

# *City of Detroit Board of Ethics*

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## **ADVISORY OPINION # 2017-02**

Issued: April 12, 2017

**Advisory Opinion # 2017-02:** At its meeting on March 16, 2017, the Board of Ethics (the “Board”) reviewed Request for Advisory Opinion No. 2017-02, regarding the propriety of a member of a City of Detroit commission accepting an appointment to a State of Michigan board which has appellate jurisdiction over certain decisions of the City’s commission. The Board concluded that the two positions are incompatible.

### **I. PROCEDURAL BACKGROUND AND FACTS**

Request for Advisory Opinion No. 2017-02 was received on January 25, 2017. The Requestor is currently a member of the [REDACTED] and is under consideration for an appointment to the [REDACTED]. Both positions are unpaid.

The Requestor is concerned that the [REDACTED] appellate jurisdiction over the [REDACTED] permit denial decisions could create a conflict of interest. The Requestor indicated that the [REDACTED] was comfortable with recusal should a [REDACTED] decision come before that body for review.

## II. APPLICABLE LAW AND DISCUSSION

### A. State and Local Law Governing the Two Public Bodies

[REDACTED] Sections 25-2-51 and 2-2-55, 1984 Detroit City Code. The Commission reviews recommendations of the [REDACTED] regarding [REDACTED]

[REDACTED] Section 25-2-55 (1), (2), 1984 Detroit City Code. [REDACTED] Section 25-2-10, 1984 Detroit City Code, as follows:

(a) If it is determined by the historic district commission that a resource in an historic district is being demolished by neglect, the commission, on its own initiative, and to insure that the resource shall be preserved and protected in consonance with the purposes of this article, may take the following actions:

(1) Require the owner of the resource to repair all conditions contributing to demolition by neglect; the commission may also file a petition with the buildings and safety engineering department requesting that the department require the correction of defects or necessary repairs of the structures.

(2) If the owner does not make the necessary repairs within a reasonable time, file a petition with the planning and development department requesting that the planning and development department, as the agent of the commission and pursuant to an order from the circuit court, enter the property and cause the necessary corrections or repairs to be made and the cost, if not paid promptly by the property owner, to be reported to the board of assessors for levy as a special assessment against the property.

(b) In addition to other enforcement rights created by this article, the requirements of an historic district may be enforced upon the complaint of any property owner or association of property owners within the district. Any citizen or duly organized historic preservation organization in the city, as well as resource property owners, jointly or severally aggrieved by a decision of the historic district commission

may appeal the decision to the circuit court, except that a permit applicant aggrieved by a decision rendered under division 2 of this article may not appeal to the court without first exhausting the right to appeal provided in [Sec. 25-2-58](#).

Section 25-2-58, 1984 Detroit City Code, provides that any “citizen or historic preservation organization within the City of Detroit, or a permit applicant, jointly and severally aggrieved by a decision of the historic district commission shall have the right of appeal from the decision as provided for in Section 11 of the Act.” The “Act” referred to here is the Local Historic Districts Act, MCL 399.201 *et seq.* The appeals provision cited in the Code states as follows:

Any citizen or duly organized historic preservation organization in the local unit, as well as resource property owners, jointly or severally aggrieved by a decision of the historic district commission may appeal the decision to the circuit court, **except that a permit applicant aggrieved by a decision rendered under section 5(1) may not appeal to the court without first exhausting the right to appeal to the state historic preservation review board under section 5(2).** (Emphasis added.) MCL 399.211

To summarize, under the statute and the code, exterior work on properties located in historic preservation districts cannot proceed unless a permit is approved by local historic district commission. (See Section 25-2-18, 1984 Detroit City Code and MCL 399.205.) Aggrieved applicants must appeal permit denials by the [REDACTED] to the [REDACTED] before proceeding to circuit court.

The [REDACTED] was established by Michigan Executive Order 2007-53. All board members are appointed by the Governor. The board’s website summarizes its duties and authority as follows:

[REDACTED] is appointed by the Governor. The Board reviews and approves each national register nomination prior to submission to the Keeper of the National Register; **has appellate jurisdiction under the Local Historic Districts Act**, as amended, and provides general advice, guidance, and professional recommendations to the State Historic Preservation Office on matters related to historic preservation. (Emphasis added.)

The [REDACTED] under the Local Districts Act, MCL 399.201 *et seq.* Accordingly, the Requestor is proposing to simultaneously serve on the [REDACTED] and the [REDACTED] the state agency charged with appellate review of certain decisions of the [REDACTED]

### **B. Ethics Ordinance Standard of Conduct**

The Requestor is a volunteer and uncompensated member of the [REDACTED]. The Ethics Ordinance (Ordinance) regulates the conduct of public servants. Under the Ordinance, the term “public servants” includes “any member of a board, commission, or other voting body that is established by either branch of city government or by the 2012 Detroit City Charter, or by this Code . . .” Section 2-6-3, 1984 Detroit City Code. As noted above, the [REDACTED] is established by the Detroit City Code. Accordingly, as a member of a commission established by the Detroit City Code, the Requestor is a public servant whose conduct is regulated by the Ordinance.

Conflict of interest regulation generally prohibits public employees from being in positions where they must choose between conflicting loyalties. As a public servant, the Requestor is subject to the provisions of Section 2-6-65 of the Ethics Ordinance (Ordinance) which states as follows:

#### **Incompatible employment or rendering services prohibited.**

Except as otherwise provided for by applicable law, a public servant shall not knowingly engage in or accept employment, or knowingly render services, for a private or public interest where such employment or service is in conflict or incompatible with the proper discharge of the public servant’s official duties for the city, or where such employment or service is reasonably expected to impair the public servant’s independence of judgment or action in the performance of his or her official duties for the city.

As the ordinance includes both paid employment and “rendering of services,” it clearly regulates uncompensated services. (See Request for Advisory Opinion No. 2015-01.) Requestor’s volunteer status has no impact on the issue of the Ordinance’s reach.

The Ordinance prohibits the occupation of two offices if the positions are in conflict or incompatible. Incompatibility is not defined in the Ordinance, however, in Advisory Opinion 2003-1, the Board of Ethics ruled that it could properly use the

Michigan Incompatible Offices Act, (IOA), MCL 15.181 *et seq.*, as guidance. (See Advisory Opinion, 2003-1, March 31, 2003, pp 6-7.) The IOA provides that, “Except as provided in section 3, a public officer or public employee shall not hold 2 or more incompatible offices at the same time.” MCL 15.182.

Public officer includes any person appointed to “a department, **board**, agency, institution, **commission**, authority, division, council, college, university, school district, intermediate school district, special district, or other public entity of this **state or a city**, village, township, or county in this state.” MCL 15.181(e)(iii). (Emphasis added.) The Requestor is a public officer as defined in the IOA.

The statute defines “incompatible offices” as follows:

(b) “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:

- (i) The subordination of 1 public office to another.
  - (ii) The supervision of 1 public office by another.
  - (iii) A breach of duty of public office.
- MCL 15.181.

Note that incompatibility applies only to the simultaneous occupation of two **public offices**.

The [REDACTED] and the [REDACTED] are appointed by distinct authorities. The [REDACTED] is appointed by the governor. [REDACTED] members are appointed by the mayor subject to approval by the Detroit City Council. Section 24-2-51, 1984 Detroit City Code. The [REDACTED] has no direct role in the budget of the [REDACTED] nor does it generally supervise or direct its activities. This is distinct from the situation found in *Detroit Area Agency on Aging v Offices of Services to the Aging*, 210 Mich App 708 (1995), where the state’s Commission on Services to the Aging had a direct role in the funding of the local Area Agencies on Aging (AAA) and could enter into agreements and contract as required for the performance of duties. The Court ruled that this relationship “clearly establishes that the . . . AAAs are subordinate to and subject to the supervision of, the commission.” *Id.*, at p 713. Accordingly, two commissioners on the state body, who also served on subordinate local AAAs, were occupying incompatible offices. *Id.*, at p 714.

Because the relationship between the [REDACTED] and the [REDACTED] is not as entangled as that described in *Detroit Area Agency on Aging, supra*, the positions are not incompatible under MCL 15.181(b)(i) and (ii), which are premised on subordination or supervision

respectively. This does not resolve the issue of whether the simultaneous occupation of positions on the [REDACTED] and [REDACTED] will result in “a breach of duty of public office,” as barred by MCL 15.181(b)(iii).

The Requestor notes that in the event of an appeal from a matter decided by the [REDACTED], he can simply abstain or recuse himself from participation in the appellate review. This is generally not satisfactory under the statute. In OAG, 1996, No. 6899, (May 7, 1996), the Attorney General construed the impact of the Incompatible Offices Act on simultaneous membership on the State Board of Education and the Saginaw Valley State University Board of Control. Although the State Board of Education does not exercise leadership or supervision over colleges and universities, it does have authority for coordination of all public education. *Id.*, p 2. More importantly, the State Board of Education develops examinations and standards for teacher certification and may approve “fast-track” certification programs for colleges and universities. *Id.*, p 3. The State Board also approves institutions which can recommend candidates for teacher certification. *Id.*

Based on this authority, the Attorney General concluded that incompatibility would result when such issues were before the State Board. *Id.*, at p 4. At that point, recusal or abstention is not appropriate as the recusal is a breach of the public duty. “Once either body submits a proposal to the other public body for review and approval, the positions become incompatible for a person sitting on both bodies simultaneously.” *Id.*

Although the Requestor indicates that abstention should suffice, caselaw interpreting the IOA suggests otherwise. Abstention is not appropriate as abstention from voting is, itself, a breach of duty owed to the public. *Contesti v Attorney General*, 164 Mich App 271, 280-282 (1987), lv den 430 Mich 893 (1988).

### III. CONCLUSION

Because the [REDACTED] has appellate authority over permit decisions by the [REDACTED] the two positions are incompatible under the Section 2-6-65 of the Ordinance. As such, abstention will not suffice; the Requestor cannot simultaneously hold these two positions.

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