL 15.361 *et seq*.

(e) Any person who files a complaint alleging a violation of this ordinance knowing that material information provided therein is not true or that information provided therein was made in reckless disregard for the truth may be subject to a fine of up to $500 as well as the reasonable costs incurred by the [type of local unit] in investigating the complaint and the reasonable costs incurred by the Respondent in responding to the complaint.

(f) A complaint must be filed with the Clerk within [number of years to be determined by the unit's governing body] years of the date the offense is alleged to have occurred.

CHAPTER FOUR (ALTERNATIVE 2) – FILING AND DISPOSITION OF COMPLAINTS (For use when the ordinance does not provide for a Board of Ethics)

Section 4 – 1. As deemed appropriate in its discretion, the [name of unit's governing body] shall:

(1) Upon receipt of a signed, notarized, written complaint against an officer or employee, investigate, conduct hearings and deliberations, conduct or issue referrals for disciplinary hearings and refer violations of Chapter Two of this ordinance or state or federal criminal statutes to the attention of the appropriate attorney with a request for the filing of the appropriate criminal prosecution or civil infraction enforcement.

(2) Receive information from the public pertaining to its investigations and seek additional information and documents from officers and employees of the [type of unit].

(3) Request the attendance of witnesses and the production of books and papers pertinent to an investigation. It is the obligation of all officers and employees of the [type of local unit] to cooperate with the [name of unit's governing body] during the course of its investigations. Failure or refusal to cooperate with requests by the [name of unit's governing body] shall constitute grounds for discipline or discharge of appointed officers and employees of the [type of local unit].

See: Model Ethics Complaint Form

Section 4 – 2. (a) Complaints alleging a violation of this ordinance shall be filed with the Clerk of the [type of local unit].

(b) Within 3 business days after the receipt by the Clerk of a complaint, the Clerk shall send by certified mail, return receipt requested, a notice to the respondent that a complaint has been filed against him or her together with a copy of the complaint. Within 3 business days after receipt by the Clerk of a complaint, the Clerk shall send by certified mail, return receipt requested, a notice of confirmation of receipt of the complaint together with a copy of the complaint to the complainant. The notices sent to the respondent and the complainant shall also advise them of the date, time, and place of the [name of unit's governing body] hearing to determine the sufficiency of the complaint and to establish whether probable cause exists that the respondent named in the complaint violated Chapter Two of this ordinance. The Clerk shall also concurrently send copies of the foregoing complaint and notices to the members of the [name of unit's governing body].

(c) The [name of unit's governing body] shall conduct a hearing to review the sufficiency of the complaint and, if the complaint is deemed sufficient to allege a violation of Chapter Two of this ordinance, to determine whether there is a reasonable basis to believe that the respondent has violated Chapter Two of this ordinance based on the evidence presented by the complainant and any additional evidence provided to the [name of unit's governing body] at the hearing pursuant to its investigatory powers. The complainant and respondent may be represented by counsel at the hearing. Within a reasonable period of time after the completion of the hearing which may be conducted in one or more sessions at the discretion of the [name of unit's governing body], the [name of unit's governing body] shall issue notice to the complainant and the respondent of the [name of unit's governing body]'s ruling on the sufficiency of the complaint and, if necessary, as to whether they find that there is a reasonable basis to believe that the respondent has violated Chapter Two of this ordinance.

If the complaint is deemed sufficient to allege a violation of Chapter Two of this ordinance and the [name of unit's governing body] finds that there is a reasonable basis to believe that the respondent has violated Chapter Two of this ordinance, then the Clerk shall notify in writing the attorney designated by the [type of local unit's governing body] and shall transmit to the attorney the complaint and all additional documents in the custody of the [name of unit's governing body] concerning the alleged violation, with the [name of unit's governing body]'s request for the filing of appropriate criminal or civil proceedings. The Clerk shall also provide these documents to the respondent's appointing authority within the [type of unit] with the [name of unit's governing body]'s request for the commencement of appropriate disciplinary action consistent with any applicable collective bargaining agreement, civil service commission rules or employment regulations of the [type of local unit].

(d) Sections 2b - 2e of the State Ethics Act, MCL 15.341 *et seq*, set forth protections for officers and employees who act as whistleblowers regarding the conduct of the [type of unit's] officers and employees. Additional whistleblower protections are set forth in the Whistleblowers' Protection Act, 1980 PA 469, MCL 15.361 *et seq.*

(e) Any person who files a complaint alleging a violation of this ordinance knowing that material information provided therein is not true or that information provided therein was made in reckless disregard for the truth may be subject to a fine of up to $500 as well as the reasonable costs incurred by the [type of local unit] in investigating the complaint and the reasonable costs incurred by the Respondent in responding to the complaint..

(f) A complaint must be filed with the Clerk within [number of years to be determined by the unit's governing body] years of the date the offense is alleged to have occurred.

CHAPTER FIVE – SANCTIONS

Section 5 – 1. Sanctions shall not be construed to diminish or impair the rights of an officer or employee under any collective bargaining agreement, nor the [type of local unit's] obligation to comply with such collective bargaining agreements.

Section 5 – 2. State statutes cited in this ordinance contain criminal penalties and civil remedies that apply, as provided in those statutes, to the conduct regulated by those statutes.

Section 5 – 3. A violation of this ordinance may be punished as a civil infraction by a fine of up to $ [amount to be set by the local unit's governing body].... OR.... A violation of this ordinance may be punished as misdemeanor by a fine of up to $500 and/or 90 days in jail.

Commentary. A specific ordinance violation may be either a civil infraction or a misdemeanor, but not both.

Section 5 – 4. In addition to any other penalty, whether criminal or civil, an employee or officer who intentionally violates this ordinance may be subject to disciplinary action including censure, reprimand, removal, dismissal or discharge.

Commentary. If the Charter of a Home Rule City or Home Rule Village provides for removal of an elected officer by the governing body of the city or village, the officer may be so removed. Michigan cases recognizing the removal power of city councils pursuant to applicable provisions of a city charter include McComb v City Council of Lansing, 264 Mich 609 (1933), Wilson v City Council of Highland Park, 284 Mich 96 (1938), and City of Grand Rapids v Harper, 32 Mich App 324 (1971). In Hawkins v Common Council of the City of Grand Rapids, 192 Mich 276, 285-286 (1916), the Michigan Supreme Court rejected the argument that the power to remove elected city officers rested exclusively with the Governor, upholding the authority of the city council to remove the City's elected treasurer under the provisions of the city charter. However, absent such a provision in a city or village charter, removal of elected officers of local units of government is accomplished only by the Governor. MCL 168.383 (village); MCL 168.369 (township); MCL 168.327 (city); and MCL 168.268 and MCL 168.207 (county).

Section 5 – 5. In addition, the common law offense of misconduct in office (misfeasance, malfeasance and nonfeasance) constitutes a felony as provided in the Michigan Penal Code, MCL 750.505 and willful neglect of duty constitutes a misdemeanor as provided in MCL 750.478.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

GARFIELD NEIGHBORHOOD WATCH, a Michigan non-profit corporation; NORTHERN MICHIGAN ENVIRONMENTAL ACTION COUNCIL, a private non-profit organization; and JEROME L. SCHOSTAK d/b/a TRAVERSE CITY VENTURE,

Plaintiffs,

vs

File No. 90-8075-CE
HON. PHILIP E. RODGERS

CHARTER TOWNSHIP OF GARFIELD, a Michigan charter township; PLANNING COMMISSION OF GARFIELD TOWNSHIP; ZONING BOARD OF APPEALS OF GARFIELD TOWNSHIP; ZONING ADMINISTRATOR OF GARFIELD TOWNSHIP; GENERAL GROWTH COMPANY, INC., a foreign corporation; and GRAND TRAVERSE MALL LIMITED PARTNERSHIP, an Iowa limited partnership,

Defendants.
_____/

Dean A. Robb (P19481)
Attorney for Plaintiff GNW

Frederick D. Dilley (P26090)
Attorney for Plaintiff NMEAC

Norman Hyman (P15319)
I.W. Winsten (P30529)
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General Growth and GT Mall

James C. Adams (P24311)
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Attorneys for Dayton Hudson Corp.,
d/b/a Hudson's & d/b/a Target Stores

DECISION AND ORDER

INTRODUCTION

This litigation arises out of zoning and environmental issues associated with the construction of the Grand Traverse Mall. Plaintiffs and Defendants have filed motions for summary disposition directed at various counts, and Defendants have also challenged Plaintiffs' standing to litigate several of the counts set forth in the Amended Complaint. Each of the issues has been extensively briefed and argued to the Court orally. To facilitate a review of this complex litigation and the voluminuous materials filed with the Court, the Court's findings and decisions on the issues raised pursuant to the various motions for summary disposition will be organized and described in reference to the specific counts of the Amended Complaint. This analysis will be preceded by a discussion of the issues of standing and vested rights which were raised by the Defendants and conclude with a review of the conflict of interest question.

Before this discussion begins, a brief factual history would be appropriate. The Grand Traverse Mall is currently under construction on a parcel of land which has long been under consideration for the development of a regional shopping center and which has been the subject of two prior township referenda, a Circuit Court injunctive action and a decision of the Court of Appeals. Committee for Sensible Land Use, et al v Garfield Township, et al. 124 Mich App 559; 335 NW2d 216 (1983).

The Sensible Land Use litigation was filed after Garfield Township adopted ordinance amendments on August 15, 1979, which rezoned approximately 37 acres of land from single and multiple family residential classifications to a planned shopping center district. These lands were under common ownership with adjacent lands which had been similarly zoned in 1974. Of the combined

acreage in the two parcels, the owner retained 11 acres and proposed to develop the remaining 73 acres as a regional shopping center, then commonly referred to as "Buffalo Mall." This owner/developer will be hereinafter referred to as "Oleson."

The Sensible Land Use litigation challenged the rezoning as contrary to Section 6.8.2 of the Garfield Zoning Ordinance and the Township's Comprehensive Plan. Other issues concerned an alleged failure to comply with the Michigan Environmental Protection Act, MCLA 691.1201, et seq.; MSA 14.528 (201), et seq., ("MEPA") and the purported failure to consider regional environmental impacts as well as a failure to obtain the approval of the County Zoning Coordinating Committee. See, Exhibit 7 (a), Appendix to Defendant Township's Motion for Summary Disposition.

Pursuant to a motion for summary disposition based upon the failure to state a claim upon which relief can be granted and the absence of any genuine issue as to any material fact entitling the Defendant to judgment as a matter of law, the trial court dismissed Plaintiff's Complaint. Among other holdings, the trial court found that the rezoning did meet the mandatory prerequisites under the Garfield Zoning Ordinance, Section 6.8.2, and that the site conformed with each of the criteria under the previously adopted or pending proposed Comprehensive Development Plan. See, Exhibit 7 (b), Appendix to Defendant Township's Motion for Summary Disposition.

The Court additionally found that approval of a County Coordinating Committee was not a prerequisite to valid zoning changes and that a de novo standard of review was not applicable to an appellate review of township zoning decisions. Finally, the trial court recognized that rezoning in and of itself did not create a judiciable issue under the Michigan Environmental Protection Act. With respect to MEPA, the trial court held as follows:

> "It is not necessary or appropriate that this Court review the potential environmental impact of zoning activities which, by their nature, have no likely environmental impact. The issues could be rendered moot by a

complete change in the zoning classification. The action is premature."

The trial court's opinion was upheld by the Michigan Court of Appeals, which reiterated a number of well-settled standards for determining the validity of municipal zoning decisions. The sum and substance of these standards impose upon Plaintiffs the burden of showing that the challenged zoning is arbitrary and capricious and, therefore, invalid. Not having met this burden of proof, the Court of Appeals affirmed the trial court's decision, both with respect to the zoning questions and the prematurity of the MEPA claim.

Following these decisions, no development activity occurred on the subject site. In fact, from the date of the second rezoning in August, 1979, there was no submission of final plans or a construction timetable, no building permits were issued and there was no indication of a proposed development until November, 1989, when a new developer (Defendant Grand Traverse Mall Limited Partnership) bought the land and indicated its intent to construct the Grand Traverse Mall.

Following a number of public hearings, the Planning Commission approved the Grand Traverse Mall project on July 6, 1990, and the Zoning Board of Appeals' approval followed thereafter on July 10, 1990. A building permit was issued on July 25, 1990, and construction began immediately.

The record indicates that Plaintiffs' Complaint was filed on June 27, 1990, challenging the zoning and appealing the decision of the Planning Commission. Following the Zoning Board of Appeals' approval, an Amended Complaint was filed on July 31, 1990, a Motion for Temporary Restraining Order was filed on August 3, 1990, and following a hearing on August 6, 1990, the request for injunctive relief was denied as premature.

Construction has proceeded in the interim and, pursuant to the Court's inquiry, the Defendant Grand Traverse Mall disclosed that paving was scheduled to begin on June 15, 1991. With the understanding that paving may have an impact on surface and subsurface waters that could rise to the level of an

impermissible environmental impairment, the parties were placed on an aggressive time schedule to complete discovery, file dispositive motions, and prepare for the trial of those issues arising under the Michigan Environmental Protection Act.[1] The parties have worked diligently to meet this schedule and the substantive motions will now be addressed.

STANDING

The Defendants challenge the standing of Plaintiffs to assert those claims set forth in the Amended Complaint, with the exception of those brought under MEPA. To analyze the standing issue, it is necessary to review each Plaintiff separately. Garfield Neighborhood Watch ("GNW") is a Michigan non-profit corporation whose members are residents and property owners in the residential subdivisions immediately adjacent to the Grand Traverse Mall. GNW was incorporated on May 2, 1990. It is agreed that Plaintiff GNW is not an elector, property owner, or taxpayer of or within the township.

Plaintiff Jerome Schostak ("Schostak") is a property owner and taxpayer within the Township. He owns land and a business known as the Cherryland Mall.

Plaintiff Northern Michigan Environmental Action Council ("NMEAC") is a non-profit corporation organized for environmental purposes. It is agreed that it is not an elector, property owner or taxpayer of or within the Township.

The Defendants challenge Plaintiff GNW's standing on two levels. First, as an independent corporate entity which is not

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[1]The parties recently discovered significant facts regarding the subsurface waters beneath the proposed development's main storm water retention basin which caused Plaintiffs to dismiss the substantive MEPA claims in the First Amended Complaint. Over Defendants' objections, this Court remanded the environmental issues to the Township ZBA. See, transcript of June 6, 1991, Decision. Plaintiffs' Motion to file a Second Amended Complaint has been adjourned pending the completion of the remand process.

an elector, property owner, or taxpayer, and whose corporate existence postdates a number of the administrative actions which are the subject matter of the Complaint, Defendants argue that it has no independent basis to assert standing. Secondly, if Plaintiff GNW is to borrow its standing from its constituent members, then, say the Defendants, those members should be before the Court. If they were, the Defendants further contest their ability to establish a sufficient interest to support a finding of standing.

Given the broad standing conferred by MEPA, the Court's discussion will focus upon the standing necessary to pursue those claims which have their origin in the site's zoning or actions of the Planning Commission, Zoning Board of Appeals, or Zoning Administrator. Standing for purposes of pursuing these claims, say Defendants, requires that the Plaintiff be "aggrieved" or "a person having an interest affected by" such action. Specifically, it is Defendants' position that the Plaintiffs must meet the "aggrieved" party standard to challenge the existing zoning and have "an interest affected by" administrative action to pursue their administrative appeals. The Defendants' argument is summarized at pages 11 through 18, inclusive, of the Township's Memorandum in Support of Motion for Summary Disposition, dated July 25, 1990.

Plaintiffs' response and a discussion of the law they rely upon is found, among other documents, most succinctly stated in Plaintiff Schostak's Brief in Opposition to Motion for Summary Disposition, dated April 2, 1991, at pages 6 through 11.

A review of the authorities provided by the parties indicates that the "aggrieved party" standard is not applicable to township zoning decisions. Rather, that language is derived from Section 10 of the City or Village Zoning Act, MCL 125.590. As noted previously, Section 23A of the TRZA confers standing on a person with an "interest affected" by the zoning ordinance. MCL 125.293a(1); MSA 5.2963(23a); and Brown v East Lansing Zoning Board of Appeals, 109 Mich App 688, 699; 311 NW2d 828 (1981).

This standard applies both to appeals and to the review of existing zoning.

Despite the limited differences that seem applicable to the application of these varying standards in practice, both Plaintiffs Schostak and GNW have alleged special damages--the former from an alleged over development of retail sales which is injurious to community welfare arising from his ownership interest in the Cherryland Mall, and the latter due to the impact of the Mall on their homes which are located in the neighborhood immediately adjoining it. These claims also evidence an "interest affected" by the various decisions which form the subject of the Amended Complaint. Both Plaintiffs allege a substantial economic interest in the outcome of this litigation beyond that which will be felt by the community as a whole. See, Brown, supra, at page 701, quoting, Comment, Standing to Appeal Zoning Determinations: The "Aggrieved Person" Requirement, 64 Michigan Law Review 1070, 1084-1085 (1966).

Subsection 6.8.2 of the zoning ordinance sets forth a series of significant conditions precedent to the receipt of Planned Shopping District zoning. Subsection 6.8.2(1) requires a market analysis and further states that "[T]he purpose of this requirement is to protect the Township from the over development of retail sales and service establishments which could prove highly injurious to the community welfare." This Court recognizes those decisions which hold that a mere competitive interest does not generate standing. Here, however, the Township zoning ordinance prohibits the construction of projects in C-4 zones which will overdevelop available retail sales establishments. Plaintiff Schostak certainly has a competitive interest in preventing the construction of the Grand Traverse Mall, which interest would not be an appropriate basis for standing in the usual circumstance associated with site plan approval. Schostak's standing, then, must be derived from an alleged injury which exceeds mere competition and goes to the purported "overdevelopment of retail sales and service

establishments which could prove highly injurious to the community welfare."

Just as the purpose of subsection 6.8.2(I) is stated to be the protection of the township from overdeveloped retail sales, so does subsection 6.8.1 indicate an intent to "avoid and minimize...adverse affects upon property within adjacent zoning districts." Certainly, the residents and neighbors of the adjoining neighborhood have standing to contest decisions made under the township zoning ordinance where its clear purpose, in part, is the protection of adjacent zoning districts. Plaintiff GNW's corporate purpose is stated to be the promotion, protection and advancement of the interests of the residents and property owners of the residential neighborhood adjoining the Mall.

With respect to Plaintiff GNW, this Court finds the holdings in White Lake Improvement Assoc v City of Whitehall, 22 Mich App 262; 177 NW2d 473 (1970); Muskegon Building & Construction Trades v Muskegon Area Intermediate School District, 130 Mich App 420; 343 NW2d 579 (1983); and Wisniewski v Kelly, 175 Mich App 175; 437 NW2d 25 (1989) to be dispositive. In White Lake, the Plaintiff was also a non-profit membership corporation. Its members were riparian owners who banded together and sued to enjoin the pollution of White Lake. In finding that Plaintiff had standing to maintain the suit, the Michigan Court of Appeals held as follows:

> "No constructive purpose would be served by requiring the members of the Plaintiff association who are riparian owners to maintain this action individually and thereby require that they seek in some other fashion financial and other support from the other affected landowners. Additionally, allowing the landowners to associate together for this purpose may avoid a multiplicity of suits; the difficulties that are likely to be encountered where there are a large number of plaintiffs are all too familiar to anyone who has had experience in such litigation. The most expedient way for the riparian owners to obtain a determination on the merits is to allow them to combine and join together for this purpose with others of a like interest under a single banner both before and at the

> time of suit: 'The only practical judicial policy when people pool their capital, their interests or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all.'" Whitehall, supra, at 272-273.

White Lake and Wisniewski, then, require this Court to look through the Plaintiff GNW to derive standing from its members. See also, Muskegon Building & Construction Trades, supra, where an association organized to advance political and economic interests of its members, was found to have standing to challenge legislation adversely impacting its members, and National Motor Freight Traffic Assoc Inc v United States, 372 US 246 (1963), where an association was found to have standing as the representative of its members even in the absence of an injury to itself.

For these reasons discussed above, this Court finds that both Plaintiff Schostak and Plaintiff GNW have standing to pursue the non-MEPA claims found in the Amended Complaint. All Plaintiffs have standing to pursue the MEPA claims. The Court cannot find any basis, however, to confer standing on Plaintiff NMEAC to pursue any claim other than any substantive or procedural issues arising under MEPA.[2] The Court will grant Defendants' motions regarding standing as to Plaintiff NMEAC with respect to all claims except those arising under the Michigan Environmental Protection Act. The remaining motions as to standing are denied.

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[2]Although Plaintiff NMEAC has signed the Complaint and Amended Complaint without limitation as to those claims which it is pursuing, it has limited its submission of written documents and its presentation of oral argument to those issues related to alleged violations of the Michigan Environmental Protection Act. Consistent with Plaintiff NMEAC's actual role in pursuit of the Amended Complaint, is this Court's inability to find standing to pursue the non-environmental claims either in NMEAC as a corporate entity or in its membership at large.

VESTED RIGHTS

The Defendant Grand Traverse Mall Limited Partnership has filed a motion for summary disposition asserting the doctrine of vested rights. The Defendant partnership first argues that having submitted its site plan for approval on November 14, 1989, it was entitled to approval or disapproval within 60 days thereafter. Township Zoning Ordinance, 6.8.2(5).

In view of the Court's resolution of the issues raised in Count II and those discussed in Count VII ahead, it is clear that but for Amendments 133 A, B and C, which were not promulgated until March 15 of 1990, the Defendant partnership had no right whatsoever to proceed with its project within 60 days of its submission of a site plan. The Defendant partnership was a stranger to the 1979 zoning process and its project was significantly larger and envisioned a more intense use of the property than that approved in 1979. Further, there had been significant changes to the relevant market area which cried out for the submission of up-dated data.

The C-4 zoning designation placed upon this site in 1979 was granted subject to conditions. Among other conditions, the C-4 zoning amendment site envisioned a project constructed in substantial conformity with the site plan approved. Recognizing the significant differences in the site plan offered by the Defendant Partnership, no permit to approve construction could possibly have been granted absent the amendatory process which was completed in March of 1990. The Defendant Township completed its review in a timely fashion given the evolution of the site plan as a response to initial questions and objections. The Defendant partnership's motion for summary disposition based upon Section 6.8.2(5) must be dismissed as a matter of law. MCR 2.116(C)(10).

The Defendant Partnership's second argument refers to the pleadings. The Defendant partnership correctly notes that in the original Complaint, filed by Plaintiffs on June 27, 1990, it was not a named Defendant. In the Amended Complaint, filed on July 31, 1990, both General Growth Company, Inc., and Grand Traverse

Mall Limited Partnership were named as Defendants. The court file contains the Affidavit of Victor Stein, dated August 3, 1990, reflecting his receipt on August 3, 1990, of two certified mail packages addressed to Grand Traverse Mall Limited Partnership and General Growth Company, Inc., each package containing a summons, amended complaint, letter to the Clerk of the Court, motion for temporary restraining order, notice of hearing, motion for preliminary injunction, and various affidavits.

Mr. Stein's affidavit, which was filed on August 6, 1990, disclaims any relationship between General Growth Company, Inc. and Grand Traverse Mall Limited Partnership, identifies the Defendant General Growth Company, Inc.'s agent for service of process as Terry Tobin in Des Moines, Iowa, and identifies the designated agent for service of process for the Grand Traverse Mall Limited Partnership as the Corporation and Securities Bureau within the Michigan Department of Commerce.

Neither Defendant voluntarily appeared at the hearing on Plaintiff's petition for a temporary restraining order which occurred on August 6, 1990. Thereafter, on February 28, 1991, the Defendant Partnership filed its answer and affirmative defenses. The Defendant General Growth was dismissed pursuant to the parties' stipulation on March 13, 1991. Neither the Defendant General Growth nor the Defendant Partnership appeared at a pre-trial conference held on December 27, 1990, and did not submit to the jurisdiction of the Court until February 28, 1991, the time scheduled for the Court's second pre-trial conference.

The Defendant partnership's absence from the case was the subject of protracted discussion at the opening of the hearing on Plaintiffs' petition for a temporary restraining order on August 6, 1990. Transcript, pp 3-17, inclusive. During the course of that discussion, Plaintiffs' counsel, Thomas Dignan, described his efforts to serve the partnership in response to the Township's motion to add a necessary party. Plaintiffs' counsel, Mr. Winsten, further described the basis for service on Victor Stein. Mr. Winsten represented that Mr. Stein had appeared as

the partnership's agent at all of the township hearings related to the Grand Traverse Mall. Further, Mr. Winsten represented, and the file indicates, that counsel for the Defendant Partnership was also served with copies of all documents filed in the case.

There is no question that the Defendant Partnership had actual and timely notice of the amended complaint and the motion for a temporary restraining order. Both the complaint and amended complaint had been delivered to an agent of the partnership and its Traverse City attorneys. The suggestion that the developer was proceeding with construction following the issuance of a building permit on July 25, 1990, in peaceful ignorance of the whirlwind of litigation swirling about it is simply not supported by the facts.

In issuing the ruling on August 6, 1990, denying Plaintiffs' petition for a temporary injunction, this Court unambiguously warned the Defendant Partnership that in continuing construction it was proceeding at its own risk. Having notice of the litigation through service on its agent and separate service on its attorneys, and having chosen not to attend the hearing, the partnership now argues that its construction work through February 28, 1991, confers vested rights upon it.

The vested rights doctrine has its roots in equitable principles of estoppel. In support of its case, the Defendant partnership cites Parker v Twp of West Bloomfield, 60 Mich App 583, 591-592; 231 NW2d 424 (1975); Schubiner v West Bloomfield Twp, 133 Mich App 490; 351 NW2d 214 (1984) and Dingeman Advertising, Inc v Algoma Township, 393 Mich 89; 223 NW2d 689 (1974). Those cases establish the principle that estoppel may arise where one has relied, to one's detriment, upon the positive actions of government officials and, thereby, incurred a change of position or made expenditures in reliance upon those actions. The essence of the doctrine is a determination that "the public body...created a situation where it would be inequitable and unjust to permit it to deny what it has done or permitted to be done." Parker, supra, at p 592.

Here, the Defendant partnership commenced construction following the issuance of a building permit with notice of the original Complaint. Recognizing that the Defendant Partnership was not a party to the original litigation, the Court has reviewed that construction activity which took place following the issuance of the building permit on July 25, 1990, and the receipt of the amended complaint and petition for a temporary restraining order and associated documents by Mr. Stein on August 3, 1990.

Aerial photographs submitted by the Defendant partnership which were taken on August 1, 1990, substantiate that significant excavation work had occurred along the northerly edge of the site and in the area of the proposed storm water detention ponds. There is also evidence of excavation work in the form of initial berm construction along the east property line and south through the radius of the curve along South Airport Road. The remaining portion of the property is in a state consistent with that of its prior farmland use and a barn and outbuilding are still standing. There is no evidence of footings or the erection of structural steel.

Recognizing that vested rights arise in equity and viewing the circumstances in their totality, it is this Court's opinion that equity does not compel the application of the vested rights doctrine on the facts of this case. Here, the Defendant partnership was not proceeding with construction and then ambushed by Township efforts to change the zoning or with litigation of which it had no prior knowledge.

Assuming for the sake of this argument that the service on the Defendant partnership did not fully comply with the legal requirements of the court rules, such legal technicalities should not be used in equity to confer vested rights where the record unambiguously demonstrates timely notice of the August 6, 1990, proceedings as well as actual receipt of all pleadings filed in the case prior to that date. The Court instructed the Defendant partnership that it gained no special equity by proceeding with construction and that it continued with the project at its peril.

With full knowledge of this warning, the Defendant partnership has proceeded with construction and has expended substantial sums of money. It has done so at its peril, and this Court dismisses Plaintiffs' motion for summary disposition predicated upon the doctrine of vested rights and does so as a matter of law. MCR 2.116(C)(10).

COUNT I
INVALIDITY OF THE 1974 AND 1978 REZONINGS

Count I of Plaintiffs' Amended Complaint challenges the validity of the C-4 Planned Shopping District zoning as approved by Garfield Township in 1974 and 1979. The Planned Shopping District zoning on this property has been the subject of intense public scrutiny. Approximately one-half of the parcel was zoned C-4 when the Township first promulgated its zoning code and map February 14, 1974. Exhibit 4 (a), Appendix to Memorandum in Support of Motion for Summary Disposition. The zoning ordinance and associated map were the subject of a public referendum which was approved by the voters (65 percent yes; 35 percent no).

Following the rezoning of the remaining one-half of this parcel on August 15, 1979, another referendum election was held. Again, the rezoning was subjected to a referendum election and approved by the voters (65 percent yes; 35 percent no). Appellate Record, Garfield Township: General, Exhibit 1 (D). Further, as discussed above, the rezoning was the subject of a challenge in the Sensible Land Use litigation.

In Sensible Land Use, the trial court and the Court of Appeals commented upon the Defendant Township's review of the prerequisites to the rezoning which are set forth in Section 6.8.2 of the township zoning ordinance. These requirements included a traffic study, several market analyses, a study of the effect of the rezoning on the region's population, sewage disposal and water runoff, and a review of the rezoning's affect on the economic condition of the community. The Court of Appeals further noted that the record established that the Township Planning Commission had also considered the regional

environmental effect of its decision to rezone. After a review of the entire record, the Court of Appeals held as follows:

> "[T]he rezoning cannot be found to be arbitrary and capricious. We hold that Plaintiffs have failed to state a claim upon which relief may be granted and summary judgment in favor of defendants is affirmed on that basis."
> Id., at p 570.

Any procedural deficiencies in the 1973 and 1979 rezonings were cured by the referendum elections. The substantive requirements were found to have been met both by this Court and the Court of Appeals.

Recognizing this decision and the substantial identity between the claims contained in Count I of Plaintiffs' Complaint and those raised in the Sensible Land Use litigation, this Court is constrained to summarily dismiss Count I. As the Court has noted previously, Plaintiff GNW's standing to litigate this issue is derived from that of its members. The record before the Court indicates a substantial overlap between individuals participating in Garfield Neighborhood Watch and individual Plaintiffs named in the Sensible Land Use litigation. Although Jerome Schostak was not a party to the Sensible Land Use litigation, the record indicates that he did participate in the zoning process and opposed the zoning decision made by Garfield Township as recorded in the minutes of the Garfield Township Board for August 15, 1979. Appellate Record, Garfield Township: General, Exhibit 1 (G).

Whether the applicable doctrine is res judicata, collateral estoppel, or the "doctrine of prior judgments," as counsel have described it with reference to MCR 2.116(C)(7), it is clear that the issues which comprise Count I of Plaintiffs' Amended Complaint were litigated in the Sensible Land Use case, both at the trial court and appellate level. It is equally clear that there is a substantial identity of parties which precludes relitigation of these same questions or questions which could have been raised in that suit. Additional consideration of the 1973 and 1979 rezonings cannot be predicated upon the addition of

parties whose interests were identical to those who appeared as Plaintiffs in the prior action simply because they observed and did not participate in that action.

The relationship which is required between a prior lawsuit and the persons bound by the doctrine of prior judgments is discussed in 46 Am Jur 2d, Judgments, Section 535. There, the authors wrote as follows:

> "The strict rule that a judgment is operative, under the doctrine of res judicata, only in regard to parties and privies, is sometimes expanded to include as parties, or privies, a person who is not technically a party to a judgment, or in privity with him, but who is, nevertheless, connected with it by his interest in the prior litigation and by his right to participate therein, at least where such right is actively exercised by prosecution of the action, employment of counsel, control of the defense, filing of an answer, payment of expenses or costs of the action, the taking of an appeal, or the doing of such other acts as are generally done by parties. The rule stated broadly is that a judgment recovered in an action is res judicata or conclusive, as to the issues adjudicated therein, in favor of or against a person who, though not an actual party to the record in that action, prosecuted the action or the defense thereto, on behalf of a party, or assisted the latter or participated with him in the prosecution of such action or its defense, if the same issue should be raised again in a subsequent action between him and the adversary of the party to whom his assistance was given or with whom he co-operated."
>
> St Clair Shores National Bank v State Banking Commissioner, 358 Mich 14 (1959); 99 NW2d 574. See also: Knoblauch v Kenyon, 163 Mich App 712; 415 NW2d 286 (1987); Darin & Armstrong v Ben Agree Co, 88 Mich App 128; 276 NW2d 869, lv app den (1979); Bousson v Mitchell, 84 Mich App 98; 269 NW2d 317 (1978); Senior Accountants v Detroit, 60 Mich App 606, 611; 231 NW2d, 479 (1975).

Having concluded that the principles which underlie the doctrine of prior judgments are applicable here, the Court

further concludes that they bar other matters which could properly have been raised and determined in that prior litigation. See, for example, 46 Am Jur 2d, Judgments, Sections 420, 422 and Gose v Monroe Auto Equipment; Sanders v General Motors Corp, 409 Mich 147, 174; 294 NW2d 165 (1980); Bhama v Bhama, 169 Mich App 73, 82; 425 NW2d 733 (1988); West Michigan Park Ass'n, Inc. v Fogg, 158 Mich App 160, 164; 404 NW2d 644 lv app den (1987). Based upon these principles and a reading of the issues which were raised or could properly have been raised and determined in the Sensible Land Use litigation, it is this Court's conclusion that Count I of the Plaintiffs' Complaint be, and the same hereby is, dismissed. MCR 2.116(C)(7).

COUNT II
Invalidity of the C-4 Classification
Due to Non-Use

As discussed above, the subject parcel gained its C-4 zoning through two separate actions of the Township Board. One half of the parcel was zoned C-4 with the original promulgation of the Township Zoning Ordinance and associated map. The remaining half was rezoned from Single and Multiple Family Residential uses in 1979. Both legislative actions of the Township Board were the subject of referendum elections and both were approved. However, the Buffalo Mall project which served as the predicate for the 1979 rezoning was never constructed. Ten years later, a new developer proposed to utilize the existing C-4 zoning to construct a significantly larger regional mall and more intensely use the available land.

Plaintiffs contest the availability of the existing C-4 Planned Shopping District zoning on this site to the Defendant Partnership and argue that the zoning was functionally extinguished through Oleson's failure to submit final plans for the Buffalo Mall and commence construction. The Defendants have moved for summary disposition on this claim. Defendants argue, also as a matter of law, that the zoning runs with the land and contains no "sunset provision."

A debate arose between Plaintiffs and Defendants regarding the characterization of the C-4 Planned Shopping District zoning as a "floating zone". To assist the Court in reviewing this issue, the Plaintiffs provided the Court with standards published by the American Society of Planning Officials and the Defendants have submitted the affidavit of Clan Crawford, author of Michigan Zoning and Planning, 3rd ed. A floating zone is defined by the ASPO Standards as follows:

> "Floating zones differ radically from mapped districts in that their exact location is not established on the zoning map until their development is imminent. They are similar, however, in that the text of the ordinance describes the standards, requirements, and conditions which will be applied to proposed development whenever future amendment of the map changes floating zones to mapped districts.
>
> "Floating zones are created for certain commerical uses which eventually will be needed in a municipality but whose specific location cannot reasonably be determined in advance. These zones are necessary to indicate general future commerical location when existing residential development is not sufficient to support them.
>
> "Use of floating zones encourages competition among property owners. For example, where there is more than one site proposed in the same general location and each is equally appropriate for a needed shopping center, the competitive effect of utilizing the floating zone (rather than favoring one site with a mapped district) prevents an undue inflation of the cost of acquiring the site for actual development.
>
> "The use of floating zones is most appropriate either in instances where the municipality is sparsely developed and the pattern of its development is not yet clearly defined, or in old cities where portion (sic) of their urban areas have become obsolete and the future pattern of redevelopment has not yet emerged.
>
> "The floating zone is granted as a conditional type of mapped district. The

> zone is normally granted on the condition that construction will begin within one year. The one-year time period is adequate if the Planning Commission requires adequate evidence that the floating zone is needed. Normal requirements are as follows: (1) a valid market analysis; (2) construction plans (approval of shopping center site design should follow basic subdivision design procedure); and (3) evidence that the developer owns or has consummated the necessary arrangements to buy the site.
>
> "If the construction of the proposed center is not started within one year or if the construction is terminated after any stage and there is ample evidence that further development is not contemplated, the ordinance establishing the district may be rescinded for the whole tract or the unused portion and returned to its former classification." Id., at p 41.

A far more general definition of a floating zone is found in Michigan Zoning and Planning, 3rd ed., Section 11.01, at page 261:

> "A floating zone is a district for which all the regulations are set forth in the zoning ordinance but which does not appear on the map, because no land has yet been placed in the district. It has, at least indirectly, been recognized as a legitimate means of making provisions for land uses that will be needed in the future but which do not yet exist in the municipality."

It is the Defendants' and Mr. Crawford's opinion that the C-4 Planned Shopping District is not a floating zone as it is one of 13 specific map-designated zoning districts. The Defendants note that the official zoning map adopted in 1974 specifically designated and zoned a part of the subject site as C-4. Other identified C-4 locations within the township included the then existing Cherryland Mall and Meijer Shopping Centers.

The Defendants further dispute that the authority within Section 6.8 of the township zoning ordinance to add more land to an existing C-4 district makes the C-4 Planned Shopping Center District a "floating zone." Rather, the Defendants argue that

the Township Board has statutory authority to amend its zoning ordinance and rezone land from one district to another. MCL 125.284; MSA 5.2963(14).

This Court agrees that a floating zone cannot simply be correlated with the rezoning of land from one district to another. As Mr. Crawford notes, "all zones would be floating zones if the test were that additional land could be added to them by rezoning." Crawford Affidavit, paragraph 6. Here, the issue is not the mere fact of rezoning but the import of the several specific and detailed conditions which must be satisfied as conditions precedent to securing the C-4 designation.

In view of the rigorous standards necessary to establish a C-4 Planned Shopping District, which requirements are set forth in 6.8.2 of the Township zoning ordinance, the Planned Shopping District is more akin to the floating zone described in the ASPO Standards. The fact that other C-4 uses exist within the township does not change the character of this special land use and the standards associated with it--including the submission of final plans and construction of the project. Yet, a C-4 rezoning, once made, does generate a site-specific amendment to the township zoning map. This Court finds the C-4 zone described by the township zoning ordinance to be a land use designation legislatively granted subject to conditions. Satisfaction of those conditions is the issue which drives the resolution of the Count II claims.

Plaintiffs have shown that the Defendant Partnership is a stranger to the 1974 and 1979 C-4 zoning decisions. Plaintiffs have further shown that this zoning was predicated on the construction of the Buffalo Mall, a project which was to be jointly developed by the owner of the property (Oleson) and the Dayton Hudson Corporation. Since the project was never built, Plaintiffs argue that the conditions upon which the Planned Shopping District were created were not satisfied, cannot now be satisfied, and that the whole tract has constructively been rezoned to its former land use classifications.

Conversely, Defendants argue that the C-4 zoning is not project specific but runs with the land; that is, once the Township Board rezoned the subject parcel to a Planned Shopping District, that zoning remains applicable thereafter. Given the Statement of Intent which introduces the Planned Shopping provisions of the township zoning ordinance, (Section 6.8.1), it is difficult to adopt the Defendants' analysis.

Recognizing that the lawful uses within a Planned Shopping District may be as disparate as a neighborhood shopping center designed to serve township residents or a regional shopping mall whose clientele are projected to reside in several surrounding counties, and recognizing the submission of data required by 6.8.2 of the zoning ordinance, C-4 zoning must be related to a specific class of project. Certainly, were the zoning on this parcel approved in 1979 following the submission of data under Section 6.8.2 for a "neighborhood shopping center," the subsequent issuance of a building permit for a regional mall would defy both the letter and p licy underlying the township zoning ordinance.

The analysis of Section 6.8 has been rendered additionally complex by the township's failure to include a sunset provision in the ordinance. Similar ordinances cited to the Court from the city of Detroit, (Section 110.0500, Exhibit B to Plaintiff Schostak's Brief in Opposition to Motion for Summary Disposition, April 2, 1991), or the state of Illinois, American National Bank & Trust Co of Chicago v Village of Arlington Heights, 115 Ill App 3d 342, 450 NE2d 898 (1983), contain provisions which automatically revoke the benefit of the zoning change absent the completion of the project or the commencement of construction within a defined period of time. Another Illinois Court has read a sunset provision into the ordinance where one was not otherwise found. See, Goffinet v The County of Christian, 65 Ill 2d 40,

357 NE2d 442 (1976) A sunset provision is not contained within the Township Zoning Ordinance.[3]

It is this Court's opinion that the resolution of the claims made in Count II must turn on the interpretation of the Township Board-enacted Amendments 133 A, B, and C to Section 6.8.2 which were adopted effective March 8, 1990, and which alter the administrative procedure with respect to the development of a C-4, Planned Shopping Center. Appellate Record, Garfield Township: General, Exhibit 1 (G). Simply stated, those amendments require an additional submission of evidence and supporting data where the initial submission required by Section 6.8.2 is more than five years old. See, Affidavit of John F. Porritt, April 15, 1991.

In the course of reviewing the application of the Grand Traverse Mall, Plaintiffs' representatives brought to the Township Board's attention the absence of a sunset provision with respect to the original C-4 zoning, the significant potential for changed circumstances given the ten-year hiatus in which no construction had taken place, and argued the Township Board's obligation to review the Grand Traverse Mall proposal and relegislate the C-4 zoning. The Township Board chose not to follow this course of action.

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[3]A final complexity is added by the interplay between the phased development of a Planned Shopping District and the Planned Unit Development provisions found in Article 8 of the township ordinance. Here, the entire parcel was once under common ownership. Seventy-five acres were sold to the Defendant Partnership for a sum in excess of 4.5 million dollars, and 11 acres were reserved by Oleson. As counsel for the Defendant Township noted in his oral argument to the Court, neither Oleson nor his 11 acres are before the Court. Whether or not those 11 acres still retain their C-4 zoning will be for determination another day depending upon Oleson's proposed use of the property. These 11 acres are not part of a proposed "phased development" by the Defendant Partnership. The relationship between Section 16 of the Township Rural Zoning Act (MCLA 125.286; MSA 5.2963(16)) and Articles 6 and 8 of the Garfield Township Zoning Ordinance will be discussed further in Count VII ahead.

Instead, the Township Board adopted Amendments 133 A, B, and C, which required the resubmission of data and left review and approval of the project entirely with the Planning Commission, the Zoning Board of Appeals, and the Zoning Administrator. In so doing, the Township Board not only removed elected officials from the process of reviewing a development whose potential impact will be felt throughout northwestern Michigan, but also denied voters their referendum right on any legislative action which the Township Board may have taken with respect to the project.

In reviewing the amendments and the written objections of Plaintiffs, two facts appear. First, the Township Board made an intentional decision to remove itself from the politics surrounding the Grand Traverse Mall debate. Second, in making this decision, the Township Board also intentionally adopted an amended approval scheme for Planned Shopping Districts, essentially as alternatively proposed by Plaintiff Schostak.

As with any legislative action, one can always question its wisdom or the policy underlying it. Yet, there can be no effective separation of powers if courts substitute their judgment for that of the legislative body absent unconstitutional or arbitrary and capricious action. This rule of law was well stated in McDonald Pontiac-Cadillac-GMC, Inc v Prosecuting Attorney for the County of Saginaw, 150 Mich App 52, 55; 388 NW2d 301 lv app den (1986):

> "Preserving the separate functions of the executive, Legislature, and judiciary is fundamental to our system of government, and is embodied in the Michigan Constitution at Const 1963, art 3, sec 2. It is a well-established rule of law that, absent an infringement of a constitutional right, the judiciary may not inquire into the reasonableness of the policy the Legislature pursues in enacting a statute. Albert v Gibson, 141 Mich 698; 105 NW 19 (1905). Nor may the courts inquire into the knowledge, motives, or methods of the Legislature in passing legislation. C. F. Smith Co v Fitzgerald, 270 Mich 659; 259 NW 352 (1935) app dis 296 US 659 (1935)."

See also: 6 McQuillin (3d ed rev), Municipal Corporations, Section 20.03; 5 Callaghan's Michigan Civil Jurisprudence, Constitutional Law, Section 42; 17 Callaghan's Michigan Civil Jurisprudence, Municipal Corporations, Section 154.

The applicable standard governing this Court's review of a zoning ordinance is further set forth in Macenas v Village of Michiana, 433 Mich 380, 396; 446 NW2d 102 (1989). The standard is as follows:

> "When the question of law is the construction of an ambiguous ordinance, the constraints of the rules of statutory construction are of foremost importance. The Court is not free to substitute its judgment by imposing what it considers to be the wisest version of the ordinance, but is confined to an analysis of the text of the ordinance and, in the face of ambiguity, a determination of what the legislative body that enacted the ordinance intended by the language in question.
>
> "Where a construction has been applied over an extended period by the officer or agency charged with its administration, that construction should be accorded great weight in determining the meaning of the ordinance."

See also, Schwartz v City of Flint, (after remand) 120 Mich App 449; 329 NW2d 26 (1982); Belkin v City of Birmingham, 87 Mich App 690; 276 NW2d 465 (1978) mod 406 Mich 949; 278 NW2d 43 (1979); Lorland Civic Ass'n v DiMatteo, 10 Mich App 129; 157 NW2d 1 (1968).

The Charter Township of Garfield dealt with the lack of a sunset provision in Section 6.8 by requiring a submission of current data when the evidence supporting the C-4 zoning is more than five years old. Had the Township Board elected to recognize a functional sunset provision through the failure to build for more than a decade, it would have received and evaluated this same updated data, and would have made its decision on the proposed Grand Traverse Mall as a legislative body. The significance of the varying procedures, then, lies not in the substantive data that was reviewed, but in the loss of the referendum right attendant upon legislative action.

In enacting Amendments 133 A, B, and C, the Garfield Township Board deliberately chose to absent itself from the approval process and, in view of two prior referenda, to deny Township residents the right to once again vote on this project. Again, while one can debate the wisdom of this decision, one cannot find that it is arbitrary or capricious. Accordingly, it is this Court's determination, as a matter of law, that Count II of the Plaintiffs' Complaint must be dismissed. MCR 2.116(C)(10).

COUNT III
General Invalidity of the C-4 Classification of the Land

In Count III, the Plaintiffs challenge the current reasonableness of the C-4 zoning on the site of the Grand Traverse Mall. Plaintiffs specifically argue that this challenge cannot be barred by the application of res judicata or collateral estoppel principles. Plaintiffs note that one can always challenge zoning based on changed circumstances, subject to the applicable standard of review. Among other issues, Plaintiffs here raise questions concerning traffic and regional market impact.

The Defendants contest this count and assert that for the Court to grant Plaintiffs relief it would have to improperly substitute its judgment for that of the Township Board. Brae Burn, Inc v Bloomfield Hills, 350 Mich 425; 86 NW2d 166 (1957). The standards for determining the validity of municipal zoning decisions are well-settled and were concisely summarized by the Sensible Land Use court, supra, page 565:

> "The important principles require that for an ordinance to be successfully challenged, Plaintiffs prove:
>
> "'[F]irst, that there is no reasonable governmental interest being advanced by the present zoning classification itself *** or
>
> "'[S]econdly, that an ordinance may be unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area in

question.' Kropf v Sterling Heights, 391 Mich 139, 158; 215 NW2d 179 (1974).

"The four rules applying these principles were also outlined in Kropf. They are:

"'1. [T]he ordinance comes to us clothed with every presumption of validity.' 391 Mich 139, 162, quoting from Brae Burn, Inc v Bloomfield Hills, 350 Mich 425; 86 NW2d 166 (1957).

"'2. [I]t is the burden of the party attacking to prove affirmatively that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of his property ***. It must appear that the clause attacked is an arbitrary fiat, a whimsical ipse dixit, and that there is no room for a legitimate difference of opinion concerning its unreasonableness.' 391 Mich 139, 162, quoting Brae Burn, Inc.

"'3. Michigan has adopted the view that to sustain an attack on a zoning ordinance, an aggrieved property owner must show that if the ordinance is enforced the consequent restrictions on his property preclude its use for any purposes to which it is reasonably adapted.' 391 Mich 139, 162-163.

"'4. This Court, however, is inclined to give considerable weight to the findings of the trial judge in equity cases.' 391 Mich 139, 163, quoting Christine Building Co v City of Troy, 367 Mich 508, 518; 116 NW2d 816 (1962). Ed Zaagman, Inc v Kentwood, 406 Mich 137, 153-154; 277 NW2d 475 (1979), quoting Kirk v Tyrone Twp, 398 Mich 429, 439-440; 247 NW2d 848 (1976). Silva v Ada Twp, supra, pp 604-605. (emphasis added)'"

With due regard for this precedent, the trial court dismissed the earlier challenge to the zoning on this same parcel and held as follows:

"The compilation of extensive factual documentation considered by the Defendant Township and presented for this Court's review demonstrates that the rezoning action complained of cannot be successfully attacked as an arbitrary fiat, a whimsical ipse dixit such that there is not room for legitimate

difference of opinion concerning its reasonableness. Sensible Land Use, Trial Court Opn., p 10."

In view of the foregoing precedent, the Defendants challenge Count III for the failure to state a claim upon which relief may be granted. MCR 2.116(C)(8). The Defendants further claim that there is no genuine issue as to any material fact and that they are entitled to judgment as a matter of law. MCR 2.116(C)(10). The standard of review for a (C)(8) motion may be found in Mitchell v General Motors Acceptance Corp, 176 Mich App 23, 33; 439 NW2d 261 (1989).

> "A motion for summary disposition brought under MCR 2.116(C)(8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone and examines only the legal basis of the complaint. The factual allegations in the complaint must be accepted as true, together with any inferences which can reasonably be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. Beaudin v Michigan Bell Telephone Co, 157 Mich App 185, 187; 403 NW2d 76 (1986). However, the mere statement of the pleader's conclusions, unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action. NuVision v Dunscombe, 163 Mich App 674, 681; 415 NW2d 234 (1988), lv den 430 Mich 875 (1988). [Roberts v Pinkins, 171 Mich App 648, 651; 430 NW2d 808 (1988).]"

The standard of review for a (C)(10) motion was described in Ashworth v Jefferson Screw 176 Mich App 737, 741 (1989).

> "A motion for summary disposition brought under MCR 2.116(C)(10), no genuine issue as to any material fact, tests whether there is factual support for the claim. In so ruling, the trial court must consider the affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties. MCR 2.116(G)(5). The opposing party must show that a genuine issue of fact exists. Giving the benefit of all reasonable doubt to the opposing party, the trial court must determine whether the

kind of record that might be developed would leave open an issue upon which reasonable minds could differ. Metropolitan Life Ins Co v Reist, 167 Mich App 122, 118; 421 NW2d 592 (1988). A reviewing court should be liberal in finding that a genuine issue of material fact exists. A court must be satisfied that it is impossible for the claim or defense to be supported at trial because of some deficiency which cannot be overcome. Rizzo v Kretschmer 389 Mich 363, 371-372; 207 NW2d 316 (1973).

The party opposing an MCR 2.116(C)(10) motion for summary disposition bears the burden of showing that a genuine issue of material fact exists. Fulton v Pontiac General Hospital, 160 Mich App 728, 735; 408 NW 2d 536 (1987). The opposing party may not rest upon mere allegations or denials of the pleadings but must, by other affidavits or documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4). If the opposing party fails to make such a showing, summary disposition is appropriate. Rizzo, p 372."

Despite the rigorous standard of review applicable to such motions for summary disposition, this Court also finds that upon a review of the pleadings and documents filed in this case, including the certified record below, that the current zoning "cannot be successfully attacked as an arbitrary fiat, a whimsical ipse dixit such that there is not room for legitimate difference of opinion concerning its reasonableness." Count III is dismissed. MCR 2.116(C)(10).

COUNT IV
MICHIGAN ENVIRONMENTAL PROTECTION ACT

The Defendants recognize the broad standing conferred by the Michigan Environmental Protection Act, MCLA 691.1201, et seq.; MSA 14.528 (201), et seq., (being the Thomas J. Anderson, Gordon Rockwell Environmental Protection Act of 1970, otherwise, commonly referred to as MEPA), as well as the factual issues arising thereunder which are not capable of summary disposition. The Defendants, however, challenge the constitutionality of MEPA pursuant to MCR 2.116(C)(4).

The Defendant, Grand Traverse Mall Limited Partnership, correctly notes that MEPA has its origin in Article IV, Section 52 of the 1963 Michigan Constitution. With regard to the protection of our environmental resources, the Michigan Constitution there provides as follows:

> "The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction."

Defendants challenge MEPA as an over-broad and vague delegation of legislative power to the judiciary. MEPA, says the Defendants, violates traditional notions of separation of powers. Defendants also complain that the legislation lacks articulated standards and is "void for vagueness" because a reasonable person reading the statute has no means of ascertaining what he or she must do to conform his or her behavior to the statute in the absence of litigation.

Defendants further contend that any appellate opinion regarding the constitutionality of MEPA is dicta, as the issue has never been directly raised in any appellate proceeding including Ray v Mason County Drain Commissioner, 393 Mich 294; 224 NW2d 883 (1975).

The debate concerning the constitutionality of MEPA centers upon Ray v Mason County Drain Commissioner, and the following quotation which is found at page 306:

> "The legislature spoke as precisely as the subject matter permits and in its wisdom left to the courts the important task of giving substance to the standard by developing a common law of environmental quality." [10]

Footnote 10 states as follows:

> "Thomas J. Anderson, one of the legislative sponsors of the EPA underscored this purpose when he said that the EPA should: 'permit

> courts to develop a common law of environmental quality, much as courts have developed a right to privacy.' Press Release, Representative Thomas J. Anderson, Michigan Passes Landmark Environmental Law, 2 July 1970. Brief Amicus Curiae, p 6. While the language of the statute paints the standard for environmental quality with a rather broad stroke of the brush, the language used is neither illusive nor vague. 'Pollution', 'impairment' and 'destruction' are taken directly from the constitutional provision which sets forth this state's commitment to preserve the quality of our environment. In addition these and other terms used in establishing the standard have acquired meaning in Michigan jurisprudence. The development of a common law of environmental quality under the EPA is no different from the development of the common law in other areas such as nuisance or torts in general, and we see no valid reason to block the evolution of this new area of common law."

The Defendants argue that Ray did not deal with specific constitutional issues but with the findings of fact required by trial judges reviewing MEPA claims. Defendants likewise dispute the Plaintiffs' reliance on two unpublished circuit court opinions and a law review article, all predicated on fn 10 in Ray, supra. See, discussion in Defendant Partnership's Rejoinder Brief as to the unconstitutionality of MEPA at pages 7 and 8.

The law review article referred to is that of Jeffrey K. Haynes and is entitled "Michigan Environmental Protection Act in its Sixth Year: Substantive Environmental Law from Citizens' Suits," 53 Journal of Urban Law, 589 (1976). Assessing the impact of this same "dicta" contained in fn 10 of Ray, supra, Mr. Haynes wrote as follows:

> "The most important aspect of the Ray decision concerns MEPA's constitutionality. Although the decision's immediate impact was on the adequacy of the circuit court's findings of fact under the Act, the Court necessarily had to analyze the purpose behind the legislature's enactment of MEPA--an endeavor intimately connected to the Act's constitutionality. MEPA establishes

> environmental rights that are enforceable through the courts. The establishment of these rights by the Legislature, the Court said, does not delegate legislative power. Moreover, the rights are not without specific content: 'rather, the Legislature spoke as precisely as the subject matter permits and in its wisdom left to the Courts the important task of giving substance to the standard by developing a common law of environmental quality.'"

While the findings of the Michigan Supreme Court in Ray may be dicta, it is this Court's opinion that the analysis contained therein is nonetheless insightful and germane to the question before this Court. Here, this Court likewise agrees that the terms "pollution," "impairment" and "destruction" cannot be impermissibly vague when they are taken directly from the constitutional provision mandating environmental legislation to protect and preserve the state's natural resources. These terms have commonly-accepted meanings and have proven capable of analysis and application for the last 20 years. While it is true that a developer cannot avoid MEPA litigation by showing compliance with applicable state or local permit procedures or satisfaction of legislatively-articulated compliance criteria, those facts do not denigrate or in any sense invalidate the delegation of authority to the courts to develop an environmental common law, nor do they render the statute impermissibly vague. In granting the Michigan judiciary de novo review over environmental matters, and in granting broad-based standing to citizens to pursue such lawsuits, the Legislature's enactment of MEPA was a reasoned response to the broad scope of the issue.

Simply stated, MEPA envisions de novo review even where a developer has complied with all other applicable permit procedures and where state officials find the project otherwise unassailable. The fact that citizens have been empowered to raise independent challenges to development and the fact that the courts have been given de novo review over these challenges does not render MEPA unconstitutional or impermissibly vague. Rather, it speaks to the commitment of this state to the protection of

its natural resources, the responsibility of local government to make MEPA findings as a condition of site plan approval, and places upon developers the risk of noncompliance.

A review of the cases cited by the parties indicates that the courts have interpreted MEPA in a fashion consistent with the Michigan Constitution and consistent with their charge to develop an environmental common law. See, for example, West Michigan Environmental Council v Natural Resources Commission, 405 Mich 741; 275 NW2d 538, cert den 444 US 941 (1979); City of Portage v Kalamazoo County Road Commission, 136 Mich App 276; 355 NW2d 913 (1984); Rush v Sterner, 143 Mich App 672; 373 NW2d 183 (1985); Oscoda Chapter of PBB Action Committee Inc v Dept of Natural Resources, 403 Mich 215; 268 NW2d 240 (1978).

For all the foregoing reasons, this Court will decline the Defendants' invitation to rule the Michigan Environmental Protection Act invalid as an unconstitutional delegation of legislative power to the judiciary or find it impermissibly vague or overbroad. The Defendants' motion for summary disposition predicated upon MCR 2.116(C)(4) is denied.

COUNT V
INVALIDITY OF PLANNING COMMISSION ACTION

Within the Plaintiffs' Amended Complaint are three counts dealing with the Planning Commission's approval of the Grand Traverse Mall proposal on June 6, 1990. Count VII is an administrative appeal. Pursuant to the applicable standard of review and based upon the certified record, the Court will make a decision on it at a later point in these proceedings. Count VI requests this Court to exercise superintending control over the Planning Commission. Count V also questions the propriety of the Planning Commission's approval of this project. All three counts are based on the same operative facts.

Frankly, the Court cannot find a substantive issue which has independent life within the confines of Count V that is not more properly denominated as an administrative appeal within Count VII.

In Count V, as in Count VII, Plaintiffs' contest the evidentiary basis for the Planning Commission's decision, its reliance on the parking variance granted by the Zoning Board of Appeals, as well as its deferral to the interpretation of the transition strip requirement made by the Zoning Board of Appeals. Additionally, Plaintiffs raise a question concerning the applicability of Article 8, Planned Unit Development procedures, found in the township zoning ordinance to the Grand Traverse Mall project which, claim Defendants, is specifically governed by Section 6.8 of Article 6.

Whether described as matters of procedure or substance, all of the deficiencies attributed to the Planning Commission in Count V are necessarily incorporated by reference in Count VII. Further, there has been no substantiation for the proposition that this Court has jurisdiction to hear a collateral attack on the Planning Commission's activity outside the confines of a timely administrative appeal.

It is the Decision and Order of this Court, then, that to the extent that substantive and procedural allegations currently found within Count V are incorporated by reference into Count VII, they shall be decided there, but that in all other respects Count V is summarily dismissed. MCR 2.116(C)(8).

COUNT VI
SUPERINTENDING CONTROL

The applicable court rule dealing with superintending control is found at MCR 3.302 which, in part, provides as follows:

> "(B) Policy Concerning Use
>
> If another adequate remedy is available to the party seeking the order, a complaint for superintending control may not be filed. See subrule 'D)(2), and MCR 7.101(A)(2), and 7.304(A).
>
> (D) Jurisdiction
>
> (2) When an appeal in...the circuit court...is available, that method of review

must be used. If superintending control is sought and an appeal is available, the complaint for superintending control must be dismissed."

Here, Plaintiffs seek superintending control arising out of alleged improprieties by the Garfield Township Planning Commission. Plaintiffs have an adequate remedy in the form of a direct appeal to circuit court. Given that the Planning Commission acted on June 6, 1990, it is clear that Plaintiffs' Complaint, filed on June 27, 1990, constitutes a timely appeal. MCR 7.101(B)(1) and Krohn v Saginaw, 175 Mich App 193, 196; 437 NW2d 260 (1988).

For the foregoing reasons, it is this Court's determination that superintending control is not a remedy available to Plaintiffs in this case and Count VI is thereby dismissed. MCR 3.302(B) and (D)(2). In re: People v Burton, Burton v Wayne County Prosecutor, 429 Mich 133, 144; 413 NW2d 413 (1987) and Schlega v Detroit Board of Zoning Appeals, 147 Mich App 79, 80-81; 382 NW2d 737 (1985)

COUNT VII
CLAIM OF APPEAL FROM PLANNING COMMISSION ACTION

Plaintiffs have filed a timely appeal of the Planning Commission action taken on June 6, 1990. While the Court will make a determination regarding this appeal based upon the certified record and subject to the applicable standard of review at a later point in these proceedings, it will address one of Plaintiffs' motions for summary disposition in the context of this count. Specifically, the Court will now consider the applicability of Article 8, Planned Unit Development Procedures, to the proposed phased development of the Grand Traverse Mall. The facts are not in dispute and the Court can make the interpretation of the ordinance as a matter of law. MCR 2.116(C)(10).

Plaintiffs raise a vigorous argument regarding the applicability of Planned Unit Development requirements to the Grand Traverse Mall. First, Plaintiffs state that the

developer's plans as presented for the proposed mall were not final and could not comply with the zoning ordinance since they did not cover the entire C-4 zoned parcel. Specifically, Plaintiffs object to the exclusion of the the 11 acres retained by Oleson, which land comprises a significant percentage of the entire C-4 parcel. Second, although less strenuously, Plaintiffs object to the exclusion of several "reserve" parcels which are identified on the Grand Traverse Mall site plan.

The legal basis for Plaintiffs' arguments are found in Section 16c of the Township Rural Zoning Act, ("TRZA"), MCLA 125.286c; MSA 5.2963 (16c) and Article 8 of the Township zoning ordinance. Section 16c of the TRZA sets forth the requirements for Township approval of Planned Unit Developments. Article 8 is the township's legislative response to the authority granted it under Section 16c of the TRZA and deals with uses authorized by special use permit, including regulations pertaining to Planned Unit Developments. Section 8.10.

The Defendants respond by stating that the Grand Traverse Mall is not a Planned Unit Development and not subject to the requirements of Section 8.10 of the township zoning ordinance. Rather, the Defendants contend that the development of their Planned Shopping District is controlled by the specific requirements of Section 6.2.

In interpreting the zoning ordinance, the TRZA, and its applicability to the issues at hand, it is important to note the legislative history as it overlays the development of this site. Section 16c of the TRZA was added by P.A. 1978, No. 637, with an effective date of March 1, 1979. Garfield Township did not amend its zoning ordinance pursuant to the statutory authority created by Section 16c until January 16, 1987. The Township zoning ordinance was promulgated in 1974 and one-half of the site was zoned C-4. The zoning ordinance and associated map were approved in a subsequent referendum. The remaining portion of the property was rezoned in 1979, following the passage of P.A. 1978, 637, but eight years prior to the amendment of the township

zoning ordinance to include provisions for Planned Unit Developments.

As with the issues raised in Count II, this Court believes that amendments 133 A, B and C control the resolution of this issue. When these amendments were promulgated on March 15, 1990, the Township Board was aware of the absence of a sunset provision in Section 6.2, that a decade had passed without construction since the 1979 rezoning, and that it had enacted provisions controlling the Planned Unit Development process in 1987. The Township Board's legislative response was to require the submission of up-dated data meeting the requirements of Section 6.8.2, and to delegate the review and approval process to the Planning Commission and the Zoning Board of Appeals.

Just as the township could have legislated a sunset provision or incorporated the Planned Unit Development provisions of Section 8.10 into the Section 6.2 review process, and thereby retained control over the development at the Township Board level, it chose not to do so. Similarly, when Section 8.10 was added to the township zoning ordinance in 1987, the Township Board likewise declined to incorporate its requirements into Section 6.2 but chose to retain the C-4 zoning requirements as an independent substantive and procedural track over which a developer must pass in order to obtain approval for a Planned Shopping District.

To further complicate the analysis, however, the Plaintiffs correctly note that the developer has identified several "reserve" parcels on the site plan and that the 11-acre parcel retained by the original owner/developer (Oleson) of the Buffalo Mall is part of a C-4 district which, by definition, calls for planned centers "located on a single, unified site and are designed and constructed as an integrated unit for shopping and other business activity." Section 6.8.1. Further, Plaintiffs' note that the Township Zoning Administrator referred to the Grand Traverse Mall proposal and the development of the "reserve" parcels identified in the site plan as development authorized under the authority of TRZA Subsection 16c(7). Subsection 16c(7)

deals with final approvals of each phase of multi-phased Planned Unit Developments.

The location of the 11-acre parcel on the intersection of two major thoroughfares and contiguous with a regional shopping mall clearly suggests that the development of the property will be commercial in character. If, as Defendants have stated, the development of the 11-acre parcel is not a part of the Grand Traverse Mall project and is not part of its phased development, then approval for any subsequent development on the Oleson parcel will not be part of a multi-phased approach to the development of the C-4 District identified as the Grand Traverse Mall and characterized by development located on a "single, unified site."

As noted above, the impact of this position by the Defendant Township and the Defendant Partnership and the risks associated with it as they pertain to the zoning on the 11-acre parcel are known to and assumed by the owner of that land. Oleson's agent has filed affidavits in this litigation (Affidavits of Jack Smith), and his attorneys are co-counsel for the Defendant Township. The zoning of the Oleson parcel, then, is not before the Court, as the Oleson parcel is not part of the Grand Traverse Mall site plan.

With regard to the "reserve" parcels, the parties agree that they are a small portion of the overall site plan for the Grand Traverse Mall and both their use and traffic impact are easily foreseeable. Specific uses would include banks, fast-food restaurants or small retail establishments. The traffic impact has been dealt with in the overall site plan through the limitation in the number of curb cuts and the requirement of traffic utilizing the interior circulation pattern of the larger mall development.

The future approval of development on these "reserve" parcels, however, is not specifically discussed in Section 6.8. If the phased development of an "integrated unit for shopping, and other business activity" is controlled by Section 6.8 and not by the Planned Unit Development provisions of Section 8.10, then

development of the "reserve" parcels must likewise be subject to the review procedures contained within Section 6.8.2.[4] Article 8 is inapplicable to future development on the Grand Traverse Mall site as a direct result of the legislative intent evidenced by the Township Board in the amendment of its zoning ordinance. Where that intent is clear, unambiguous and otherwise constitutional, this Court must defer to it. Macenas, supra, at pages 396-397.

Administrative action by the Defendant township, however, has been argued to be inconsistent with the Defendants' position that Section 6.8.2 is controlling. It is undisputed that on February 13, 1990, the Township Zoning Administrator, John Porritt, and its Planner, Gerry Harsch, presented to the Zoning Board of Appeals a "Request to Board of Appeals." See, Exhibit A to Plaintiff Schostak's Supplemental Memorandum in Support of its Motion for Summary Disposition as to the Invalidity of the Defendant Township Planning Commission actions of June 6, 1990, and dated April 19, 1991. The "Request" sought an interpretation from the ZBA that Section 16c of the TRZA, with respect to the Grand Traverse Mall Development, provided the following:

> 1. The basis for denial, approval or approval with conditions of a planned development;
>
> 2. That the zoning administrator was the official charged with the duty of denial, approval or approval with conditions of the planned development; and
>
> 3. That the zoning administrator may seek the counsel of the Garfield Township Planning Commission in recommending denial, approval, or approval with conditions of the

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[4]There is no language in either Section 6.8.2 or 8.10 that would provide the Zoning Administrator with the authority to make final decisions regarding the phased development of a Planned Shopping District in a C-4 zone. The ZBA's interpretation of February 13, 1990, lacks competent, material and substantial evidence on the record to support it but was rendered of no consequence by subsequent Township Board action on March 15, 1990.

planned development and that Subsection 16C(1) and (2) of the TRZA were the "Pertinent Sections" of the TRZA.

Despite the ZBA's adoption of this interpretation on February 13, 1990, the procedures followed thereafter were those set forth by Section 6.8.2, as amended, and not those governed by Section 16c of the TRZA and Section 8.10 of the zoning ordinance. The reason for the change in procedure seems evident. Following the ZBA action of February 13, 1990, the Township Board adopted Amendments 133 A, B and C on March 15, 1990, which amendments required that the Planning Commission hold a public hearing for purposes of approving, disapproving, or approving the project with conditions. Similarly, the Zoning Board of Appeals was charged with the responsibility for reviewing the Planning Commission's findings and the record before the Planning Commission together with all new evidence and supporting data in making its determination to approve or disapprove the project and to communicate its written decision to the Zoning Administrator.

Just as the courts are not bound by administrative "legal" interpretations of the zoning ordinance, Macenas, supra, at 395, neither is the Township Board. The Township Board's legislative action of March 15, 1990, rendered moot the "Request" to the ZBA and its interpretation of February 13, 1990.

Plaintiffs' motion for summary disposition on this issue is denied and this specific claim is dismissed based upon the Court's interpretation of the ordinance as a matter of law. MCR 2.116(C)(10).

COUNT VIII
INVALIDITY OF ZBA ACTION ON JULY 10, 1990 - SUPERINTENDING CONTROL

For the reasons set forth in this Court's discussion of Count VI, supra, it is this Court's determination that Count VIII of the Plaintiffs' Amended Complaint likewise be dismissed. MCR 3.302(B) and (D)(2).

COUNT IX
CLAIM OF APPEAL FROM ZONING BOARD OF APPEALS' ACTION OF JULY 10, 1990

While Plaintiffs have filed no motion specifically directed at their appeal from the Zoning Board of Appeals' approval of the Grand Traverse Mall project on July 10, 1990, they have filed motions for summary disposition predicated upon improper ZBA interpretations regarding parking variances and the transition strip which were relied upon in granting final approval on July 10, 1990. This Court has determined that the Plaintiffs GNW and Schostak have standing to appeal the ZBA action of July 10, 1990, and that their appeal is timely. A decision on the merits following a review of the certified record will occur at a later point in these proceedings.

At this time, and in the context of this count, the Court will consider the parking variance and transition strip issues as raised by Plaintiffs' Summary Disposition motions.

A. Parking Variances

Plaintiffs have moved for summary disposition alleging that a parking variance was improperly granted by the Zoning Board of Appeals, which variance was relied upon by the Planning Commission in its approval of the Grand Traverse Mall development. MCR 2.116(C)(10).

On December 19, 1989, the Zoning Board of Appeals granted a variance from the parking requirements otherwise applicable to the Planned Shopping District. The standards for granting a variance are set forth in Section 23 of the TRZA as follows:

> "Where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the zoning ordinance, the board of appeals in passing upon appeals may vary or modify any of its rules or provisions so that the spirit of the ordinance is observed, public safety secured, and substantial justice done. The board of appeals may impose conditions with an affirmative decision pursuant to Section 16d(2)."

As a "non use" variance, the applicant was required to show "practical difficulty" and not unnecessary hardship to justify granting the variance. Indian Village Manor Co v City of Detroit, 5 Mich App 679; 147 NW2d 731 (1967); Heritage Hill Assoc, Inc v City of Grand Rapids, 48 Mich App 765; 211 NW2d 77 (1973).

A review of the appellate record and the minutes of the ZBA meetings of December 19, 1989, and those where the variance was renewed on July 25, 1990, indicate that it was improvidently granted and renewed. The record is devoid of any evidence whatsoever of "practical difficulties." Rather, the reasons supporting the variance were equally applicable to all such developments thereby requiring an ordinance amendment.

Subsequently, the zoning ordinance was amended, effective February 14, 1991, and the requirements for parking contained in the disputed variances granted by the ZBA have now been legislatively adopted into an amended township zoning ordinance. Section 7.8.3(3)(a). See, Affidavit of Gerry Harsch, April 29, 1991, paragraph 13.

In this Affidavit, Mr. Harsch further states that the movie theatres identified within the site plan are a permitted use within the Planned Shopping Center District under 6.8.4 (4) and no incremental parking requirement is imposed on such uses. Harsch, supra, paragraph 14.

The Defendants have cited several cases to the Court which stand for the proposition that where a subsequent enactment or repeal of an ordinance or statute addresses the precise questions involved in a pending dispute, so as to dispose of such questions, the entire matter is rendered moot. See, e.g., Dearborn Fire Fighters Assoc, Local No 412 v Herdzik, 319 Mich 345; 29 NW2d 830 (1947); McBroom v City of Flint, 266 Mich 679; 254 NW2d 468 (1934); City of Detroit v Killingsworth, Detroit Police Officers Assoc v City of Detroit, 48 Mich App 181; 210 NW2d 249 lv app den (1973); Howe v Doyle, 187 Mich 655 (1915).

> "Where an ordinance is repealed by a later ordinance governing the same subject matter and the earlier ordinance is therefore no

longer in existence, the validity of the earlier ordinance becomes a moot question, the determination of which would profit no one." McBroom, supra, at p 681.

There has been no procedural challenge to the amendment of the zoning ordinance and it was not deemed of sufficient interest to generate a referendum election. Even recognizing the stringent standard of review applicable to a motion for summary disposition pursuant to MCR 2.116(C)(10), this Court must not only deny Plaintiffs' Motion for Summary Disposition but dismiss this specific claim as moot, and do so as a matter of law.

B. Transition Strip

A review of the certified record indicates that the Zoning Board of Appeals made an interpretation regarding the ability to include retention ponds in the transition strip required by Section 6.8 and that this interpretation was made on April 10, 1990. The Defendants contest the Plaintiffs' ability to raise this issue, first, on procedural grounds. It is the Defendants' position that the determination made on April 10, 1990, should have been appealed within 21 days and that the failure to do so precludes Plaintiffs from litigating the issue now. MCR 7.101(B)(1) and Krohn v Saginaw, supra.

Plaintiffs respond by referring to the Notice of Hearing which advised the public that this issue would be raised. Appellate Record, General, Tab 1(H), Minutes of ZBA meeting 4/10/90. The Public Meeting Notice indicated that "miscellaneous interpretations" would be made with respect to the zoning ordinance. A review of the appellate record indicates that public meetings involving the Grand Traverse Mall were well attended and the issue vigorously debated prior to April 10, 1990. The record further indicates that the only "miscellaneous interpretation" of the township ordinance which was considered on April 10, 1990, was the transition strip issue now before this Court and its specific application to the Grand Traverse Mall.

The Township's Meeting Notice, in view of the significant public interest in this project, was disingenuous if not a clear violation of the letter and policy which underlie the Open Meetings Act. Although the record indicates that a representative of the Plaintiff Schostak was present, this Court will not countenance the deception implicit in the April 10, 1990, Meeting Notice by suggesting that an appeal from the action taken at that meeting was not timely perfected. Were this Court to conclude otherwise, the equities demand that this Court grant leave to appeal. MCR 7.203(B).

The substantive objections relating to the transition strip require an interpretation of Subsection 6.8.5(8) of the zoning ordinance. In pertinent part, it provides as follows:

> "Transition Strips: All planned shopping center districts, when located...adjacent to [a]...residential district...shall include as an integral part of the site development a strip of land two-hundred (200) feet or more in width on all sides of the site except on the side fronting on a major thoroughfare. No part of such land may be used for any shopping center functions, except that up to one-hundred (100) feet of the strip width on the interior side may be used as part of the parking area. Except for the part that may be occupied by parking space, the strip shall be occupied by plant materials or structural fences and walls, used separately or in combination. The plans and specifications for shopping center development shall include the proposed arrangement of such plantings and structures and such proposals shall be subject to the approval of the Zoning Board of Appeals."

The site plan approved by the Zoning Board of Appeals on July 25, 1990, is found as Exhibit 3 to the Appendix to Memorandum in Support of Motion for Summary Disposition filed by the Defendant Township. The transition strip is located on the north side of the property where it adjoins the residential neighborhood along Day Drive. There is no dispute concerning the easterly half of the transition strip.

However, a storm water detention pond has been located within a portion of the westerly half of the transition strip. Plaintiffs argue that the inclusion of storm water detention ponds within the transition strip violates the clear language as well as the policy underlying Subsection 6.8.5(8).

A review of the minutes of the Zoning Board of Appeals' meeting of April 10, 1990, indicates that the request for an interpretation regarding the transition strip was presented by the Garfield Township Planner and then adopted by the ZBA. Both parties agree that the applicable standard of review is set forth in Macenas, supra, at page 395, where the Supreme Court wrote as follows:

> "The statute instructs courts to defer to determinations of fact made by an appeals board if supported by competent, material, and substantial evidence on the record, MCL 125.585(11)(c); MSA 5.2935(11)(c). The board's decisions based on those determinations of fact are to be deferred to provided they are procedurally proper, MCL 125.585(11)(b); MSA 5.2935(11)(b); and are a reasonable exercise of the board's discretion, MCL 125.585(11)(d) and MSA 5.2935(11)(d). This deference, however, does not undercut the authority of the Court to decide questions of law as they arise in the course of a review of appeals board actions...."

Following the staff-initiated request for an interpretation, the Zoning Board of Appeals did conclude that the retention pond and mall service drive could be located within the transition strip area. The Planning Commission adopted this interpretation on June 6, 1990, when it approved the development proposal and found that the ZBA interpretation was "consistent with the intent and purpose of the zoning ordinance and the accepted practice followed in administrating the zoning ordinance." Plaintiffs challenge these interpretations "as being erroneous as a matter of law." See, Plaintiff GNW's Memorandum of Law Regarding the Transition Strip Requirements, dated April 2, 1991. The Court now will consider each issue in turn.

1. Service Drive

Subsection 6.8.5(8) of the zoning ordinance limits the use of the interior 100 feet of the transition strip to occupation by "plant materials or structural fences and walls, used separately or in combination" and "as part of the parking area." Plaintiffs dispute the ZBA interpretation which allows the mall service drive to be located within the interior 100 feet of the transition strip.

The Defendants argue that the interpretation of the ordinance reached by the ZBA is in accordance with the consistent uniform past practice of the township. See, Affidavit of Gerry Harsch, dated April 29, 1991, paragraph 7. Specifically, Mr. Harsch refers to an application requesting site plan review and variance regarding the Cherryland Mall, dated July 21, 1975, and similar applications requesting site plan review and variance for the Cherryland Mall dated November 15, 1976, October 14, 1980, and October 2, 1984. These applications, however, were acknowledged by counsel to be limited to the location of a retention pond within the interior 100 feet of the transition strip. These applications did not address the question of service drives.

The specific request of the Garfield Township Planning Department which is referenced in the minutes of the April 10, 1990, ZBA meeting was,

> "Is the service drive a part of the parking area, and, therefore, may legitimately be located within the interior 100 feet of the 200-foot transition strip and is the retention area landscape element sufficiently similar to the landscape elements of 'plant materials' or 'structural fences' that it also is appropriately located within the buffer area."

The minutes reflect discussion regarding the retention pond and limited discussion concerning the location of the service drive. Similarly, in the Planning Commission's findings of June 6, 1990, paragraph 2(i) discusses the transition strip with

respect to the location of the retention pond but contains no discussion of the location of the service drive within the interior 100 feet.

While this Court recognizes its obligation to enforce those interpretations of the township zoning ordinance that are supported by competent, material and substantial evidence, the record provided to the Court is devoid of any such evidence supporting the ZBA interpretation that a service drive is a land use sufficiently analogous to a parking area to allow its location within the interior 100 feet of the transition strip--other than the conclusory Affidavit of Mr. Harsch. Since a parking area and a service drive refer to distinct but related land uses, the Court cannot say that "no conceivable factual development" would prevent the Defendant from prevailing on this issue. Therefore, based upon the applicable standard of review, the Court must deny Plaintiffs' Motion for Summary Disposition.

The parties may provide the Court with references to supporting materials, if any, within this voluminous record so that the Court may appropriately consider this issue on the merits when it makes its findings with regard to the administrative appeals of both the Planning Commission action of June 6, 1990, and the Zoning Board of Appeals' action of July 10, 1990.

2. Retention Pond

A review of the Township Zoning Map indicates that three C-4 districts were in existence at the time the Defendant Grand Traverse Mall Limited Partnership presented its proposal to the Township. Other than the site of the Grand Traverse Mall, the other C-4 districts included the Cherryland Mall and Meijers Thrifty Acres. There is no evidence before the Court that either parcel has a retention pond located in the exterior 100 feet of the transition strip where it adjoins a residential district. Cherryland Mall has a retention pond in the interior 100 feet of its transition strip, and there is no evidence before the Court

which describes the precise location of Meijer's retention ponds relative to its transition strip and any abutting residential district.

The Affidavit of Township Planner Gerry Harsch offers the conclusion that both the location of service drives within the interior 100 feet of the 200-foot transition strip and the location of retention ponds within the transition strip are consistent with the uniform past practice of the township. Mr. Harsch draws his conclusion not only with respect to the past practice relating to shopping centers but to other land use classifications such as office and commercial and industrial uses. Affidavit of Gerry Harsch, dated April 29, 1991, paragraph 10.

Despite the conclusive nature of Mr. Harsch's Affidavit, and in the absence of specific references to support his identified uniform practice, this Court can decide this issue based solely upon the language of the relevant ordinance provision. With the exception of that portion of the transition strip which may be occupied by parking space, the zoning ordinance requires that it otherwise be occupied by plant materials or structural fences and walls, used separately or in combination.

The retention pond is proposed as a landscaped area which will retain storm water and offer the viewer a pond-like vegetated appearance, or, at periods of low water, it will present the appearance of a vegetated wetlands area. In either case, to the extent it occupies the transition strip, it does so as a planted, bermed, landscaped area containing trees, cattails and other vegetation as described on Defendants' site plan. Exhibit 3, Appendix to Motion to Support Summary Disposition. Harsch, supra, paragraph 8 and 9

Reviewing Section 6.8.5 in light of the intent and purpose of the Planned Shopping Center land use classification described in Section 6.8.1, where the Township Board stated its legislative intent "to promote safe and convenient access to shopping and business facilities by the automobile-conveyed customer and to avoid and minimize undue traffic congestion or other adverse

affects upon property within adjacent zone districts" (Emphasis added), it becomes clear that a great gulf lies between the Township's stated intent and the ordinance's actual requirements.

The plain language of the ordinance does not require that the transition strip be bermed, contains no specific standards regarding the type or volume of plantings, and does not designate the height or composition of structural fences and walls. There are no aural or noise abatement standards. Compliance with the strict language of the ordinance may be achieved in the exterior 100 feet by providing a level grassy area with or without a fence.

A review of the transition strip provision suggests that very minimal requirements are necessary to satisfy it. Were there an existing wetlands in the westerly half of the transition strip, a plain reading of the ordinance would not require that it be removed and replaced with a bermed, landscaped area. Similarly, it is equally clear that the interior 50 percent of the transition strip may be utilized as parking area, a use far more likely to generate noise, and certainly far less attractive, than an appropriately landscaped and maintained retention pond.

Plaintiffs' final argument is that a storm water retention pond is a shopping center function. Here, the Court must disagree. On-site storm water detention systems are required of most new nonresidential development. Storm water detention systems are an element of development infrastructure but are no more a shopping center function than they are an office, retail, or industrial function.

While this Court concedes that legislative action to draft meaningful transition strip criteria would be consistent with the stated intent of the ordinance and have strong underpinnings in policy and common sense, this Court may not write legislation or impose its views concerning policy on an independent branch of government. To the extent there is any meaningful residential buffer on this site plan, it can only have been generated by the developer's economic interest in promptly securing site plan

approval and not be reference to this toothless transition strip requirement.

For all the foregoing reasons, and based upon the standard of review set forth in Macenas, supra, it is this Court's determination that Plaintiffs' Motion for Summary Disposition regarding the transition strip be denied and this specific claim dismissed as a matter of law. MCR 2.116(C)(10).

COUNT X
MICHIGAN ENVIRONMENTAL PROTECTION ACT
APPLICABLE TO ZBA ACTION OF JULY 10, 1990

The Defendants have filed a Motion for Summary Disposition directed at Count X which is based upon MCR 2.116(C)(8) and (10). The gravamen of Count X is the ZBA's alleged failure to make the findings required by MEPA as well as the ZBA's approval of the project prior to the completion of the Kids Creek Watershed Study in violation of an announced Township policy. See paragraph 61 and 62 of Plaintiffs' Amended Complaint.

To the extent that the ZBA may have failed to make the findings required by MEPA, that issue has been rendered moot by this Court's decision of June 6, 1991, wherein the environmental issues were remanded for supplemental findings by the ZBA in accordance with Section 4(2) of MEPA. MCA 691.1204(2); MSA 14.528(204)(2).

Plaintiffs' second substantive allegation in Count X is the failure to await completion of the "Kids Creek Watershed Study" before issuing approval to this project violated a township policy. The policy alleged was voluntary in nature and was limited to rezonings only. It did not apply to the issuance of building permits and was not so interpreted by the Township. Again, while a compelling argument can be made to withhold the approval of significant development within the Kids Creek Watershed until such a study was completed, no such requirement was ever part of the approval process set forth in 6.8.2, as amended. Further, it now appears that the Kids Creek Watershed will not be meaningfully impacted by the proposed development as Plaintiffs' substantive MEPA claims have been voluntarily

dismissed. The approval of the Grand Traverse Mall site plan prior to the completion of the "Kids Creek Watershed Study" creates no claim upon which relief can be granted. MCR 2.116(C)(10).

The remaining issues raised by Count X, if any, will be considered following the issuance of supplemental MEPA findings by the ZBA pursuant to this Court's decision to remand on June 6, 1991.

COUNT XI
ZONING BOARD OF APPEALS' ACTION ON JULY 25, 1990 - SUPERINTENDING CONTROL

For the reasons set forth in this Court's discussion of Count VI, supra, it is this Court's determination that Count XI of the Plaintiffs' Amended Complaint be dismissed. MCR 3.302(B) and (D)(2).

COUNT XII
CLAIM OF APPEAL FROM THE ZBA ACTIONS OF JULY 25, 1990

Plaintiffs have timely perfected an appeal from the ZBA decision to renew a parking variance on July 25, 1990, which had earlier been granted on December 19, 1989. The parking variance has been discussed in the context of Plaintiffs' Motion for Summary Disposition in Count IX, supra. The Court has reviewed the parties' briefs and the certified record as it pertains to this issue.

For the reasons set forth in Count IX, this Court is convinced that the variance was improvidently granted. However, the issue has been rendered moot by a subsequent legislative amendment to the zoning ordinance. Count XII of the Amended Complaint is dismissed. MCR 2.116(C)(10).

COUNT XIII
INVALIDITY OF ACTION BY ZONING ADMINISTRATOR

In Count XIII of the Amended Complaint, Plaintiffs challenge the Zoning Administrator's approval and issuance of a building permit for construction of the Grand Traverse Mall. Plaintiffs allege that the Defendant Partnership's failure to satisfy certain procedural conditions precedent precluded the issuance of a building permit. Amended Complaint, paragraph 81. The duties of the Zoning Administrator are set forth in the zoning ordinance at Article 4, Section 4.1.2. The requirements regarding the issuance of land use permits are specified in Section 4.1.3(1).

Norman Hyman and Mark Schostak have both filed Affidavits substantiating their review of township files and the certified record, respectively, and denying the existence of either an application for a land use permit or the land use permit itself. The Zoning Administrator has filed an Affidavit indicating that he received the application and issued the permit. Porritt Affidavit, dated April 15, 1991. The documents were attached as Exhibits 3 and 5. No issue regarding their existence remains.

The certified record indicates that the development was approved by the Planning Commission on June 6, 1990, and by the Zoning Board of Appeals on July 10, 1990. Whether or not those approvals are "valid" and conform with existing zoning is the subject of administrative appeals previously identified in this Decision and Order. Those issues will be decided in the context of Counts VII and IX.

As a part of their procedural challenge, Plaintiffs allege that while the Defendant Partnership has filed a Soil Erosion and Sedimentation Control Permit with the Zoning Administrator, dated January 15, 1990, such permit relates to a site plan different than that approved by the ZBA. Therefore, Plaintiffs allege that the Soil Erosion and Sedimentation Control Permit requirement has not been met. Amended Complaint, paragraph 81(c).

The Affidavit of Maureen M. Kennedy, Grand Traverse County Drain Commissioner, dated August 6, 1990, sets forth the

chronology associated with the issuance of the permit. In paragraph 8 of her Affidavit, Ms. Kennedy described how the permit was issued on May 7, 1990, although dated January 15, 1990, in response to revised site plans that accommodated recommendations to the originally-proposed site plan, dated January 29, 1990. See, Exhibit One to Kennedy Affidavit. As to the compliance with the Soil Erosion and Sedimentation Permit process, the Grand Traverse County Drain Commissioner made the following statement in her Affidavit:

> "Based upon her own inspection and review, and taking into account the consulting advice provided to the Drain Commissioner by FTC&H, it is her professional opinion and judgment: (') that all administrative review steps required by the Act, and the applicable administrative regulations, have been properly and fully completed; (ii) that site plan and storm-water drainage/detention systems, as revised, comply with all standards and requirements of the Act and regulations; and (iii) that the permit was properly issued in full compliance with the County's responsibilities for the administration and enforcement of the Act and its applicable regulations." Kennedy Affidavit, paragraph 9.

The Affidavits of Larry Hagburg and John Rice question the soil sedimentation permit process. Mr. Rice's Affidavit is dated April 2, 1991, and does not indicate that he has reviewed the Drain Commissioner's Affidavit of August 6, 1990. The Drain Commissioner's Affidavit clearly establishes that the soil sedimentation permit was based upon those plans which were finally approved by the Garfield Township Zoning Board of Appeals and as modified to meet her specific requirements.

The Court, in its Decision and Order of June 6, 1991, required the Defendant Partnership to notify all permit granting agencies of the functional changes to the storm water system. Any new issues raised thereby will be resolved at the agency level and are no longer properly before this Court.

Plaintiffs additionally challenge the failure of the Zoning Administrator to make independent findings required by MEPA and

for issuing the building permit prior to the completion of the Kids Creek Watershed Study. Amended Complaint, paragraph 85 and 86. These issues were discussed and dismissed by the Court previously in Count X. A similar result is required here. MCR 2.116(C)(10).

Plaintiffs further claim that the Defendant Partnership failed to produce and the Zoning Administrator failed to receive the necessary applications and permits prior to issuing a building permit. Amended Complaint, paragraph 81(a) through (f), inclusive. This claim is directly contradicted by the affidavits of the Zoning Administrator, John Porritt, dated March 14, 1991, and April 15, 1991. The issue lies not in the existence of these documents but in the ramifications of several contested case hearings surrounding their issuance.

The Court is sensitive to the fact that a number of the permits received by the Defendant Partnership are the subject of contested case hearings. See, Affidavit of Frederick Dilley. However, it is not the Zoning Administrator's obligation to look through a permit which is otherwise valid on its face and determine whether it may become the subject of a contested case hearing; and, if so, what the outcome of that hearing will be. To the extent that certain permits must be filed as a condition precedent to the issuance of a township building permit, the action of the Zoning Administrator in response to the production of these permits is simply ministerial.

Recognizing that some actions of the Zoning Administrator are discretionary, Plaintiffs allege that the final plans approved by the Zoning Board of Appeals and which form the basis of the land use permit issued by the Zoning Administrator on July 25, 1990, were in fact different in significant ways from those presented to the Road Commission on March 21, 1990, and which formed the basis of the Road Commission's permit of April 12, 1990. If the Zoning Administrator was aware of significant changes to the site plans which were material to the Zoning Board of Appeals' review process and issued a land use permit despite

this knowledge, then such discretionary action would be the appropriate subject of review.

However, the Court has been unable to locate in the certified record or the exhibits attached to the parties' motions and briefs any evidentiary basis to rely upon in resolving these issues. At the very least, the Court must be directed to the significant differences in the site plans, evidence identifying Mr. Porritt's knowledge of those significant differences, and evidence identifying his failure to bring these matters to the attention of the Zoning Board of Appeals prior to the issuance of a building permit.

Unless the road improvements and acquisition of right-of-way would change the location of curb cuts previously identified and approved by the Zoning Board of Appeals or otherwise reconfigure parking space, service drives, landscaping buffers, or transition strips in a significant way, the Court must profess some confusion as to how the precise engineering of the South Airport Road improvements would impact on the propriety of the April 12, 1990, driveway permit and the subsequent issuance of a building permit in reliance thereon.

Other than those issues which have been dismissed as noted herein, the Court will resolve Count XIII upon a review of the certified record at a later point in these proceedings.

CONFLICTS OF INTEREST

Plaintiffs have raised a substantial issue regarding conflicts of interest or the appearance of impropriety attributable to the participation in the Zoning Board of Appeals' approval process by two of its five members. The development of a regional shopping center on this site has been controversial since the time of the 1979 rezoning. The current project is disputed by neighbors, an environmental group, and one owner of a competitive mall located within the township.

Reduced to its essence, Plaintiffs allege that Frank McManus ("McManus") and Tony Wilhelm ("Wilhelm") should not have participated in decisions while members of the Zoning Board of

Appeals which pertained to the Grand Traverse Mall.[5] McManus and Wilhelm were two of five members on that board and participated both in the discussion and voting on a number of questions, including the issuances of parking variances, an interpretation regarding the transition strip and, ultimately, the final approval of the Grand Traverse Mall proposal.

It is undisputed that Wilhelm and McManus participated in a like-kind land exchange wherein they sold land to an entity or agent of the original owner/developer of the Buffalo Mall (Oleson) and, thereby, facilitated his sale of the Buffalo Mall property to the Defendant Partnership. The record indicates that the terms of this transaction were agreed upon shortly before the Defendant Partnership notified the Defendant Township of its intent to construct the Grand Traverse Mall and little more than a month before the Zoning Board of Appeals granted its first parking variance, a variance which this Court believes should not have been issued given the absence of any evidence of practical difficulties associated with construction on the existing site. See, discussion found within Count IX, supra.

The minutes of the December 19, 1989, Zoning Board of Appeals meeting indicate that the Chairman requested disclosure of any conflicts of interest and none were reported. Transcript, pp 3-4. Some months later, the potential conflict of interest issues associated with the like-kind land exchange were raised by others. The conflict question was complicated by the fact that the Defendant Township and Oleson were represented by the same law firm, which firm documented the real estate transactions between McManus and Wilhelm and Oleson. This firm also provided the initial opinion regarding the putative conflict of interest.

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[5]The facts concerning Wilhelm's residence within the township are alleged to now be at issue but are not before the Court in the record upon which this motion is being determined. The alleged lack of residency at the time the ZBA voted to approve this project on July 10, 1990, is an issue which has been rendered moot by his disqualification on other grounds.

Due to the controversy raised by the discovery of the like-kind land exchange and the role of Wilhelm and McManus in it, the Township Board appropriated funds and authorized the retention of an independent law firm to provide it with an opinion regarding the potential conflict of interest. This "independent" opinion was provided by the Dykema Gossett law firm and has been provided to the Court (over objection) as a part of the certified record. Both firms now represent the township as co-counsel in this litigation.

The Court finds that the factual statements contained in the Dykema Gossett opinion are supported by the documents related to the land exchange and fairly summarize the nature of the transaction between the Defendant Partnership as buyer, Oleson as seller, and Wilhelm and McManus. There is no question that Oleson was obligated to sell the land to the Defendant Partnership for approximately 4.5 million dollars, whether or not a like-kind land exchange could be facilitated. To the extent a like-kind land exchange transaction could be consummated within approved time periods, it was a matter of contractual indifference to the Defendant developer as it was obligated to pay no more or no less consideration for the land.

It is equally evident that both Wilhelm and McManus were aware that they were participating in the sale of their property as part of a transaction associated with the sale of the Buffalo Mall site to a new developer. Further, neither of these sales was contingent upon any other event or condition. The parties had agreed upon terms and funds were delivered in escrow by November 14, 1989. Wilhelm closed and was paid on December 7, 1989, and McManus closed and was paid on January 2, 1990. The ZBA meeting where the parking variance was granted was held on December 19, 1989.

Based upon a review of the undisputed facts, it is this Court's conclusion that neither Wilhelm nor McManus ever had a direct financial interest in the property Oleson sold to the Defendant Partnership, never negotiated directly with any representative of the Defendant Partnership or General Growth

Company, Inc., and that neither Wilhelm nor McManus had any contingent or conditional interest in the development of the Grand Traverse mall property. Similarly, upon the sale of their property, neither had any financial hopes of benefiting directly or indirectly from the construction of the mall in any sense that differed from that of any other taxpayer in Garfield Township. There was no conflict of interest.

Plaintiffs additionally argue that there was the appearance of impropriety and that the appearance of impropriety also precluded McManus and Wilhelm from voting. Defendants argue that such ethical considerations are not applicable to township officials in Michigan generally and are not otherwise applicable on the facts of this case.

A demonstrated appearance of impropriety has the potential to be every bit as damaging to the body politic as an actual conflict of interest. It destroys the faith and trust that is integral to the operation of government in a representative democracy. Objections to utilizing the appearance of impropriety as a basis for disqualifying legislators, members of the judiciary, attorneys, or local government officials from engaging in certain behavior or participating in certain decisions are not persuasively predicated on the standard being unworkable. As our government becomes increasingly more remote from its people, it seems important to strengthen the ethical requirements for those who participate in it. The people's confidence in government cannot long be sustained if we turn a blind eye to behavior that creates an impermissable appearance of impropriety. The doctrine, however, does have limits.

Plaintiffs have cited a number of cases which establish the "appearance" rule in several other states. No law on this issue was provided by the Defendants. The Court finds the reasoning contained in the cited decisions persuasive and well supported by the policies of due process and fundamental fairness which pervade our law.

The public policy served by the enforcement of the so-called "appearance" doctrine is an important one:

> "The evil lies not in influence improperly exercised but rather in the creation of a situation tending to weaken public confidence and to undermine the sense of security of individual rights which the property owner must feel assured will always exist in the exercise of zoning power." Mills v Town Plan & Zoning Commission of the Town of Windsor, 144 Conn 493, 134 A2d 250 (1957).

Fairly summarized, Courts in these cases have repeatedly questioned the participation by a board or commission member in a proceeding, including zoning proceedings, where such participation creates an appearance of impropriety, partiality, bias, or lack of fairness. This Court will highlight those cases which it finds particularly germane to the issues at hand.

First, in Abrahamson v Wendell, 72 Mich App 80; 249 NW2d 403 (1976), on reh 76 Mich App 278; 256 NW2d 613 (1977), the Court of Appeals ruled, as a matter of law, that the appearance of a township supervisor before the zoning board of appeals, where the supervisor had appointment power over the board, presented the potential for duress and rendered the action of the board void. The Court emphasized the need to create confidence in public officials by avoiding even the appearance of impropriety: "[i]t is hoped that this conclusion will help bolster the public confidence in the decision makers who must represent their interests and who must seek to avoid even the appearance of impropriety". 72 Mich App, at 83.

Similarly, in Barkey v Nick, 11 Mich App 381; 161 NW2d 445 (1968), the action of a zoning board of appeals was also invalidated due to the appearance of partiality. There, the Court held that a ruling of the zoning board of appeals was void due to the fact that a city commissioner who had zoning board of appeals appointment power represented his brother before the board. The appearance of the commissioner before the board was deemed improper because it created an appearance of partiality: "[i]t creates an abuse of trust imposed by the assumption of public office and creates a personal pecuniary interest conflicting with the fiduciary duty owed all members of the

public. Further, it creates a doubt in the public mind as to the impartiality of the board's action." 11 Mich App at 385; See also, OAG, 1979-1980, No. 5774, p 972 (Sept. 8, 1980). A member of a township board must avoid even the appearance of impropriety; any conflict of interest between personal profit and public duty must be scrupulously avoided.

The law of other jurisdictions is similar to that of Michigan, and there are limitations on the application of the doctrine. Mere contact with a party or the existence of a remote fact which might suggest the impropriety was held not to be sufficient to call the doctrine into play in King County Water District v King County Boundary Review Board, 87 Wash 2d 536, 554 P2d 1060 (1976). The Oregon Supreme Court declined to follow the doctrine in 1000 Friends of Oregon v Wasco County, 304 Or 76; 742 P2d 39 (1987), cert den, 486 US 1007 (1988). There, a member of the board of county commissioners had voted to call an election on a proposal to incorporate a city. His vote was challenged on the grounds that he had sold cattle to the petitioners before the vote at generally unfavorable terms. The commissioner in question had informed his fellow commissioners of this sale but not members of the public. The Oregon Court of Appeals invalidated the vote because the cattle sale created an appearance of impartiality. The Oregon Supreme Court reversed this decision, stating as follows:

> "...A reviewing body may find it less painful to order reconsideration of an official's action for insufficient respect for appearances than to determine whether the official in fact acted under the influence of bias or self-interest. But the two standards serve different interests. Actual impartiality protects the substantive quality of the official action as well as the parties' interest in its fairness. Invalidation for appearance alone, as the Swift court said, aims to preserve public confidence and it does so regardless whether the decision in fact was both correct and fair. The price of such invalidation is delay of what, but for appearances, is a proper application of public policy, at potentially heavy cost to an innocently

successful proponent as well as to the agency." 742 P2d at p 44.

Other limitations on the doctrine do not allow the alleged appearance of impropriety to be speculative. A zoning commissioner was not disqualified merely because he was a member of an association opposed to an applicant's request for a special permit, Holt-Lock, Inc v Zoning and Planning Commission of the Town of Granby, 161 Conn 182, 286 A2d 299 (1971), or because he had once sold equipment to the applicant for a variance ten years earlier. Fail v LaPorte County Board of Zoning Appeals, 171 Ind App 192, 355 NE2d 455 (1976). Nor was the decision invalid simply because the law firm representing an applicant had in the past represented a corporation in which a commissioner owned a substantial amount of stock. Anderson v Zoning Commission of the City of Norwalk, 157 Conn 285, 253 A2d 16 (1968). Finally, in Dana-Robin Corp v Common Council of the City of Danbury, 166 Conn 207, 348 A2d 560 (1974), a planning commission member was held not disqualified upon the grounds of conflict of interest or an appearance of impropriety because he, his mother and sister were the sole stockholders in real estate corporations which owned properties in the city unrelated to the properties involved in the proceeding.

Recognizing the validity of the appearance doctrine, it remains to be determined whether it applies in this case. Here, despite a call by the ZBA chair for the disclosure of potential conflicts, neither Wilhelm nor McManus responded in public. Whatever private discussion subsequently occurred between these gentlemen and counsel for the Defendant Township and the substance of the advice they were provided is not before this Court. Rather, the ZBA went forward in its consideration of the request for a parking variance and both Wilhelm and McManus participated in the vote without any discussion of a potential conflict of interest or facts which might create the appearance of impropriety. Indeed, the facts associated with the like-kind land exchange were not made public by the Township or members of the Zoning Board of Appeals but were first reported by a local

newspaper. Only then was the issue addressed by the Township Board and, as discussed previously, another law firm was retained to provide the ethics opinion found in the certified record.

In considering the possible application of the appearance doctrine in this case, the Court recognizes that the legislative process at the township level in a rural area brings government closer to people than it does anywhere else in our state. Members of township boards, planning commissions, and zoning boards of appeals are friends, neighbors, and acquaintances and often members of families who have resided in the region for several generations. They serve for little or no compensation, are known to those who elect or appoint them, enjoy good reputations and, clearly, embody the concept of public service.

The juxtaposition of growth and rapid development with the lifestyle selected by those who live in a rural area can create, among these neighbors, hostile confrontations characterized by anger, frustration with the decision-making process, and a feeling of helplessness. In resolving such disputes at the township level, it is critically important that all parties be accorded the respect which they are due as township residents or persons otherwise properly appearing before the Township Board or its commissions and that they receive a fair hearing.

Actual or potential conflicts of interest should be disclosed on the record and resolved in public. Meeting notices should fairly describe the substance of the item on the agenda and the arguments raised in public hearings carefully evaluated and considered in formulating final decisions.

A public hearing is not merely a procedural condition precedent to the issuance of decisions previously made but the time and place to acquire additional substantive information to be used in formulating opinions and policy or in making interpretations and decisions on issues properly before a board or commission. If people do not believe they can obtain a fair hearing among their acquaintances and neighbors in a rural township, it is little wonder that they feel a sense of alienation from state and federal government.

One cannot review the transcripts of the public meetings found within the certified record without experiencing a disquieting sense of procedural unease. A perceived alliance between the Defendant Partnership and Garfield Township was reinforced by the noted common use of counsel by the Township and the predecessor developer, Oleson. Public participation was not encouraged, but only tolerated. Procedural technicalities were asserted, in the context of this emotionally-charged issue, which reduced due process concepts to their lowest common denominator.

It is also alleged that contrary to representations of the Township Board, its general counsel were involved in the selection of the law firm who prepared the independent opinion regarding conflicts of interest. Further, it is alleged that the Defendant developer's attorneys communicated ex parte with the ZBA and provided proposed MEPA findings which were adopted by both the Planning Commission, the Zoning Board of Appeals and the Zoning Administrator. The source of these findings was not revealed at any public hearing nor were opposing parties offered an opportunity to submit their proposed findings as would be the case in any judicial proceeding.

All of these facts were unfolding during the period when the Township Board enacted Amendments 133 A, B and C to delegate the review process for this C-4 Planned Shopping District to the Planning Commission and Zoning Board of Appeals rather than relegislate the district itself or control it through the implementation of planned unit development procedures. Elected officials were removed from direct participation in the project and a public referendum on this specific project was thereby avoided. Similarly, during this period, the ZBA approved and renewed a parking variance in the absence of any evidence of practical difficulties and made a controversial interpretation regarding the ability to locate retention ponds within the exterior 100 feet of the transition strip.

Although stated in the context of a different issue, Plaintiffs' frustration with the Township approval process in this matter may be crystalized in the following quotation:

> "An examination of the entire record in this case will review a zig-zagging pattern of administrative proceedings, patchwork zoning ordinance amendments, holding of key hearings without required notices, violations of the township's own rules of procedure, and abrupt, on-the-spot rule changes, which would do a broken-field runner proud, all designed to "steamroller" approval of the proposed mall." See, Plaintiff Schostak's Opposition to Defendant Township's Motion and Supplemental Motion for Summary Disposition, at page 16.

This Court cannot review the record below--the vigor with which all competing interests advocated their positions, the refusal of the Township Board to take part in the decision to approve the Grand Traverse Mall either by relegislating the C-4 zoning or by applying the planned unit development procedures to it, the social, economic and environmental ramifications of the review and approval process delegated to the Planning Commission and ZBA, and the facts associated with the like-kind land exchange--and reach any conclusion other than the participation of Wilhelm and McManus created an atmosphere which has weakened public confidence and created a doubt in the public mind as to the impartiality of the ZBA's action.

Substituting the names of Wilhelm and McManus and the ZBA for those of Bell and Jones and the Planning Commission, the Court could adopt the legal holding and policy analysis implicit in the following holding of the Washington Supreme Court:

> "It is the foregoing considerations that prompted us to state in Smith v Skagit County, 75 Wash 2d 715, 739; 453 P2d 832, 846 (1969): 'It is axiomatic that, whenever the law requires a hearing of any sort as a condition precedent to the power to proceed, it means a fair hearing, a hearing not only fair in substance, but fair in appearance as well.'
>
> "In the instant case, we find no evidence of, nor do we impute any, dishonest, dishonorable or self-serving motives or conduct on the part of any members of the planning commission in conducting the hearing and entering their findings of fact and

> recommendations. Neither do we hold that the respective individual actions, relationships and expressed views of the chairman of the planning commission, Mr. Bell, or Mr. Jones constitute any breach of public trust which, standing alone, would necessarily and fatally infect the hearing and fact-finding proceeding. Nevertheless, we, as was the trial court, are driven to the conclusion that the unfortunate combination of circumstances heretofore outlined and the cumulative impact thereof inescapably cast an aura of improper influence, partiality, and prejudgment over the proceedings thereby creating and erecting the appearance of unfairness condemned in Smith v Skagit County, supra." (Chrobuck v Snohomish County, 78 Wash 2d 858; 480 P2d 489, at 496 (1971). See also, Fleming v City of Takoma, 81 Wash 2d 292; 502 P2d 327 (1972).

In fashioning a remedy for the appearance of impropriety which has been created in this case, the Court is guided by an opinion which was not cited to it by either party. Murach v Planning and Zoning Comm of the City of New London, 196 Conn 192; 491 A2d 1058 (1985). Murach involved an appeal from a trial court decision upholding a zoning reclassification approved by the city of New London's Planning and Zonning Commission. While it was determined that one member of the commission had been illegally appointed and had made the motion to approve the disputed zoning reclassification, the Connecticut Supreme Court noted that while the appearance of impropriety was sufficient to require disqualification, it did not necessarily invalidate the commission's action. On this point, the Court wrote as follows:

> "..we have often stated that the test for disqualification 'is not whether personal interest does, in fact, conflict, but whether it reasonably might conflict.' [citations ommitted] In such matters, however, we have not always adhered to a per se rule of invalidation when a member of a board or commission had a conflict of interest that should have counseled disqualification in a matter upon which the member should not have participated. [Citation omitted] We note at this juncture that the trial court neither found, nor do the plaintiffs contend, that

Nunes had any personal or financial interest in this particular zoning classification.

"The statutes at issue, which we hold to have precluded Nunes' membership on the city of New London Planning and Zoning Commission, do not in their language provide any guidance as to what remedy a reviewing court should grant in the event of a post-hoc Sec. 8-19 and Sec. 8-4a disqualification. The case law on this point is also sparse. In Board of Commissioners v Thompson, 216 Ga 348, 116 SE2d 737 (1960), a challenge was made to commission's approval, by a six to three margin, of a zoning reclassification request. Five affirmative votes were needed to grant the request, but two of the members voting in favor of the approval were disqualified. One of those disqualified, a judge of the county juvenile court, was prohibited by a statute comparable to Sec. 8-19 from membership on the commission. In holding that the trial court properly held the zoning commission's action void, the court tallied up the remaining valid affirmative votes, four, and noted that "[e]liminating the two illegal votes, the resolution failed to carry by a vote of four to three." Id., 349.

"Significantly, the Court did not hold that the illegal votes per se tainted the entire action. In cases involving municipal councils, generally 'where the required majority exists without the vote of a disqualified member, his presence and vote will not invalidate the result.' 56 Am Jur 2d, Municipal Corporations, Sec. 172, p 225 (1971); See also, Marshall v Ellwood City, 189 Pa 348, 354, 41 A 994 (1899); Annot., 43 ALR 2d 698, 751, Sec. 27[b] (1955)." Murach, supra, at pp 1064, 1065.

The better reasoned decision of courts which apply the appearance doctrine have not adopted a per se rule of invalidation. Here, the Court has concluded that there was no conflict of interest. While the appearance of impropriety had its origins in the like-kind land exchange and while the participation of McManus and Wilhelm in that transaction disqualified them from participation in proceedings involving the Grand Traverse Mall, public confidence was most affected by the

ill-advised decision not to promptly disclose and resolve this potential conflict in public and on the record. Wilhelm and McManus are not shown to have had any role in the selection of the subsequent "independent" counsel, nor have they been shown to be responsible for the unilateral submission of proposed MEPA findings by the developer's counsel. Neither Wilhelm nor McManus had an ongoing business relationship with the Defendant Partnership nor were they responsible for interpretations of township rules and their draconian application at the several hearings.

The ZBA votes throughout this period were unanimous. Defendants have argued that a quorum was present and the Wilhelm and McManus votes were not necessary to the final approval of the mall. Further, there was no immediate temporal nexus between the closing on the triangular land exchange and the project's final approval by the ZBA.

Recognizing that the Plaintiffs bear the burden of demonstrating that the disqualification of Wilhelm or McManus tainted the entire proceeding, the Court has reviewed the transcriptions which are a part of the certified record. The transcripts and the minutes of the relevant meetings which form the basis of contested issues which have not been previously been dismissed by this Court indicate that without the votes of Wilhelm and McManus a quorum was still present and the actions sustained by the unanimous votes of the remaining three ZBA members. Further, the transcripts do not indicate any effort by Wilhelm or McManus to unduly influence the ZBA.

Recognizing a strong presumption of regularity in the proceedings of a public body such as a township zoning board of appeals, the absence of an actual conflict of interest and no indication from the record that the participation of Wilhelm and McManus actually impaired the integrity of the decision-making process, it is this Court's conclusion that their participation did not render the ZBA's decision invalid.

Here, the Court has not disguised its concern for the combative atmosphere which has surrounded the underlying

proceedings. Although it assigns no fault to Wilhelm or McManus, the Court has likewise concluded that their participation in these proceedings was ill-advised and that they should have properly been counselled to disqualify themselves due to the appearance of impropriety. However, a substantive review of the record does not indicate either an actual conflict of interest, efforts to unduly influence the ZBA or other evidence which would rebut the presumption of regularity in the public proceedings of the ZBA. Like the Murach Court, this Court is constrained to find that the disqualification of these commissioners did not taint the entire proceeding and that any other determination would have to be premised on mere speculation or conjecture.

Plaintiffs' motion for summary disposition which is predicated upon conflicts of interest or the appearance of impropriety due to the participation of Wilhelm and McManus in the ZBA proceedings is denied and that claim dismissed as a matter of law. MCR 2.116(C)(10). McManus, however, may not participate in the deliberation or vote to adopt supplemental MEPA findings which will occur following the issuance of proposed findings by the presiding officer who is currently taking testimony in the MEPA remand proceedings. Wilhelm is no longer a member of the ZBA.

CONCLUSION

In summary, the Court finds that the Plaintiffs GNW and Schostak have standing to pursue all those counts found in Plaintiffs' Second Amended Complaint. Plaintiff NMEAC, however, has standing only to pursue those claims which arise under the Michigan Environmental Protection Act.

The Defendant Township's Motion to Dismiss the Second Amended Complaint, which is predicated on the doctrine of vested rights, is denied.

The environmental claims have been bifurcated from the consideration of zoning questions and the Court contemplates a de novo review of the remand record to resolve those remaining issues found in Counts IV and X. The Defendants' constitutional

challenge to the Michigan Environmental Protection Act has been denied.

The Court will consider the administrative appeals from the Planning Commission action of June 6, 1990, (Count VII) and that based upon the Zoning Board of Appeals' Action of July 10, 1990, (Count IX) following the conclusion of the MEPA remand process.

The Court likewise will review the certified record to resolve those aspects of Count XIII which were not resolved by the Court's decision herein.

The Court has otherwise dismissed Counts I, II, III, V, VI, VIII, XI and XII. The Court has also denied Plaintiffs' Motions for Summary Disposition predicated on Planned Unit Development arguments, the inappropriate granting of a parking variance, and the location of the retention pond. These issues have been resolved and dismissed as a matter of law. As noted in the Decision and Order, the issue pertaining to the location of the service drive remains open.

The Court Administrator will notify the parties of a scheduling conference upon the completion of the MEPA remand proceedings.

IT IS SO ORDERED.

HON. PHILIP E. ROGERS, Jr.
Circuit Judge

DATED: 7/16/91

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LEELANAU

ELMWOOD CITIZENS FOR SENSIBLE GROWTH, INC., a Michigan non-profit corporation, and STEVE VAN ZOEREN,

Plaintiffs,

v

File No. 01-5451-CE
HON. PHILIP E. RODGERS, JR.

CHARTER TOWNSHIP OF ELMWOOD, a Michigan township, ELMWOOD TOWNSHIP BOARD OF TRUSTEES, ELMWOOD TOWNSHIP PLANNING COMMISSION, and JOHN GALLAGHER, as Planning Commission Chairman and as Board of Trustees Member, in his official capacities,

Defendants.
/

Christopher M. Bzdok (P53094)
Scott W. Howard (P52028)
Attorneys for Plaintiffs

Michael A. Kronk (P16259)
Attorney for Defendants

DECISION AND ORDER REGARDING
PLAINTIFFS' MOTION FOR STAY ON APPEAL OR,
ALTERNATIVELY, PRELIMINARY INJUNCTION AND
DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

Plaintiffs appeal the Defendants' approval of a conditional use permit and site condominium for a project known as Lincoln Meadows. The Stewart and Armstrong families (hereinafter collectively referred to as the "Developer") own acreage in Elmwood Township, Leelanau County, Michigan. In June of 1999, the Developer met informally with the Township Planner, the Zoning Administrator, and the Planning Commission Chairman to discuss what types of uses for their land were permitted by the Township Zoning Ordinance (hereinafter the "Ordinance") and whether a

proposed project would fit within the general allowable classifications. The Developer ultimately submitted a preliminary site plan for review by the Elmwood Township Planning Commission. The site plan was approved in February of 2000. The Township Zoning Ordinance , however, required that the proposed development also obtain a conditional use permit. A public hearing was held on March 21, 2000 and, on April 18, 2000, the conditional use permit for the proposed project was denied.

The Developer submitted a revised application to the Township Planning Commission on or about June 6, 2000. A public hearing was held on June 27, 2000. On July 6, 2000, at a special meeting, the Planning Commission found by a vote of 4 to 3 that the "proposed application meets the general criteria of Section 13.6(1), but conditions must be established to satisfy Section 13.6(2)." On August 1, 2000, the Township Planning Commission made a bald determination that the project met the requirements of Section 13.6(2) for clustered housing. On August 15, 2000, the Township Planning Commission formally authorized the conditional use permit.

The application was then presented to the Township Board for final approval. It was scheduled for the first Board meeting in January of 2001. The Township Board conducted an additional public hearing on the application and voted 5 to 1 to approve it.

The Plaintiff non-profit corporation was incorporated on January 25, 2001. On January 29, 2001, it filed the Complaint herein challenging the decision of Elmwood Township to approve the application for the Lincoln Meadows development. On March 13, 2001, it filed an Amended Complaint and added as a party Plaintiff, Steve Van Zoeren, an individual who owns land adjacent to the Lincoln Meadows project.

The Plaintiffs filed a motion for stay on appeal or, alternatively, preliminary injunction. The Plaintiffs request that the Court issue a stay and an injunction to prevent the Defendants' approval of the conditional use permit and site condominium from taking effect until this matter can be resolved. The Defendants filed a motion for summary disposition. They claim that they are entitled to judgment as a matter of law for the following reasons: (1) the Court lacks subject matter jurisdiction because the Plaintiff Elmwood Citizens For Sensible Growth has failed to show "special damages" and, thus, does not have standing to pursue this matter, MCR 2.116(C)(4); (2) the Plaintiff Elmwood Citizens For Sensible Growth lacks the legal capacity to sue, MCR

2.116(C)(5); (3) as to the Conflict of Interest allegations contained in Count II, the Plaintiffs' action is barred by the doctrine of laches, MCR 2.116(C)(7); and (4) as to the Conflict of Interest allegations contained in Count II, the Plaintiffs have failed to state a claim upon which relief can be granted, MCR 2.116(C)(8). The Plaintiffs filed a response to the Defendants' motion. The Court heard the arguments of counsel on May 14, 2001 and took the matter under advisement. The Court now issues this written decision and order.

STANDARD OF REVIEW

MCR 2.116(C)(4) and (5)

When reviewing a motion for summary disposition for lack of subject matter jurisdiction under MCR 2.116(C)(4), the Court must determine whether the pleadings demonstrate that the defendant is entitled to judgment as a matter of law or whether the affidavits and other proofs show there is no genuine issue of material fact. *Steele v Dep't of Corrections*, 215 Mich App 710, 712; 546 NW2d 725 (1996), lv den 454 Mich 853, 558 NW2d 726. Whether subject-matter jurisdiction exists is a question of law. *Eaton Co Bd of Co Rd Comm'rs v Schultz*, 205 Mich App 371, 375; 521 NW2d 847 (1994). In reviewing a motion for summary disposition pursuant MCR 2.116(C)(5), the Court must consider the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties. *Dep't of Social Services v Baayoun*, 204 Mich App 170, 173; 514 NW2d 522 (1994). The Court must examine the entire record to determine whether the defendant is entitled to judgment as a matter of law. *Id.*

MCR 2.116(C)(7)

MCR 2.116(C)(7) sets forth the following grounds for summary disposition:

> The claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.

In *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (2000), the Court of Appeals said:

> When a motion for summary disposition is premised on MCR 2.116(C)(7), the nonmovant's well-pleaded allegations must be accepted as true and construed in the nonmovant's favor and the motion should not be granted unless no factual development could provide a basis for recovery. *Stabley, supra* at 365; 579 NW2d 374; *Dewey v Tabor*, 226 Mich App 189, 192; 572 NW2d 715 (1997). '[T]he court must consider not only the pleadings, but also any affidavits, depositions, admissions, or documentary evidence that has been filed or submitted by the parties.' *Horace v City of Pontiac*, 456 Mich. 744, 749; 575 NW2d 762 (1998). If no facts are in dispute, whether the claim is statutorily barred is a question of law. *Dewey, supra* at 192; 572 NW2d 715.

MCR 2.116(C)(8)

A motion for summary disposition pursuant to MCR 2.116(C)(8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone. Only the legal basis of the complaint is examined. The factual allegations of the complaint are accepted as true, along with any inferences which may fairly be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. *Mills v White Castle System, Inc,* 167 Mich App 202, 205; 421 NW2d 631 (1988).

STANDING AND CAPACITY TO SUE

The Defendants challenge the Plaintiff non-profit corporation's standing to assert those claims set forth in its Verified Complaint. The Plaintiffs respond that (1) it has representational standing; and (2) an individual adjacent landowner has been added as a party Plaintiff.

The Plaintiffs correctly contend that "representational standing" has been recognized in Michigan. In *Trout Unlimited v City of White Cloud*, 195 Mich App 343, 348; 489 NW2d 188 (1992), the Court of Appeals said:

> To have standing, a plaintiff must demonstrate a legally protected interest that is in jeopardy of being adversely affected. *Health Central v Ins Comm'r*, 152 Mich App 336, 347-348; 393 NW2d 625 (1986). To have standing, a party must allege a sufficient personal stake in the outcome of the controversy to ensure that the dispute sought to be adjudicated will be presented in an adversarial context that is capable of judicial resolution. *Karrip v Cannon Twp*, 115 Mich App 726, 733; 321 NW2d 690 (1982); *Baker v Carr*, 369 US 186, 204; 82 S Ct 691, 703, 7 L Ed 2d 663 (1962); Sierra Club v Morton, 405 US 727, 731-732, 92 S Ct 1361, 1364-1365; 31

> L Ed 2d 636 (1972); *Lujan v Defenders of Wildlife*, 504 US 555; 112 S Ct 2130; 119 L Ed 2d 351 (1992). Generally, a plaintiff shows a personal stake in a lawsuit by demonstrating that he has been injured or represents someone who has been injured. *Kaminskas v Detroit*, 68 Mich App 499; 243 NW2d 25 (1976). **A nonprofit corporation has standing to advocate interests of its members where the members themselves have a sufficient stake or have sufficient adverse and real interests in the matter being litigated.** *Karrip, supra; White Lake Improvement Ass'n v City of Whitehall*, 22 Mich App 262; 177 NW2d 473 (1970). [Emphasis added.]

Similarly, in *Cody Park Ass'n v Royal Oak School Dist*, 116 Mich App 103; 321 NW2d 855 (1982) the Court of Appeals held that the Cody Park Association, which was an unincorporated voluntary association[1] consisting of only a couple of property owners or users, had standing to seek a permanent injunction to restrain the school district from making changes in property without seeking and securing the permission of the city under its zoning ordinances. In reaching this conclusion, the Court reasoned that "[a] defendant is not harmed provided the final judgment is a full, final and conclusive adjudication of the rights in controversy that may be pleaded in bar to any further suit instituted by any other party."

Additionally, Section 23A of the Township Rural Zoning Act confers standing on a person with an "interest affected" by the zoning ordinance. MCL 125.293a(1); MSA 5.2963(23a); *Brown v East Lansing Zoning Board of Appeals*, 109 Mich App 688, 699; 311 NW2d 828 (1981). This standard applies to this appeal. The affidavits of Steven Van Zoeren, Paul Blystone, Anthony Winowiecki, Robert and Margie Boone, and Pei-Shan Van Zoeren, all members of the Plaintiff corporation, clearly establish that the Plaintiff corporation represents individuals who have interests affected by the decisions of the Township that are at issue in this case.

For these reasons and because Steve Van Zoeren, an individual adjacent land owner, has been added as a party Plaintiff, the Defendants' motion for summary disposition brought pursuant to MCR 2.116(C)(4) and (5) is denied.

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[1]The fact that the Plaintiff corporation was not officially incorporated until after most of the decisions complained of were made is immaterial.

CONFLICT OF INTEREST

The Defendants contend that they are entitled to judgment as a matter of law on Count II of the Complaint wherein the Plaintiffs allege a conflict of interest on the part of Defendant John Gallagher ("Gallagher").[2] At all times relevant hereto, Gallagher was a member and the Chairperson of the Township Planning Commission and a member of the Township Board of Trustees. While the Developer's site plan was being reviewed by the Planning Commission, Gallagher purchased a 20-acre parcel of property adjacent to the Lincoln Meadows development from the Developer for substantially less than the list price.

The Defendants' position is that (1) the Plaintiffs' claim is barred by the doctrine of laches and (2) Gallagher was not disqualified because, after he disclosed his acquisition of the adjoining parcel, the Planning Commission and Township Board voted that he was not precluded from acting in his official capacity in this matter.

Laches

The Court of Appeals recently described the doctrine of laches in *City of Troy v Papadelis*, 226 Mich App 90; 572 NW2d 246 (1998), saying:

> The application of the doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce the claim against defendants. *Sedger v Kinnco, Inc*, 177 Mich App 69, 73; 441 NW2d 5 (1988). In determining whether a party is guilty of laches, each case must be determined on its own particular facts. *Id.* The defendant must prove a lack of due diligence on the part of the plaintiff resulting in some prejudice to the defendant. *Badon v General Motors Corp*, 188 Mich App 430, 436; 470 NW2d 436 (1991).
>
> . . . [A] lack of due diligence alone is not sufficient. The defense of laches does not apply unless the delay of one party has resulted in prejudice to the other party. *Tomczik v State Tenure Comm*, 175 Mich App 495; 438 NW2d 642 (1989). 'It is the effect, rather than the fact, of the passage of time that may trigger the defense of laches.' *Great Lakes Gas Transmission Co v MacDonald*, 193 Mich App 571, 578; 485 NW2d 129 (1992).

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[2]The Plaintiffs' original Verified Complaint included allegations, based on information and belief, of conflicts of interest among at least four members of the Township Board based on campaign contributions from the Developer. Based on materials supplied by the Township, the Plaintiffs have withdrawn those allegations.

In the instant case, the Defendants have not demonstrated any prejudice that has resulted from the Plaintiffs' delay in raising the issue of Gallagher's conflict of interest. Although the Defendants continued the governmental process and ultimately approved the Developer's plans, there is no indication in the record that this action was taken in reliance on the Plaintiffs' failure to initiate suit earlier. Therefore, the defense of laches does not apply.

Furthermore, this matter was not ripe for judicial review until the Township Board, with its final review and decision-making authority on such projects, approved the project in January of 2001. Section 23 a of the Township Rural Zoning Act, MCL125.293a; MSA 5.6293(23a) provides:

> The decision of the board of appeals rendered pursuant to section 23 shall be final. However, a person having an interest affected by the zoning ordinance may appeal to the circuit court. Upon appeal the circuit court shall review the record and decision of the board of appeals to insure that the decision:
>
> (a) Complies with the constitution and laws of the state.
>
> (b) Is based upon proper procedure.
>
> (c) Is supported by competent, material, and substantial evidence on the record.
>
> (d) Represents the reasonable exercise of discretion granted by law to the board of appeals.
>
> (2) If the court finds the record of the board of appeals inadequate to make the review required by this section, or that there is additional evidence which is material and with good reason was not presented to the board of appeals, the court shall order further proceedings before the board of appeals on conditions which the court considers proper. The board of appeals may modify its findings and decision as a result of the new proceedings, or may affirm its original decision. The supplementary record and decision shall be filed with the court.
>
> (3) As a result of the review required by this section, the court may affirm, reverse, or modify the decision of the board of appeals.

T.P. Planning Comm. applied Zoning Ordinance and T.P. Board approved.

The Plaintiffs' Complaint was filed within 21 days of the Board's final decision. This appeal is timely. *Electro-Tech, Inc v HF Campbell Co*, 433 Mich 57; 445 NW2d 61 (1989).

The Defendants' motion for summary disposition on the conflict of interest issue on the basis that it is precluded by the doctrine of laches is denied.

Disclosure

The Defendants claim that they are entitled to judgment as a matter of law on the issue of Gallagher's conflict of interest because the Plaintiffs have failed to state a claim upon which relief may be granted. MCR 2.116(C)(8). The Defendants rely upon the undisputed fact that Gallagher "disclosed his acquisition of the adjoining parcel both during the course of the deliberations of the Planning Commission as well as the deliberations of the Township Board" and "[i]n both instances, the applicable bodies (the Planning Commission and the Township Board) voted that Trustee Gallagher did not have a "conflict of interest" that would preclude his acting on the issue before either the Planning Commission or the Board of Trustees."

The Plaintiffs, on the other hand, contend that disclosure of the acquisition alone is not enough. The Plaintiffs contend that Gallagher failed to disclose that he purchased the property adjacent to the project site from the Developer while the Developer's zoning application was being reviewed and decided by the Planning Commission and Township Board and "he appears to have obtained the property for tens of thousands of dollars below the property's value." According to the documentary evidence submitted by the Plaintiffs, Gallagher (along with others) entered into a purchase agreement with the Developer six months after the Developer filed its site plan application. The parties closed on the sale in November of 1999. Gallagher paid $150,000 for the parcel that was originally listed for $225,000. After the sale, the Township Assessor estimated the value of the parcel to be $218,000 and it has been appraised at $180,000.

At the March 21, 2000 public hearing on the project, Gallagher disclosed that he had purchased the 20-acre parcel from the Developer, but he did not disclose the purchase price, appraisal value or the date of the transaction. The remaining Planning Commission members voted 4 to 2 against recusing Gallagher.[3] On January 8, 2001, the Township Board held its public hearing on the project. At the beginning of the hearing, Gallagher again disclosed that he had purchased a parcel of land from the Developer and he asked for a vote to determine whether the Board would recuse him. Again he did not disclose the purchase price, appraisal value or the date of the transaction. The Board voted 6 to 1 not to recuse him.

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[3]No authority has been cited to the Court for the proposition that a governmental body may itself vote to excuse a conflict of interest and endorse participation by the subject official.

While the parties dispute whether or not Gallagher has a conflict of interest, they agree that Michigan law has long recognized that a conflict of interest deprives the parties of their due process right to a fair and impartial administrative hearing. *Crampton v MI Dep't of State*, 395 Mich 347; 235 NW2d 352, 354 (1975) and *Barkey v Nick*, 11 Mich App 381; 161 NW2d 445, 447 (1968). In *Crampton, supra,* the court delineated those factors which suggest the appearance of a conflict of interest sufficient to overturn an administrative decision. The list describes as inherently impermissible those situations in which a member of the administrative body:

(1) Has a pecuniary interest in the outcome;

(2) Has been the target of personal abuse or criticism from the party before him;

(3) Is enmeshed in (other) matters involving petitioner;

(4) Might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decision maker. *Id* at 354.

Here, Gallagher acquired an interest in a 20-acre parcel of land adjacent to the subject development. He purchased his interest from the Developer during the time in which the Developer's site plan was pending for approval before the Planning Commission of which he was both a member and Chairperson. In his official capacity on both the Planning Commission and the Township Board, Gallagher was required to discuss and vote on whether to approve the Developer's site plan. Further factual development is needed in order to determine whether Gallagher actually had a conflict of interest, i.e., whether he received a gift (purchase at a price significantly less than fair market value) from the Developer or engaged in a business transaction in which he may profit from his official position or authority or benefit financially from confidential information which he has obtained or may obtain by reason of his position or authority.

In this Court's opinion, however, further pursuit of this issue is unnecessary. Based on the record before this Court, Gallagher's involvement with the Developer creates at least an appearance of impropriety. While Michigan law is not clear on this point, it has been long recognized in other states that an appearance of impropriety is every bit as damaging as a conflict of interest. Both destroy the faith and trust that is integral to the operation of government in a representative democracy. As our government becomes increasingly more remote from its people, it seems

important to strengthen the ethical requirements for those who participate in it. The people's confidence in government cannot long be sustained if we turn a blind eye to behavior that creates an impermissible appearance of impropriety.

The public policy served by the enforcement of the so-called "appearance" doctrine is an important one:

> The evil lies not in influence improperly exercised but rather in the creation of a situation tending to weaken public confidence and to undermine the sense of security of individual rights which the property owner must feel assured will always exist in the exercise of zoning power. *Mills v own Plan & Zoning Comm of the Town of Windsor*, 144 Conn 493; 134 A2d 250 (1957).

Courts across our country have repeatedly questioned the participation by a board or commission member in a proceeding, including zoning proceedings, where such participation creates an appearance of impropriety, partiality, bias, or lack of fairness. In *Abrahamson v Wendell*, 72 Mich App 80; 249 NW2d 403 (1976), on reh 76 Mich App 278; 256 NW2d 613 (1977), the Court of Appeals ruled, as a matter of law, that the appearance of a township supervisor before the zoning board of appeals, where the supervisor had appointment power over the board, presented the potential for duress and rendered the action of the board void. The Court emphasized the need to create confidence in public officials by avoiding even the appearance of impropriety: "[i]t is hoped that this conclusion will help bolster the public confidence in the decision makers who must represent their interests and who must seek to avoid even the appearance of impropriety." 72 Mich App at 83.

Similarly, in *Barkey v Nick*, 11 Mich App 381; 161 NW2d 445 (1968), the action of a zoning board of appeals was also invalidated due to the appearance of partiality. There, the Court held that a ruling of the zoning board of appeals was void due to the fact that a city commissioner who had zoning board of appeals appointment power represented his brother before the board. The appearance of the commissioner before the board was deemed improper because it created an appearance of partiality: "[i]t creates an abuse of trust imposed by the assumption of public office and creates a personal pecuniary interest conflicting with the fiduciary duty owed all members of the public. Further, it creates a doubt in the public mind as to the impartiality of the board's action." 11 Mich App at 385; see also, OAG, 1979-1980, No. 5774, p 972 (Sept. 8, 1980). A member of a township

board must avoid even the appearance of impropriety; any conflict of interest between personal profit and public duty must be scrupulously avoided.

The law of other jurisdictions is similar to that of Michigan, and there are limitations on the application of the doctrine. Mere contact with a party or the existence of a remote fact which might suggest the impropriety was held not to be sufficient to call the doctrine into play in *King County Water District v King Count v Boundary Review Board*, 87 Wash 2d 536; 554 P2d 1060 (1976). The Oregon Supreme Court declined to follow the doctrine in *1000 Friends of Oregon v Wasco County*, 304 Or 76; 742 P2d 39 (1987), cert den, 486 US 1007 (1988). There, a member of the board of county commissioners had voted to call an election on a proposal to incorporate a city. His vote was challenged on the grounds that he had sold cattle to the petitioners before the vote at generally unfavorable terms. The commissioner in question had informed his fellow commissioners of this sale but not members of the public. The Oregon Court of Appeals invalidated the vote because the cattle sale created an appearance of impartiality. The Oregon Supreme Court reversed this decision, stating as follows:

> . . . A reviewing body may find it less painful to order reconsideration of an official's action for insufficient respect for appearances than to determine whether the official in fact acted under the influence of bias or self-interest. But the two standards serve different interests. Actual impartiality protects the substantive quality of the official action as well as the parties' interest in its fairness. Invalidation for appearance alone, as the *Swift* court said, aims to preserve public confidence and it does so regardless whether the decision in fact was both correct and fair. The price of such invalidation is delay of what, but for appearances, is a proper application of public policy, at potentially heavy cost to an innocently successful proponent as well as to the agency. 742 P2d at p 44.

Other limitations on the doctrine do not allow the alleged appearance of impropriety to be speculative. A zoning commissioner was not disqualified merely because he was a member of an association opposed to an applicant's request for a special permit, *Holt-Lock, Inc v Zoning and Planning Commission of the Town of Granby*, 161 Conn 182, 286 A2d 299 (1971), or because he had once sold equipment to the applicant for a variance ten years earlier. *Fail v LaPorte County Board of Zoning Appeals*, 171 Ind App 192, 355 NE2d 455 (1976). Nor was the decision invalid simply because the law firm representing an applicant had in the past represented a corporation in which a commissioner owned a substantial amount of stock. *Anderson v Zoning Comm of the City*

of Norwalk, 157 Conn 285, 253 A2d 16 (1968). Finally, in *Dana-Robin Corp v Common Council of the City of Danbury*, 166 Conn 207, 348 A2d 560 (1974), a planning commission member was held not disqualified upon the grounds of conflict of interest or an appearance of impropriety because he, his mother and sister were the sole stockholders in real estate corporations which owned properties in the city unrelated to the properties involved in the proceeding.

Recognizing the validity of the appearance doctrine, it applies in this case for several reasons. Gallagher disclosed his acquisition of a parcel of property from the Developer. He did not, however, disclose the date of the transaction which occurred shortly before the Planning Commission's first consideration of the Developer's site plan. Further, Gallagher did not disclose the purchase price, listing price or Township assessor's appraised value. Based on the limited information that was disclosed, the Planning Commission and subsequently the Township Board both voted to allow Gallagher to participate in the decisions regarding the development. Whether or not a conflict of interest was created, full disclosure of these facts would have created an appearance of impropriety that precluded Gallagher's participation and which could not be rectified by a vote of his fellow Board members.

In offering its opinion on this matter, the Court is well aware that members of township boards, planning commissions, and zoning boards of appeals are friends, neighbors, and acquaintances and often members of families who have resided in the region for several generations. They serve for little or no compensation, are known to those who elect or appoint them, enjoy good reputations and, clearly, embody the concept of public service. Yet, the juxtaposition of growth and rapid development with the lifestyle selected by those who live in a rural area can create, among these neighbors, confrontations characterized by anger, frustration with the decision-making process, and a feeling of helplessness. In resolving such disputes at the township level, it is critically important that issues are resolved in a fair hearing untainted by the appearance of impropriety.[4]

Here, Gallagher was the Chairperson of the Planning Commission and a Trustee on the Township Board. Gallagher was vocal in his support for the project. There was perceived alliance

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[4]This Court's views on this issue are well known and were first described and publicly reported on July 16, 1991 in the Decision and Order entered in *Garfield Neighborhood Watch et al v Charter Twp of Garfield*, Grand Traverse County Circuit Court File No. 90-8075-CE. The Court has taken the liberty of "plagiarizing" much of its own earlier decision in this opinion.

requested 1/9/19

between Gallagher and the Developer. Gallagher acknowledged throughout the proceedings that the development did not comply with the clustered housing provisions of the Ordinance and took the position that he did not believe it should have to meet those requirements. After the approval was granted, however, on the advice of counsel, the Board made a bald official finding that the development satisfied the requirements of clustered housing.

This Court cannot review the record below and reach any conclusion other than that Gallagher's participation created an atmosphere which has weakened public confidence and created a doubt in the public mind as to the impartiality of the Planning Commission's and the Township Board's actions. Gallagher's participation is analogous to that of Bell and Jones discussed below:

> It is axiomatic that, whenever the law requires a hearing of any sort as a condition precedent to the power to proceed, it means a fair hearing, a hearing not only fair in substance, but fair in appearance as well.
>
> In the instant case, we find no evidence of, nor do we impute any, dishonest, dishonorable or self-serving motives or conduct on the part of any members of the planning commission in conducting the hearing and entering their findings of fact and recommendations. Neither do we hold that the respective individual actions, relationships and expressed views of the chairman of the planning commission, Mr. Bell, or Mr. Jones constitute any breach of public trust which, standing alone, would necessarily and fatally infect the hearing and fact-finding proceeding. Nevertheless, we, as was the trial court, are driven to the conclusion that the unfortunate combination of circumstances heretofore outlined and the cumulative impact thereof inescapably cast an aura of improper influence, partiality, and prejudgment over the proceedings thereby creating and erecting the appearance of unfairness condemned in *Smith v Skagit County* 75 Wash 2d 715, 739; 453 P2d 832, 846 (1969); *Chrobuck v Snohomish County*, 78 Wash 2d 858; 480 P2d 489, at 496 (1971). See also, *Fleming v City of Takoma,* 81 Wash 2d 292: 502 P2d 327 (1972).

In fashioning a remedy for the appearance of impropriety which has been created in this case, the Court is guided by *Murach v Planning and Zoning Comm of the City of New London*, 196 Conn 192; 491 A2d 1058 (1985). *Murach* involved an appeal from a trial court decision upholding a zoning reclassification approved by the city of New London's Planning and Zoning Commission. While it was determined that one member of the commission had been illegally appointed and had made the motion to approve the disputed zoning reclassification, the Connecticut Supreme Court

noted that while the appearance of impropriety was sufficient to require disqualification, it did not necessarily invalidate the commission's action. On this point, the Court wrote as follows:

> . . . we have often stated that the test for disqualification 'is not whether personal interest does, in fact, conflict, but whether it reasonably might conflict.' [Citations omitted.] In such matters, however, we have not always adhered to a per se rule of invalidation when a member of a board or commission had a conflict of interest that should have counseled disqualification in a matter upon which the member should not have participated. [Citation omitted] We note at this juncture that the trial court neither found nor do the plaintiffs contend, that Nunes had any personal or financial interest in this particular zoning classification.
>
> The statutes at issue, which we hold to have precluded Nunes' membership on the city of New London Planning and Zoning Commission, do not in their language provide any guidance as to what remedy a reviewing court should grant in the event of a post-hoc Sec. 8-19 and Sec.8-4a disqualification. The case law on this point is also sparse. In *Board of Comm'r v Thompson*, 216 Ga 348; 116 SE2d 737 (1960), a challenge was made to the commission's approval, by a six to three margin, of a zoning reclassification request. Five affirmative votes were needed to grant the request, but two of the members voting in favor of the approval were disqualified. One of those disqualified, a judge of the county juvenile court, was prohibited by a statute comparable to Sec. 8-19 from membership on the commission. In holding that the trial court properly held the zoning commission's action void, the court tallied up the remaining valid affirmative votes, four, and noted that "[e]liminating the two illegal votes, the resolution failed to carry by a vote of four to three." *Id*, 349.
>
> Significantly, the Court did not hold that the illegal votes per se tainted the entire action. In cases involving municipal councils, generally 'where the required majority exists without the vote of a disqualified member, his presence and vote will not invalidate the result.' 56 Am Jur 2d, Municipal Corporations, Sec. 172, p 225 (1971); See also, *Marshall v Ellwood City*, 189 Pa 348, 354; 41 A 994 (1899); Annot., 43ALR 2d 698, 751, Sec. 27[b] (1955).

Murach, supra, at 1064-1065.

The better-reasoned decision of courts which apply the appearance doctrine have not adopted a per se rule of invalidation. Here, the Court has not decided whether there was a conflict of interest as more factual development is needed to make that determination. The Court has found, however, that there was an appearance of impropriety. While the appearance of impropriety had its origins in the timing and price paid when Gallagher acquired property from the Developer and while the participation of Gallagher in that real estate transaction disqualified him from participation in

proceedings involving the Lincoln Meadows development, public confidence was probably most affected by the selective disclosure of information about the purchase, his vocal support of the project, and the fact that he cast the deciding vote for approval. There is no evidence that Gallagher has any ongoing business arrangement with the Developer, but he does continue to own the property whose value will invariably be affected by the Lincoln Meadows development.

This case is particularly troubling because the Planning Commission's vote was not unanimous. Without Gallagher's support, the conditional use permit would not have been approved. According to the minutes of the meetings of the Planning Commission and Township Board, Gallagher voted to approve the development at every stage in the process. He voted for the project in the 4 to 3 vote of the Planning Commission to initially deny the request and he cast the deciding vote in favor of the project in the 4 to 3 vote of approval in the Planning Commission. He also served a Chairperson of the Planning Commission's meetings.

Recognizing that the Plaintiffs bear the burden of demonstrating that the disqualification of Gallagher tainted the entire proceeding, the Court has reviewed the record. The minutes of the relevant Planning Commission meetings indicate that without Gallagher's vote a quorum was still present and the vote on the conditional use permit would have been tied.

Notwithstanding the strong presumption of regularity in the proceedings of a public body such as a township planning commission or township board, the clear indication from the record is that Gallagher's participation actually impaired the integrity of the decision-making process. It is then, this Court's conclusion that his participation rendered the Planning Commission's and the Township Board's decisions invalid.

Gallagher should have disqualified himself due to an appearance of impropriety. This ethical issue cannot be resolved by a Township Board's vote to proceed; which vote, in fairness to the Board, was made with incomplete information. This Court is constrained to find that the disqualification of Gallagher tainted the entire proceeding.

The Defendants' motion for summary disposition on this issue is denied. The Plaintiffs are entitled to summary disposition on this issue. MCR 2.116(I)(2). The decisions of the Planning Commission and the Township Board are invalid and of no force and effect. The site plan approval and conditional use permit are void. The case is remanded to the township for further action

consistent with this opinion. In its reconsideration of the Developer's proposal, the Township must specifically discuss the relationship of the proposed development to the clustered housing provisions of the Zoning Ordinance. Its findings must be supported factually and with reference to the relevant Zoning Ordinance provisions.

CONCLUSION

In summary, the Court finds that the Plaintiff corporation has standing and the legal capacity to sue. The Defendants' motion for summary disposition on these issues is denied. The Court further finds that the doctrine of laches does not bar the Plaintiffs' conflict of interest claim. The Defendants' motion for summary disposition on this issue is also denied.

Finally, the Court cannot find that Gallagher had an actual conflict of interest without further factual development. The Court holds, however, that this point need not be further explored because of the appearance of impropriety created by Gallagher's purchase of an adjacent parcel of land from the Developer during the time period that the Developer was seeking site plan approval. The appearance of impropriety disqualified Gallagher from participating in the site plan review proceedings and rebuts the presumption of regularity in those proceedings. The Planning Commission and Township Board decisions in which Gallagher participated are invalid and of no force and effect. The Defendants are enjoined from issuing permits to the Developer on this record. The Developer's proposal is remanded to the Township. This Decision and Order resolves all issues raised and closes the case.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 6/06/01

Why have a Code of Ethics?

1. Aspirational
2. Deterrence
3. Enforcement

Current Parameters

1. Code of Ethics Policy

The proper operation of democratic government requires that county employees and officials be independent, impartial and responsible to the people. County employees and officials must avoid all situations where prejudice, bias, or opportunity for personal gain could influence their decisions. Even the appearance of improper conduct should be avoided.

Current Parameters

1. Code of Ethics Policy

2. Robert's Rules of Order
   - "No member should vote on a question in which he has a direct personal or pecuniary interest not common to other members of the organization." §45 ll. 22-25.

Current Parameters

1. Code of Ethics Policy
2. Robert's Rules of Order
3. Existing State Law

Existing State Law

1. MCL 15.322 Public Servants Contracting with the Entities they Serve
2. MCL 15.181 Incompatibility of Public Offices
3. Criminal Laws
4. In contrast to…

Current Parameters

1. Code of Ethics Policy
2. Robert's Rules of Order
3. Existing State Law
4. Local Case Law

Garfield Neighborhood Watch v. Garfield Twp. (1990)

1. Facts
2. Legal Issue

3. Appearance of Impropriety doctrine
   - Contours

4. Outcome

Elmwood Citizens for Sensible Growth v. Elmwood Twp. (2001)

1. Facts
2. Outcome

Limitations of the Current Parameters

1. Code of Ethics
   - Applicability, Definition, Procedure
2. Robert's Rules of Order
   - "No member can be compelled to refrain from voting in such circumstances." §45 ll. 30-31.
3. Existing State Law
4. Local Case Law

Options

1. Nothing

2. Revised Code of Ethics Policy

3. Ethics Ordinance

Revised Code of Ethics Policy

"Establish rules consistent with the open meetings act [] for the manner of proceeding before the board."

MCL § 46.11(p)

Revised Code of Ethics Policy

1. Limitations
   - Cannot remove from office. Art. 5, §10.
   - Must supply "fair and just treatment." Art. 1, § 17.

2. Examples

Revised Code of Ethics Policy

Antrim

- Prohibitions
- Disclose COI if: "reason to believe" a "potential" COI exists
- May still vote if: explanation of belief of impartiality
- County Chair can order recusal
- Enforcement

Emmet

- Prohibitions
- "Full disclosure" is there is an "appearance of a" COI
- "Shall not act" without this disclosure, but still can vote once disclosure made
- Enforcement

Revised Code of Ethics Policy

1. Limitations
2. Examples
3. Options

Ethics Ordinance

"By majority vote of the members of the county board of commissioners elected and serving, pass ordinances that relate to county affairs and do not contravene the general laws of this state"

MCL § 46.11(j)

Ethics Ordinance

1. Limitations
2. Example

AG Model Ethics Ordinance

- Prohibitions
- Gatekeeping options
- Sanctions

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5. State law does provide some limitations.