

City of Detroit Board of Ethics

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ADVISORY OPINION #2016-06

Issued: March 10, 2017

Advisory Opinion # 2016-06: A public servant may serve as a policy analyst to a city councilperson and as an unpaid member of a neighboring city's Zoning Board of Appeals without violating the Ethics Ordinance. The Requestor is cautioned to avoid the dissemination of confidential information.

I. PROCEDURAL BACKGROUND

On December 21, 2016, the Board received Request for Advisory Opinion No 2016-06. The Requestor, currently employed as a Senior Policy Analyst for a Detroit City Councilmember, submitted the following request:

I was offered a position on the _____ Zoning Board of Appeals (this is the community I reside in). After informing Councilmember_____, ___ expressed concern that this may be a conflict of interest with my employment in his office.

The Requestor attached a description of her duties as a [REDACTED] and those required of her appointment to the neighboring jurisdiction's Zoning Board. The description notes that the zoning board appointment is uncompensated.

The Requestor did not waive confidentiality.

II. FACTS

The Requestor's duties to the Councilmember are summarized as follows:

Coordinate with the Detroit City Clerk's Office to schedule public hearings and set the agenda for the Planning and Economic Development Committee; Review all Committee agenda items and advise the Councilman on voting matters. Assemble work groups and task forces as necessary to address community issues and develop or revise policies, write legislation, or identify alternate resources; and Constituent relations.

The Requestor described her duties on the Zoning Board of Appeals as follows:

The ZBA is a quasi judicial body that interprets the zoning ordinances and has the power to grant variances when circumstances warrant.

Zoning variances are typically sought by local business owners who wish to operate a business or otherwise use property in a manner at variance with zoning restrictions. Generally, these are matters of purely local concern.

III. ANALYSIS

A. Standards of Conduct

The Detroit City Charter defines the term "public servant" as including "the Mayor, members of City Council, City Clerk, appointive officers, any member of a board, commission or other voting body established by either branch of City government or this Charter and any appointee, employee or individual who provides services to the City within or outside of its offices or facilities pursuant to a personal services contract." Section 2-105(A)(9), 2012 Detroit City Charter. (See also, Section 2-6-3, 1984 Detroit City Ordinances.) Accordingly, the Requestor is a public servant and is subject to the provisions of the City's Ethics Ordinance ("Ordinance").

Conflict of interest regulation prohibits public employees from placing themselves in a position 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 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 Advisory Opinion No. 2015-01.) In addition the ordinance reaches employment or engagement by public or private bodies. Accordingly, the ordinance is applicable to the Requestor's proposed appointment to another municipality's Zoning Board.

B. The Positions Do Not Conflict and Are Not Incompatible

The Ordinance prohibits the simultaneous occupation of two offices if the positions are 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. "Incompatible offices" are defined 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

Clearly the two public positions here are not connected via subordination or supervision. They involve service to two separate political entities, neither of which supervises or controls the other. Consequently, the first two restrictions are inapplicable here.

In its decision in Advisory Opinion No. 2003-01, the Board addressed the third standard in the IOA, whether holding two positions would result in a breach of duty of a public office. The Board found that a Detroit City Councilmember could not simultaneously serve as a council member and as a City Attorney to a neighboring jurisdiction to which the City of Detroit was contractually bound to sell water. As attorney to the neighboring city she would be involved in the negotiation of the contract between the cities. As a councilmember she would have to vote on the contract. 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).

The Requestor here is not acting as attorney and does not serve on the governing board of a public body in a contractual relationship with the City of Detroit. As such, it appears the two offices are not incompatible.

Additional illustrations of the principles at play here are provided by two Opinions of the Attorney General. In OAG, 1983, No 6135, the Attorney General found that a member of the Board of Trustees of Michigan State University could not simultaneously occupy the position of Director of the Department of Licensing and Regulation. Among its many duties, the Department is involved in establishing educational standards for licensure of various professions. The opinion concluded as follows:

The Director of the Department of Licensing and Regulation, as an *ex officio* member of each licensing board, may participate in the discussion and consideration of the appropriate educational standards that universities or colleges must maintain in order to qualify their graduates for licensure. In addition, the Director may participate in the review of any decision that is made. As to the boards licensing architects, professional engineers and land surveyors, the Director of the Department of Licensing and Regulation is required to serve in a review capacity of decisions made relative to the educational courses required of colleges and universities.

The possible conflict of interest is more compelling here than in *Shillinglaw* in that the Director of the Department of Licensing and Regulation, in considering standards or in reviewing standards, would be faced with the possibility of

making decisions contrary to the positions maintained by Michigan State University. (OAG, 1983, No 6135, p 5.)

The Attorney General concluded the positions were incompatible. The authority and duties of the Department of Licensing, with its clearly defined role in establishing and reviewing educational standards for various professional schools, made this position incompatible with the trustee position at MSU.

In OAG, 1994, No. 6816, the Attorney General reviewed a situation similar to that presented by the Requestor. There a Lincoln Park city councilperson asked whether this position was compatible with simultaneously holding a position as an administrative assistant to a Wayne County Commissioner. The Attorney General concluded as follows:

Here, the two local units of government do not compete with each other for allocated millage. In addition, a review of the position description submitted with the opinion request, for the position of administrative assistant to a Wayne County Commissioner, reveals that a person occupying that public position is not involved in negotiating or voting on contracts entered into by the Wayne County Board of Commissioners.

It is my opinion, therefore, that the public positions of Lincoln Park city councilperson and administrative assistant to a Wayne County Commissioner are compatible and may be held simultaneously by the same person. (OAG, 1994, No 6816, pp 1 - 2.)

The neighboring jurisdiction's Zoning Board of Appeals does not contract with the City of Detroit. Even assuming there are contractual relations between this city and Detroit, nothing in the job description provided by the Requestor indicates that she has a role in negotiating or approving any contracts between these two municipalities.

The sole purpose of the neighboring city's Zoning Board of Appeals is to review and decide applications for zoning variances. As an appellate, quasi-judicial body, it would not contract with other public entities or bodies. It has no role in supervising, shaping, or reviewing the Detroit zoning ordinance. Thus, there is no incompatibility of public offices presented by the facts here.

C. The Zoning Board of Appeals Position Would Not Impair the Public Servant's Independence of Judgment or Action in the Performance of the Public Servant's Official Duties for the City

There is no discernible nexus between the Requestor's duties as a [REDACTED] and the duties expected of a member of Zoning Board of Appeals for another jurisdiction. In her capacity as a [REDACTED] she analyzes matters pertaining to the City of Detroit, including planning issues. In her position with the neighboring jurisdiction's ZBA she would interpret and apply that city's zoning ordinance. Because this city borders Detroit, there is a remote possibility that at some point, planning interests in the City of Detroit could touch upon zoning matters in this jurisdiction. Whether these issues would ever appear before that city's ZBA is yet another layer of speculation. Should this situation occur, the Requestor would have to recuse herself from participation in that decision

Given the absence of any current nexus or connection between these two positions, it is impossible to discern a basis for finding a "reasonable expectation" that the ZBA position would impair the Requestor's "independence of judgment or action in the performance" of her official duties for the City. Consequently, there is no conflict of interest here.

D. Confidential Information

The Requestor must be aware of her responsibility to safeguard confidential information. The Ordinance defines confidential information as follows:

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. (Section 2-6-3, 1984 Detroit City Code.)

The Ordinance addresses the improper use of confidential information as follows:

Except as otherwise provided by applicable law, **a public servant shall not knowingly use or disclose confidential information to third parties concerning** the property, government or affairs of the City or any office, department or agency thereof, **which is not available to members of the public and gained by reason of his or her official duties.** (Emphasis added.) (Section 2-6-62, 1984 Detroit City Code.)

In the course of her employment with the City of Detroit, the Requestor may become aware of matters not lawfully available to the public regarding developers or development plans which involve or may affect the city of her residence, which shares a border with Detroit. The Requestor must refrain from sharing that information with any third parties.

IV. CONCLUSION

The Board has reviewed this matter and finds that the two positions as described do not violate the conflict of interest provisions of the Ordinance. The Requestor is cautioned regarding the dissemination of confidential information to third parties.

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