

STATE OF MICHIGAN

BILL SCHUETTE, ATTORNEY GENERAL

INCOMPATIBLE PUBLIC OFFICES ACT: Compatibility of offices of village president and village manager.

CONTRACTS OF PUBLIC SERVANTS WITH PUBLIC ENTITIES ACT:

GENERAL LAW VILLAGES ACT:

VILLAGES:

The offices of village president and village manager of the same village are compatible in a village with a population of less than 40,000 under subsection 3(4)(b) of the Incompatible Public Offices Act, MCL 15.183(4)(b).

A village president is not prohibited from entering into an employment contract to serve as the same village's manager in a village with a population of less than 25,000 under subsection 3a(c) of the Contracts of Public Servants with Public Entities Act, MCL 15.323a(c).

To the extent a village ordinance provides that its village president appoints the village manager, subsection 2(1) of the General Village Law, MCL 62.2(1), prevails over the ordinance, and the village council is the appointing authority for the village manager.

Opinion No. 7295

March 8, 2017

The Honorable James Lower  
State Representative  
The Capitol  
Lansing, MI 48909

You have asked whether the Incompatible Public Offices Act (IPOA), MCL 15.181, *et seq.*, is violated by the president of the Village of Howard City also serving as the village manager.

By way of background, this office understands that a new president for the Village of Howard City was elected at the November 2014 general election. After assuming office, the new president thereafter assumed the duties of village manager on an interim basis, and then ultimately on a permanent basis. The position of village manager is a part-time position, and the village president is compensated for his performance as village manager, as well as for his work as village president. The Village of Howard City is in Montcalm County, and relevant to your question here, has a population of around 1,800.<sup>1</sup>

**A. The Incompatible Public Offices Act**

The IPOA generally provides that “a public officer or public employee shall not hold 2 or more incompatible offices at the same time.” MCL 15.182. Here, the elected and appointed offices of village president and village manager are both public offices subject to the IPOA. MCL 15.181(e)(ii). Section 1(b) of the IPOA defines “incompatible offices” as public offices which, when the official is performing the duties of either office, results in the “subordination of 1 public office to another,” the “supervision of 1 public office by another,” or a “breach of duty of public office.” MCL 15.181(b)(i)–(iii). To determine whether any of these scenarios are present here, the duties of village president and village manager must be examined.

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<sup>1</sup> Michigan census data for 2010 reveals that the village had a population of 1,808. Census data is available on the Michigan Department of Technology, Management and Budget website, <https://www.census.gov/prod/cen2010/cph-2-24.pdf>, (accessed February 3, 2017).

## 1. Village President

There are two types of villages in Michigan: general law villages established under the General Law Village Act (GLVA), 1895 PA 3, MCL 61.1 *et seq.*, and home rule villages established by charter under the Home Rule Village Act, 1909 PA 278, MCL 78.1 *et seq.* The Village of Howard City is a general law village. The GLVA constitutes “the charter for all villages incorporated under this act.” MCL 61.1. The village president is the chief executive officer of the village and a voting member of the village council over which he or she presides. MCL 64.1. The village council is comprised of the village president and the village trustees, all of whom are elected officials. MCL 62.1(1). Generally, the village president supervises the affairs of the village and village property. MCL 64.1. The village president also informs the village council concerning the affairs of the village and recommends measures that he or she considers expedient. *Id.* It is also the responsibility of the village president to “see that the laws relating to the village and the ordinances and regulations of the council are enforced.” *Id.*

## 2. Village Manager

Under the GLVA, a “[village] council may employ a village manager” who “shall serve at the pleasure of the council.” MCL 65.8(1)–(2). A village council “may enter into an employment contract with a village manager for a period extending beyond the terms of the members of council but not exceeding 6 years.” An employment contract with a manager “shall be in writing.” MCL 65.8(3). Unless a village council provides otherwise, a village manager has “only those powers and

duties not required by law to be assigned to or performed by another official of the village.” MCL 65.8(3). Under the GLVA, a village council may adopt an ordinance “assigning to the manager an administrative duty imposed . . . on the council; an administrative duty imposed . . . on the village president; the authority to appoint, remove, direct, or supervise any employee or appointed official of the village; or supervisory responsibility over the accounting, budgeting, personnel, purchasing, and related management functions imposed by this act on the village clerk and the village treasurer.” MCL 65.8(4).

The Village of Howard City’s Code of Ordinances (Code) provides for the office of “village manager.” Section 32.01.<sup>2</sup> The Village of Howard City also enacted an ordinance assigning its village manager expanded duties as provided for in the GLVA. See Section 32.05; MCL 65.8(4). The Howard City Village Manager is the chief administrative officer of the village and performs duties as listed in the village code and as directed by the village council. Section 32.04; 32.05(A); 32.05(B)(12). Those duties include management supervision over all village departments and property, and acting as the chief ordinance enforcement administrator and purchasing agent for the village. Section 32.05; 32.06. The Howard City Code further provides that the village manager serves “at the pleasure of the Council and may be removed without cause.” Section 32.02(C); see also MCL 65.8(2).

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<sup>2</sup> The Code of Ordinances is available on the Village of Howard’s website at [http://www.howardcity.org/?page\\_id=55](http://www.howardcity.org/?page_id=55), (accessed February 3, 2017).

Therefore, while the village manager for Howard City has extensive authority over the affairs of the village, that authority is not exercised in the absence of oversight. The village president for Howard City ultimately remains responsible for ensuring the enforcement of the laws related to villages and village ordinances. The village council for Howard City may remove the village manager with or without cause.

### **3. The IPOA's exception for less populated communities**

Under the circumstances set forth above, the village manager is subordinate to, and supervised by, the village president (individually and as a voting member of the village council). As a result, the offices of village president and village manager of the Village of Howard City fall within the specific definition of "incompatible offices" set forth in the IPOA. MCL 15.181(b)(i) and (ii).

But this is not the end of the analysis. The IPOA carves out an exception that allows the governing body of a village having a population of less than 40,000, "to authorize a public officer or public employee to perform, with or without compensation, other additional services for the unit of local government." MCL 15.183(4)(c). In other words, the IPOA permits a local unit of government to authorize dual office holding within the local unit that would otherwise be prohibited by the IPOA. Here, the population of the Village of Howard City is well below 40,000. Presumably, the village council of the Village of Howard City authorized the appointment of its village president as its village manager.

Accordingly, the situation presented falls within an exception to the IPOA's general rule of incompatibility.<sup>3</sup>

It is my opinion, therefore, that the offices of village president and village manager of the same village are compatible in a village with a population of less than 40,000 under subsection 3(4)(b) of the IPOA, MCL 15.183(4)(b).

But again, the analysis is not complete. The IPOA expressly provides that it “does not allow or sanction activity constituting conflict of interest prohibited by the constitution or laws of this state.” MCL 15.183(6). Therefore, the question becomes whether, despite falling within an exception to the IPOA's general rule of incompatibility, the situation presented would still result in a conflict of interest prohibited by law.

#### **B. Contracts of Public Servants with Public Entities Act**

The Contracts of Public Servants with Public Entities Act, MCL 15.321 *et seq.*, establishes specific limitations on contracts involving a “public servant,” defined as “all persons serving any public entity,” MCL 15.321(a), and a “public

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<sup>3</sup> Materials reviewed in conjunction with your request indicate that this individual may also be serving as fire chief for the Village of Howard City. The IPOA does not prohibit “public officers or public employees of a . . . village . . . having a population of less than 40,000 from serving, with or without compensation, as a . . . fire chief . . . if that . . . fire chief . . . is not a person who negotiates a collective bargaining agreement with the . . . village . . . on behalf of the . . . fire chiefs . . .” MCL 15.183(4)(b). Since your request did not inquire as to this position or provide any additional facts, this letter does not address the position of village fire chief.

entity.”<sup>4</sup> The Act applies to local units of government, including villages. MCL 15.321(b). Section 2 of the Act provides that “a public servant *shall not be a party, directly or indirectly, to any contract between himself or herself and the public entity of which he or she is an officer or employee,*” nor may a public servant “*directly or indirectly solicit any contract between the public entity of which he or she is an officer or employee,*” and himself or herself. MCL 15.322(1)–(2) (emphasis added). But this prohibition cannot “be construed” to “[l]imit the authority of the governing body of a . . . village . . . with a population of less than 25,000 to authorize a public servant to perform, with or without compensation, other additional services for the unit of local government.” MCL 15.323a(c).

Here, the village president, in his capacity as village manager, is or may be a party to an employment contract between himself and the village council with respect to his position as village manager. Ordinarily, such circumstances would violate the Contracts of Public Servants with Public Entities Act. But under the exception set forth in subsection 3a(c), the existence of such an employment contract does not present a conflict of interest prohibited by that Act.

It is my opinion, therefore, that a village president is not prohibited from entering into an employment contract to serve as the same village’s manager in a

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<sup>4</sup> “Public entity” is defined to mean “the state including all agencies thereof, any public body corporate within the state, including all agencies thereof, or any non-incorporated public body within the state of whatever nature, including all agencies thereof.” MCL 15.321(b).

village with a population of less than 25,000 under subsection 3a(c) of the Contracts of Public Servants with Public Entities Act, MCL 15.323a(c).

### C. Village Code

The Village of Howard City Code states that the village president shall, “with the concurrence of four or more Trustees, appoint a Village Manager.” Section 32.02(A). This ordinance in the Howard City Code conflicts with the GLVA, which provides that the village “president *may nominate* and the [village] council *appoint* such officers as shall be provided for by resolution or ordinance of the council.” MCL 62.2(1) (emphasis added). An ordinance must be consistent with the powers granted to the municipality by statute, *City of Riverview v Sibley Limestone*, 270 Mich App 627, 630-636 (2006), and to the extent an ordinance conflicts with the municipality’s charter, the latter controls, *Quandt v Schwass*, 286 Mich 433, 439 (1938).

Here, the GLVA’s provision controls over the village Code provision, and it is the village council that may appoint the village manager. This is consistent with other provisions in the GLVA, which provide that it is the village council that may “employ” a village manager and that a village manager serves “at the pleasure of” the village council. MCL 65.8(1)–(2).

This conclusion is also consistent with Michigan’s common law. See Const 1963, art 3, § 7 (“The common law and the statute laws now in force, not repugnant



to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended, or repealed.”). Broadly speaking, under common law principles, public officials “are expected to act in the best interests of the public entities they serve.” OAG, 2015-2016, No. 7285, p \_\_ (July 9, 2015). This means they may not use their authority to further their own interest or place themselves in a position where their private interest conflicts with either their public duties or the best interest of the public. *Id.*, citing 63C Am Jur 2d, Public Officers and Employees, § 246.

In keeping with this principle, “[a]t the common law, public officers with power of appointment were disqualified from appointing themselves to a public office.” OAG, 1995-1996, No. 6834, p 9 (February 3, 1995). “Appointment of oneself was held to be against public policy and the appointment was void.” *Id.* “Where the statute does not expressly authorize self-appointment, ‘the appointment of someone other than self is always contemplated.’” *Id.*, quoting *Welsch v Wilson*, 218 Ga 843; 131 SE2d 194, 196 (1963). If the Village of Howard City’s ordinance was followed, the village president’s self-appointment to the position of village manager would be contrary to longstanding common law principles as well as with the GLVA.

It is my opinion, therefore, that to the extent a village ordinance provides that its village president appoints the village manager, subsection 2(1) of the

General Village Law, MCL 62.2(1) prevails over the ordinance, and the village council is the appointing authority for the village manager.

A handwritten signature in black ink, reading "Bill Schuette". The signature is written in a cursive style with a long horizontal flourish extending from the end of the name.

BILL SCHUETTE  
Attorney General