

“Have You Asked Your City or Village Attorney”?



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Presentation Outline



- ❑ Ethical Concepts
- ❑ Michigan Sources of Ethical Standards
- ❑ A quote of Justice Potter Stewart
- ❑ Applications of the Principles

- ❑ A cautionary note: this presentation is intended to cover the concept of ethics and basic provisions of applicable Michigan laws. There is no substitute for consulting with your municipal attorney, who can interpret the law in the context of your community's particular circumstances and the most recent case law.
- ❑ Attribution: Bill Beach's ethics presentations, materials from Mike McGee, and Sue Jeffers' *Michigan Local Government Ethics – A Research Guide for Municipal Attorneys* were a foundation for this presentation, as well as materials of Scott Paine, PhD, of Florida League of Cities University



Ethics Considerations



The purpose of ethics:

The central purpose of ethics laws is to **protect the public trust** in the public institutions and the public officials who serve in them by forbidding certain actions ...





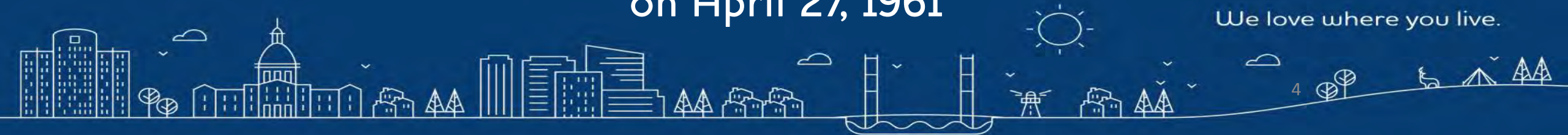
Ethics Considerations

Yet, regarding Rules and Laws...

“No web of statute or regulation, however intricately conceived, can hope to deal with the myriad of possible challenges to a (person’s) integrity or his devotion to the public interest.”

John F. Kennedy, Message to Congress
on April 27, 1961

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Ethical Principles

Guides to deciding what to do, given our values and the facts on the ground

Methods of applying our values to the facts

Scott Paine, PhD





The Values of a Public Servant

Not only what we ourselves value personally

Values associated with our role

- The values of our constituents
- Institutional values
- Public goods for which we have special responsibility

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Ethics Considerations



Working Through Ethical Dilemmas

Stop and think

Clarify your goals

Determine the facts pro and con

Develop options

Consider consequences

Choose what best reflects your responsibility to serve the public as a whole

Choose the decision that will best promote public confidence in your leadership

Make sure your choice upholds your ethical values



Ethics Considerations



Institute for Local Government sets 4 tenets of ethical conduct for public office to reduce ethical and legal dilemmas from arising:

- ❖ Do not financially benefit from your position
- ❖ Do not receive special benefits by virtue of your position
- ❖ Do not be secretive in decision-making
- ❖ Do not let favoritism or bias cloud decision-making



Ethics Considerations



- As Jack Patriarche said to MML staff...
“If you always tell the truth...
you never have to worry about remembering what you’ve said.”
- As Mike McGee advises municipal officials...
“Jail is a bad place to be”



Ethics Considerations



Appearance

Appearance

Appearance

Appearance

Appearance





Ethics Considerations

For government officials, the **perception of the public...** plays an important role in how effective a leader you can be!





Were they perceived differently?



Five Operating Principles of Ethics



1. Public office is a **public trust** to be used solely to advance the public interest.
2. Decisions should be made on the merits and based upon **objective judgment**.
3. Public officials must be **accountable** for their actions.
4. Honor and respect democratic principles by adhering to letter and **spirit of the law**.
5. Avoid conduct creating an **appearance of impropriety**.

Source: Josephson Institute of Ethics



Caution! Are You Rationalizing?



Well, no one will ever know.

Maybe just this one time.

Everyone does it.

No one will get hurt.

It is too insignificant for the law to apply to it.

“Just between you and me. . . “

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The Law



- 1) PA 317 - interest in contracts
- 2) PA 196 – The State Ethics Act*
- 3) Common law criminal offenses

* The proper name is the Standards of Conduct for Public Officers and Employees Act



Applicability: The Law -- or Just Good Principles To Follow?



- 1) PA 317 re interest in contracts:
exceptions/qualifications; especially re any city/village of less than 25,000 pop
- 2) PA 196 - State Ethics Act: the substantive terms apply, but are there actually remedies for a breach? (Effectively, the Act's provisions are used as a shield to protect a whistle blower.)



Applicability: The Law -- or Just Good Principles To Follow?



- 3) Common law criminal offenses
mis/mal/nonfeasance: may be limited to officials, but not employees; practical limitations regardless
- 4) PA 566 re incompatible offices:
exceptions/qualifications re any city/village of less than 40,000 pop, plus one for fire chiefs in a city/village of less than 3,000 population
- 5) Other laws re officials' non-permitted activities (see supplemental resources)



PA 317 - Interest in Public Contracts



- ✓ PA 317 is concerned with prohibiting local officials from pursuing certain public contracts.
- ✓ Note: the Act preempts any local charter provision (MCL 15.328)





PA 317 - Interest in Public Contracts

Section 2 (1) -- A public servant shall not be a party, directly or indirectly, to any contract between him or herself and the [municipality] of which he or she is an officer or employee.

(Note the exceptions in sections 3 and 3a.)

(Public Act 317 of 1968)(MCL 15.321, *et seq.*)



PA 317 - Interest in Public Contracts



Section 2 (2) -- A public servant shall not directly or indirectly solicit any contract between the [municipality] of which he or she is an officer or employee and any of the following:

him/herself; any firm, etc. of which he/she is a partner/employee; any private corp in which he/she owns more than 1% of the stock if unlisted or stock valued at more than \$25k if listed or if he/she is a director/officer/employee.

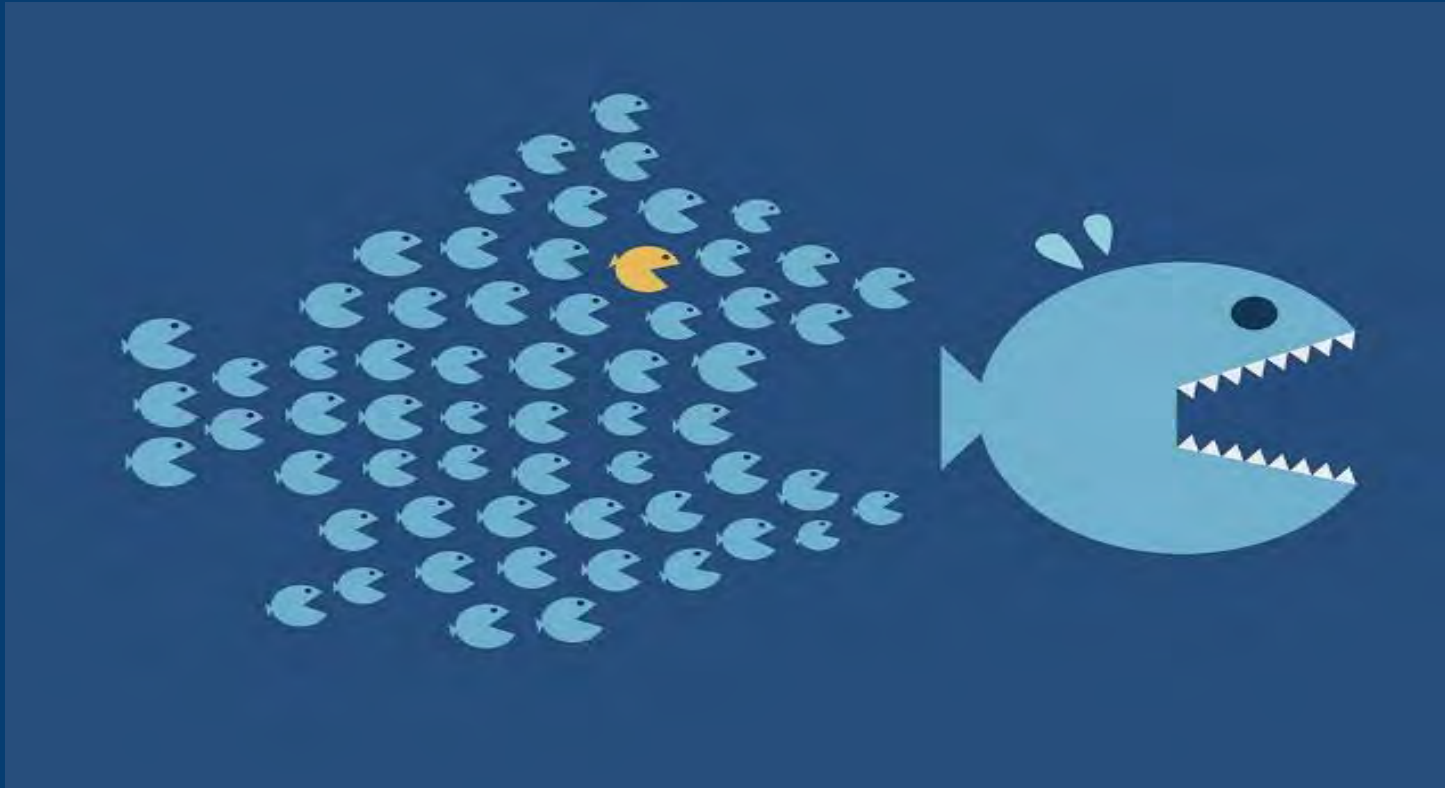
Also, he/she cannot be a part of negotiations, amendment, approval or representation of a party to the contract

(Note the exceptions in section 3.)





PA 317 – exceptions...



Exceptions to Sec 2 of PA 317



Section 2 does not apply where the public servant:

- Works 25 paid hours or less per week for the municipality ...and if
- The public servant discloses the financial interest in the contract to the official body approving the contract, as a part of the record of the official proceedings.



Exceptions to Sec 2 of PA 317



- The required disclosure (except for contracts of small benefit to the public servant or for emergency repairs/services) must be made in a specific manner, generally 7 days in advance and in writing or at a public meeting.
- Further, if the direct benefit to the public servant is more than \$5,000, there are added requirements, inc. 2/3 vote of full membership of the body in open session w/o the vote of the public servant making the disclosure, and specific information to be included in the official minutes.





Exceptions to Sec 2 and 3 of PA 317

➤ A public servant may participate in making a governmental decision if the public servant's participation is required by law.

- If 2/3 of members are not eligible under this Act to vote on a contract or to create a quorum, the member may be counted for purposes of a quorum and may vote on contract if:

- member's benefit is less than \$250 and less than 5% of cost of the contract, and
 - member files sworn affidavit with the body.
- public



Exceptions to Sec 2 of PA 317



Section 3a exceptions:

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



Exceptions to Sec 2 of PA 317



Section 4 exceptions:

Prohibitions in Section 2 do not apply to certain contracts:

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



Exceptions to Sec 2 of PA 317



Section 4 exceptions, continued:

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

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Perspective on Applicability of PA 317



- Of Michigan's 533 cities and villages, 91% or 487 have populations of less than 25,000
- Of Michigan's 1240 townships, 99.975% or 1209 have populations of less than 25,000.



PA 317 - Sanctions



❖ “Any person violating the provisions of this act is **guilty of a misdemeanor.**” (MCL 15.327)

❖ The **contract may be voided.**



PA 196 - The State Ethics Act



- The 7 “Shall Nots” – seven areas of prohibited conduct
- Provisions to which all public officers and employees should adhere.**

** The Act was amended to apply to local officials. (See 1981 OAG 6005).

The proper name is the Standards of Conduct for Public Officers and Employees Act - Public Act 196 of PA 1973, as amended (MCL 15.341, *et seq.*)



Divulge Confidential Information



1. 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 for its authorized release to the public.

Note: relationship to the Open Meetings Act



Personal Opinion



2. A public officer shall not represent his or her personal opinion as that of an agency.



Personal Use of Office Property



3. A public officer or employee shall use public 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.



Gifts



4. A public officer or employee shall not solicit or accept a gift or loan of money, goods, services, or other things of value for the benefit of a person or organization, other than the (governmental unit), which tends to influence the manner in which the public officer or employee or another public officer or employee performs official duties.



Public Insider Trader Rule



5. 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.

(Generally, instruction done outside of regular work hours is exempt.)



Conflict of Employment



6. Except provided in section 15.342a, a public 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's 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.



Personal Interest in Contracts



7. Except as provided in section 15.342a, a public 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 public officer or employee has a financial or personal interest.



Personal Interest in Contracts (continued)



Note: 15.342a (2) states the contract is not necessarily voided.

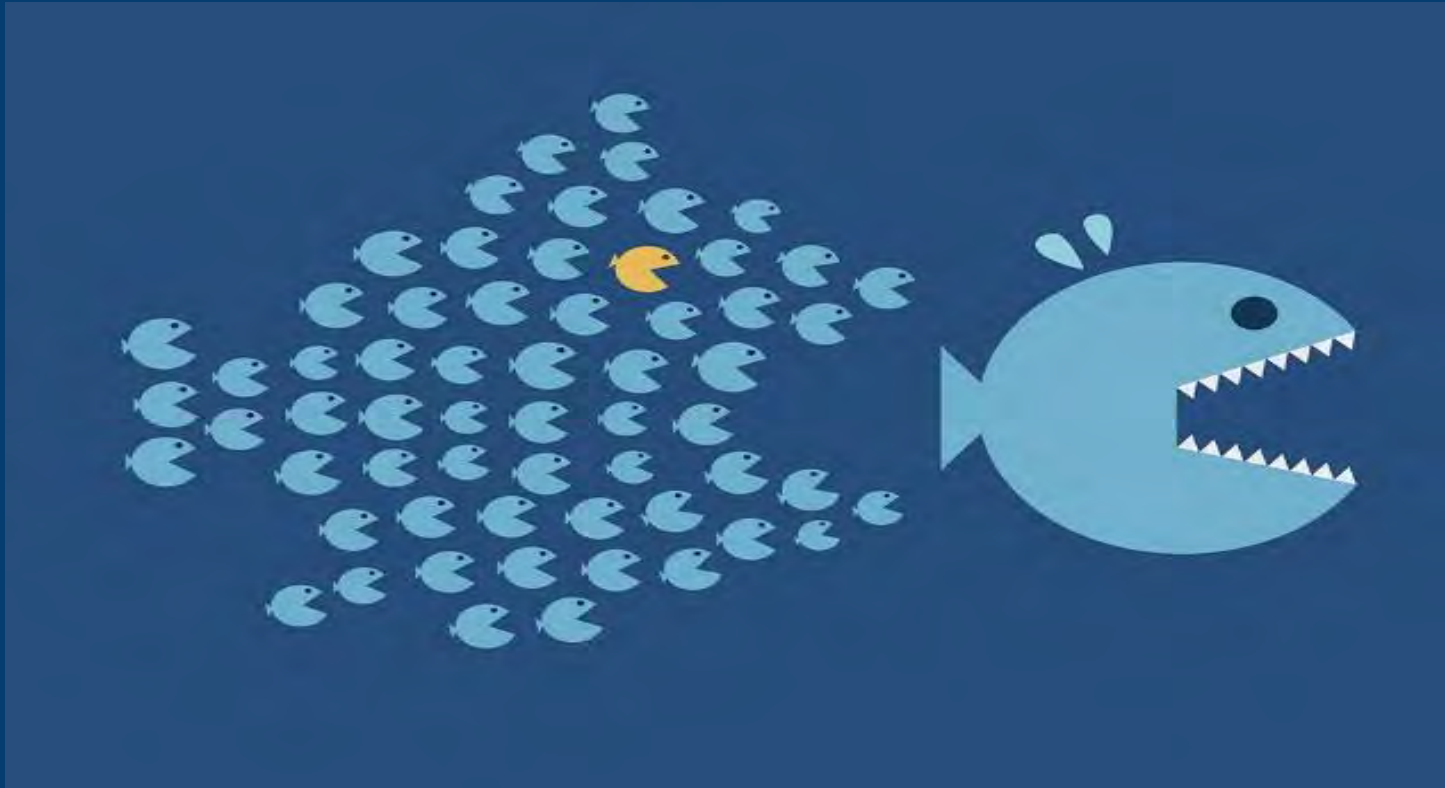
Note: a spouse does not constitute a business entity (*Forster v Delton School District*, 176 Mich App 582 (1989) where a district employee helped negotiate a contract with the teachers group of which his spouse was a member.

Note: Generally, **can a spouse vote on a contract that benefits his/her spouse?** Yes, but is it prudent to do so?
(See AGOs 6736 of 1992 and 4869 of 1975)





PA 196 – exceptions and limitations...



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Exceptions to PA 196 – State Ethics Act



Re “Shall Nots” 6 (employment) and 7 (negotiation or execution of contracts):

The public officer may vote, make or participate in the decision if:

- he/she is necessary for a quorum; and
- not paid for working more than 25 hours/week; and
- promptly discloses/part of the public record

[** Note that PA 317 is specifically not modified.]



Exceptions to PA 196



Re “Shall Nots” 6 (employment) and 7 (negotiation/execution of contracts)

Where it is the awarding of a contract, the public officer may vote, make or participate in the decision if:

- the previous 3 conditions are met, plus
- the direct benefit is less than \$250 or less than 5% of the public cost of the contract;
- he/she files a sworn affidavit to this effect; and
- the affidavit is made part of the public record.



Sanctions/Damages – PA 196



- Sanctions re whistle blower protection only, i.e. a whistle blower uses the Act as a shield against job-related retaliation when he/she brings to light conduct in violation of any of the 7 standards.

- ❖ A civil fine of \$500 can be levied.

- ❖ Persons reporting or about to report a violation of section 15.342 cannot be retaliated against.

- ❖ Plus, there can be damages for injury or loss caused by each violation of Section 15.342b, including reasonable attorney fees. (MCL 15.342b)



Common Law Criminal Offense



Misconduct in Office...

by a public officer is a common law offense subject to the provisions of MCL 750.505, such that “Any person who shall commit any indictable offense at common law...shall be **guilty of a felony**, punishable by imprisonment in a state prison not more than 5 years or by a fine of not more than \$10,000, or both...”



Common Law Criminal Offense



❖ This offense applies to public officers, as distinguished from public employees,...but note that the Supreme Court has held that includes deputy sheriffs. (*People v Coutu*, 450 Mich 348 (1999) There are 5 criteria to determine who is a public officer.

❖ May be practical limitations in prosecution

❖ The offense includes:

- Malfeasance – doing a wrongful act
- Misfeasance – doing a lawful act in a wrongful manner
- Nonfeasance – failure to perform an act required by the duties of the office



Local Provisions – Ordinance and Charter



An attribute of local governance in Michigan is that **local ordinances or home rule charters** can be tailored to meet particular needs and concerns of the community.



Local Provisions – Ordinance and Charter



- ❖ **Scope** – who is covered: city/village council, boards, administrators...
- ❖ **How detailed** – in charter, ordinance
- ❖ **Approach** – mandatory or authorized by charter
- ❖ **Enforcement and sanctions** – Ethics Board or Police Chief/City or Village Attorney, etc.



Local Provisions - Ordinance and Charter



Disclosure – what, who, how

- ❖ Disclose personal relationship if it could create the appearance of a conflict of interest
- ❖ If reasonable person would question if you are acting in public interest, consider disclosing it
- ❖ In writing? Before a meeting or at it? How much detail?
- ❖ Disclosure of financial interests may in ordinance, but isn't statutory



Local Provisions – Ordinance and Charter



Topics that *can be* addressed include:

- Conflicts of interest
- Disclosure of financial interest
- Impartiality
- Improper use of position
- Nepotism
- Personal interests
- Public information
- Public property and personnel



Local Provisions –Ordinance and Charter



- ❖ An ethics ordinance is a tool....
- ❖ Used carefully, it is a **shield** to protect the community from unethical conduct.
- ❖ Or it can be used as a **sword** – to unfairly attack officials, and thus is a detriment to the community.





“What you have a right to do
... does not equal
what is right to do.”

Potter Stewart, former US Supreme Court Justice



Application – The Parking Ticket



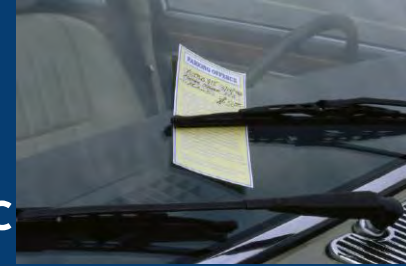
Fact summary:

You have parked illegally

No 'harm' has resulted

A ticket is being written as you approach

When the officer recognizes you, he/she starts to put the ticket book away.



Relevant values???

Ethical principle???

Decision and rationale???

Scott Paine, PhD

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Application – The Parking Ticket

Possible options:

- ✓ Go ahead, give the ticket to me.
- ✓ Thanks!
- ✓ Something else....



Application – Help from an Old Friend



Fact summary:

You have an old, wealthy and powerful friend in town

Your adult child is looking for that first career job

Your friend personally offers him/her an unadvertised position with your friend's firm



Relevant values???

Ethical principle???

Decision and rationale???

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Scott

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Application – Help from an Old Friend

How do you advise your son/daughter - Possible Options:

- ✓ Take the job, you need it.
- ✓ Take the job, there isn't an ethical problem here.
- ✓ Don't take the job, there's an appearance of impropriety.
- ✓ Don't take the job, I can't be sure the offer isn't an effort to influence me.
- ✓ Something else...



Application – Renewal Project



Fact summary:

A well-funded, well-respected developer proposes a major revitalization project for a blighted area

In order to implement the project, the city will need to exercise its power of eminent domain

The residents of the area are unified in their opposition to the project and the threat of the loss of their properties



Relevant values???

Ethical principle???

Decision and rationale???





Application – Renewal Project

Possible Options:

- ✓ Approve the project – it will benefit the city's financial condition
- ✓ Approve the project – the interests of all citizens outweigh those of a few
- ✓ Disapprove the project – it's their neighborhood, their homes and their lives that will be adversely affected
- ✓ Something else...





Being an Ethical Public Leader . . .



Requires us to **consider values unique to our role**

Requires us to be able to **explain** our actions so that others can at least understand, if not agree with, our actions

And see them as the **legitimate acts** of a **public servant**

Scott

Paine, PhD

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They like you, they really like you!



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Resources



- 1) MML One-Pager *Plus* publications that reference Ethics, OMA, and FOIA. (Go to www.mml.org. Click on “Resources,” then “Publications,” and then “One-Pager *Plus*.”)
- 2) *Handbook for Municipal Officials* (2004) Section II, Chapter 8: Ethics by Michael McGee, Miller Canfield (McGee@MillerCanfield.com)
<http://www.mml.org/pdf/hmo/book.pdf>
- 3) Laura J. Genovich, Foster, Swift, Collins & Smith, P.C. “Municipal Codes of Ethics”, MML webinar, April 27, 2016
- 4) William Beach’s presentation “Ethics in the Public Sector” 3/10/11. (billbeach@gmail.com)
- 5) Scott Paine, PhD, Florida League of Cities University, presentation to the 2017 MML Convention, “Practicing Ethical Public Leadership”



Resources (continued)



- 5) Michigan Municipal League's "*Ethics Handbook for Michigan Municipalities*"
(Go to www.mml.org, click on "Resources", then "Publications" then E- Books")
- 6) *Michigan Local Government Ethics – A Research Guide for Municipal Attorneys* (copies may be ordered through the Michigan Association of Municipal Attorneys at http://mama-online.org/sites/default/files/ethics_handbook_order_form.pdf)
- 7) "Model Ethics Ordinance for Local Units of Government", Attorney General Mike Cox, September, 2009
http://www.michigan.gov/documents/ag/ModelEthicsOrdDraft_287092_7.pdf; and generally see
http://www.michigan.gov/ag/0,4534,7-164-58056_61399---,00.html



Other Ethics Laws



1. PA 566 – Incompatible Public Offices Act

2. Political Activities by Public Employees Act

(Public Act 169 of 1976); (MCL 15.401 et seq.)

3. Michigan Campaign Finance Act

(Public Act 388 of 1976; MCL 169.201 et seq.)



Other Relevant Laws Regarding Public Officials' Permitted Actions



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





Other Relevant Laws Regarding Public Officials' Permitted Actions

Whistleblower's Protection Act MCL 15.362

Employer may not discharge or discriminate against employee regarding compensation, terms, conditions, or privileges of employment because the employee reports a violation or suspected violation of the law.





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And we're here to help!

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