

TO: Assessing Officers
Equalization Directors

No. 8 - April 7, 1989
Economic Development Corporations
Private - Non-Profit

FROM: State Tax Commission STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

ADVERSE AND PECUNIARY
INTEREST:

Officers of local units of government serving on board of directors of a private nonprofit economic development corporation

CONSTITUTIONAL LAW:

Const 1963, art 4, § 24 -- notice in title that private entities are subject to Freedom of Information Act

COUNTIES:

Authority to establish private economic development corporation

Authority to be member of, pay dues to, and provide funds to private economic development corporation

Authority to pay "finder's fees" to private economic development corporation

FREEDOM OF INFORMATION ACT:

Application to private nonprofit economic development corporation

While a county is not authorized by the Legislature to establish a private nonprofit corporation to conduct an economic development program, a private nonprofit corporation incorporated by private individuals may conduct an economic development program.

A county board of commissioners may provide funds to a private nonprofit corporation pursuant to a written agreement for the provision of economic development services and activities in the county.

A county may join and pay membership dues to a private nonprofit corporation established to conduct an economic development program.

Neither a county nor other local units of government may pay a "finder's fee" comprised of a percentage of certain taxes on new commercial and economic construction in the county to a private nonprofit corporation engaging in economic development activities in the county in the absence of receipt of sufficient value from the corporation without violating Const 1963, art 9, § 18.

A county may be a member of a private nonprofit corporation engaged in economic development in the county and may pay dues related to the value of the benefits accruing to the county by virtue of its membership.

Officers of local units of government may serve on the board of directors of a private corporation engaged in economic development in the county, provided that the officers comply strictly with the requirements of MCL 15.321 et seq; MSA 4.1700(51) et seq, and MCL 15.341 et seq; MSA 4.1700(71) et seq, so as to avoid any conflict of interest.

A private nonprofit corporation engaged in economic development in a county and funded, in part, by local governmental units is not subject to the Freedom of Information Act. MCL 15.232(b) (iv); MSA 4.1801(2)(b)(iv), was enacted in violation of Const 1963, art 4, § 24, and is void.

Opinion No. 6563

Honorable David C. Hollister
State Representative
The Capitol
Lansing, Michigan 48909

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You have asked for my opinion on several questions relating to the incorporation and operation of a development organization incorporated pursuant to Michigan law as a Michigan nonprofit corporation. Your first question is:

1. "By what statutory authority can a board of county commissioners establish by resolution, a private non-profit corporation to replace the functions of the county's Economic Development Corporation?"

The question of whether a county has the authority to form a private nonprofit corporation has been addressed in numerous prior opinions. Each of these opinions has concluded that in the absence of constitutional or statutory provision, a county has no authority to do so. See, OAG, 1985-1986, No 6411, p 444 (December 19, 1986); OAG, 1979-1980, No 5750, p 897 (July

29, 1980); OAG, 1979-1980, No 5448, p 46 (February 13, 1979); and Letter opinion of the Attorney General (Senator Jerome T. Hart, [August 19, 1980]).

However, a nonprofit corporation which is incorporated pursuant to the Nonprofit Corporation Act, MCL 450.2101 et seq, MSA 21.197(101) et seq, by private individuals rather than a county, would be entitled to carry out a broad range of purposes. A nonprofit corporation may be "incorporated to carry out any lawful purpose or purposes not involving pecuniary profit for gain for its directors, officers, shareholders, or members." (emphasis added) MCL 450.2108(2)(a); MSA 21.197(108)(2)(a).

Therefore, it is my opinion, in response to your first question, that while a county is not authorized by the Legislature to establish a private nonprofit corporation to conduct an economic development program, a private nonprofit corporation incorporated by private individuals may conduct an economic development program.

Your next three questions all concern the expenditure of county funds in support of a nonprofit corporation and its activities created to conduct an economic development program. Because these questions are closely related, they will be addressed together. They may be stated as follows:

2. May a county board of commissioners provide initial funding to such a private nonprofit corporation?

3. May the county join and pay membership dues to such a private nonprofit corporation?

4. May the county, as a condition of membership in such a nonprofit corporation, be required to pay a "finder's fee" composed of a percentage of the property taxes on all new commercial and industrial construction in the county?

Const 1963, art 9, § 18, provides:

"The credit of the state shall not be granted to, nor in aid of any person, association or corporation, public or private, except as authorized in this constitution."

This provision applies not only to the state itself, but also to counties, Oakland County Drain Comm'r v City of Royal Oak, 306 Mich 124, 142; 10 NW2d 435, 441 (1943). Therefore, neither the state nor a county may give away anything of value without adequate consideration. When a county acquires something of value in return for value, Const 1963, however, art 9, § 18 is not offended. Alan v Wayne County, 388 Mich 210; 200 NW2d 628 (1972). As the Michigan Supreme Court noted in Alan:

"Now the nub of the problem in all probability is the value received by the state in return for the value transferred. So our inquiry goes to what is the value and who determines it. While the cases definitely describing all the earmarks of the value to be received appear yet to be written, it is probably because any citizen would immediately prescribe full value, and this court is not going to argue with so logical, reasonable and just a standard.

"....

"This court will assume that the officers of the Legislative and Executive Branches will do their duty and exercise a proper judgment. The courts will respect that judgment unless there

has been a clear abuse of discretion. Obviously, if the state or county were to make a valuable grant for next to no consideration, the courts would be forced to regard that not as an exercise of discretion, but an abuse of discretion." 388 Mich at 326-327.

The Legislature has, in several different acts, authorized counties to expend funds for economic development activities.

For example, in the Economic Development Corporations Act, MCL 125.1601 et seq; MSA 5.3520(1) et seq, the Legislature has declared that it is a public purpose to encourage and assist industrial and commercial enterprises in order to strengthen and revitalize the economy of the state and its municipalities. MCL 125.1602; MSA 5.3520(2). The Act empowers economic development corporations, established pursuant to the Act by counties, cities, villages and townships to finance economic development projects including industrial, commercial, agricultural or forestry, and housing and neighborhood improvement enterprises, and authorizes counties, cities, villages and townships to do "anything necessary or convenient to aid in the planning and execution of a project plan." MCL 125.1627(1)(a); MSA 5.3520(27)(1)(a).

1966 PA 46, as amended; MCL 125.1231 et seq; MSA 5.1193(1) et seq, empowers the board of supervisors (now board of commissioners, MCL 46.416; MSA 5.359(16)) of any county, to establish a county economic development commission. Such

economic development commissions are empowered by the county or regional economic commission to plan and direct the carrying out of an economic development and expansion program for the county or region. The commission has the power to enter into contracts with boards, commissions and agencies, both public and private, and with individuals to carry out the purposes of the Act. MCL 125.1236(b); MSA 5.1193(6)(b).

Finally, in MCL 46.161; MSA 5.161, the Legislature has provided, in pertinent part:

"The boards of supervisors (now commissioners) of the several counties may ... appropriate out of the general fund an amount to be used for advertising agricultural or industrial advantages of the state or county ... for the purpose of encouraging immigration and increasing the trade in the products of Michigan, or advertising the state and any portion thereof for tourists and resorters. The board of supervisors may appropriate the sum so raised ... to the support and work and maintenance of a legal association, development bureau or board organized under the laws of Michigan, not organized or conducted for profit, and which is engaged in the purpose of advertising the advantages of and encouraging immigration, and increasing the trade of the county and other adjoining counties of the state."

The economic development activities of a private nonprofit corporation established to conduct economic development would be primarily advertising the county, including its constituent cities, villages and townships, and developing planning studies on the commercial and industrial needs of the county. Such activities may well assist the county in the

accomplishment of the objectives authorized by these acts. Accordingly, it would appear to be within the sound discretion of the county board of commissioners to determine that sufficient public benefit would be generated by these activities so as to justify entering into a contractual agreement with such a corporation under which the corporation would receive funding from the county in order to engage in such activities on the county's behalf.

Similarly, there would appear to be nothing that would prevent the county or other local units of government from becoming members of a private nonprofit corporation and paying dues in an amount that reasonably relates to the services provided to the governmental units. In Hays v Kalamazoo, 316 Mich 443; 25 NW2d 787 (1947), the court found that the home rule cities act, MCL 117.1 et seq; MSA 5.2071 et seq, empowered the City of Kalamazoo to become a member of and to pay dues to the Michigan Municipal League, a nonprofit corporation organized for the improvement of municipal government and administration through cooperative effort without offending the state constitution. The court reasoned that membership in the League served the welfare of the city and the purpose was, therefore, a city public purpose. Since economic development is a public purpose for counties, cities, townships and villages, the governmental entities in a county may similarly join a nonprofit organization organized to promote community development in the county.

It does not necessarily follow, however, that the so-called "finder's fee" identified in your third question is also lawful. The "finder's fee" is applied in addition to the normal dues charged to units of government. In order to be lawfully paid by the governmental unit, a "finder's fee" must likewise satisfy the requirement that it be paid in return for something of value provided by the nonprofit corporation. If, for instance, the fee were required regardless of whether the new construction occurred as a result of the efforts of the nonprofit corporation, then the governmental unit would not have received something of value and payment could not be lawfully made. On the other hand, if the fee were reasonably related to the corporation's costs actually incurred in its successful effort to induce new construction within the county, then the governmental unit would have received something of value for the fee, and it would be lawfully paid.

It is my opinion, in response to your second question, that the county may provide funds to a private nonprofit corporation in return for the provision of economic development services and activities performed by the corporation on behalf of the county, provided that the services and activities provided by the corporation will result in a degree of public benefit so as to constitute adequate consideration for the expenditure of county funds and, provided further, that a written agreement or contract is entered into between the corporation and the county setting forth how the funds are to be used by the corporation.

It is my opinion, in response to your third question, that the county may become a member of a private nonprofit corporation conducting an economic development program and may pay membership dues to that organization, provided that the amount of those dues is reasonably related to the value of the benefits accruing to the county by virtue of its membership.

It is my opinion, in response to your fourth question, that the county and other local units of government are not authorized to pay a "finder's fee" based on a percent of certain taxes on new commercial and economic construction in the county, in addition to payment of membership dues, unless the amount of the fee is reasonably related to the value of the benefit to the governmental unit resulting from the efforts of the nonprofit corporation.

You next ask a series of questions concerning whether it may be a conflict of interest for various officials of local units of government to serve on the Board of Directors of a private nonprofit corporation engaged in economic development. Your questions may be combined and stated as follows:

Is it a conflict of interest for the officials of member municipalities to serve on the Board of Directors of a nonprofit corporation?

Conflicts of interest for officials of local units of government are governed by MCL 15.321 et seq; MSA 4.1700(51) et seq, and by MCL 15.341 et seq; MSA 4.1700(71) et seq. Neither of these acts necessarily prohibits officials of local units of

government from sitting on a board of directors of a non-profit corporation of which their unit of government is a member.

MCL 15.322(2); MSA 4.1700(52)(2), governs conflicts of interest on the part of public officials with respect to public contracts. It provides, in pertinent part:

"No public servant shall directly or indirectly solicit any contract between the public entity of which he is an officer or employee and ... (c) any private corporation ... of which he is a director, officer or employee; ... nor shall he take any part in the negotiations for such a contract or the renegotiation thereof or amendment thereto or in the approval thereof; nor shall he represent either party in the transaction; except as provided in section 3."

The term "public servant," as used in this section, includes all persons serving any local public entity. MCL 15.321(a); MSA 4.1700(51)(a).

The exception set forth in MCL 15.323; MSA 4.1700(53), provides in pertinent part that:

"(1) Section 2 [MCL 15.322; MSA 4.1700(52)] shall not apply to ...

"(a) A public servant who is paid for working an average of 25 hours per week or less for a public entity."

Many elected local government officials, such as county commissioners and both city and village councilpersons, devote less than 25 hours per week to their public duties. Accordingly,

such officials would come within this "non-application" provision of MCL 15.323(1); MSA 4.1700(53)(1). Nevertheless, this statute goes on to require, even in such instances, that certain strict requirements must be met, providing in pertinent part:

"(2) A contract as defined in and limited by section 2 involving a public entity and a public servant described in subsection (1) shall meet all of the following requirements:

"(a) The public servant promptly discloses any pecuniary interest in the contract to the official body which has power to approve the contract, which disclosure shall be made a matter of record in its official proceedings.

"(b) The contract is approved by a vote of not less than 2/3 of the full membership of the approving body in open session without the vote of the public servant making the disclosure.

"(c) The official body discloses the following summary information in its official minutes:

"(i) The name of each party involved in the contract.

"(ii) The terms of the contract,

"(iii) The nature of any pecuniary interest." MCL 15.323(2); MSA 4.1700(53)(2).

Even if the local official is employed for more than 25 hours per week by the public body, MCL 15.322(2); MSA 4.1700(52)(2), by its express terms, applies only to prevent the official from directly or indirectly soliciting a contract and from taking part in the negotiation for the contract or for its renewal. In the absence of such involvement in the contracting

process, no conflict of interest occurs under this statute if the appropriate disclosures are made and the requisite vote obtained.

A more comprehensive prohibition is contained in MCL 15.342; MSA 4.1700(72), which provides in pertinent part:

"(6) Except as provided in section 2a, 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 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.

"(7) Except as provided in section 2a, 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."

These prohibitions are applicable to officers and employees of local units of government. OAG, 1981-1982, No 6005, p 439, 440-441 (November 2, 1981).

Section 2a, MCL 15.342a; MSA 4.1700(72a), creates an exception to these prohibitions, under certain circumstances, and specifies that strict procedural requirements be met:

"(3) Subject to subsection (4), section 2(6) and (7) shall not apply and a public 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 public entity to which the public officer has been elected or appointed is not available because the participation of the public officer in the official action would otherwise violate section 2(6) or (7).

"(b) The public officer is not paid for working more than 25 hours per week for this state or a political subdivision of this state.

"(c) The public 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, section 2(6) and (7) 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 legislative or governing body making the governmental decision.

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

Finally, in applying the provisions of both MCL 15.321 et seq; MSA 4.1700(51) et seq, and of MCL 15.341 et seq; MSA 4.1700(71) et seq, it must be observed that the governmental officials who serve on the board of directors of a private nonprofit corporation which is conducting an economic development program do so as the representatives of their respective units of government and not in their private capacities. Assuming the official has no personal or economic interest in the private, nonprofit corporation in his individual capacity, the official would be sitting on the board of the private nonprofit corporation solely for the purpose of representing the interests of his or her unit of government, and not out of any personal pecuniary interest.

It is my opinion, in response to your restated question, that officials of local units of government may serve on the Board of Directors of a private nonprofit corporation established to conduct an economic development program as representatives of their respective units of government, provided that the local officials strictly comply with the requirements of MCL 15.321 et seq; MSA 4.1700(51) et seq, and of MCL 15.341 et seq; MSA 4.1700(71) et seq, so as to avoid any possible conflict of interest.

Your final question may be stated as follows:

Is a private nonprofit corporation subject to the Freedom of Information Act, MCL 15.231 et seq; MSA 4.1801(1) et seq?

The title of the Freedom of Information Act (FOIA), MCL 15.231 et seq; MSA 4.1801(1) et seq, states in pertinent part that it is an act "to provide for public access to certain public records of public bodies." (Emphasis supplied.) Section 3(1) of FOIA, MCL 15.233(1); MSA 4.1801(3)(1), effectuates this purpose by providing that subject to certain exceptions, "a person has a right to inspect, copy, or receive copies of a public record of a public body... ." It follows, therefore, that a private nonprofit corporation is subject to the provisions of FOIA only if it constitutes a "public body" within the intendment of FOIA.

The term "public body" as used in FOIA is defined in section 2(b), MCL 15.232(b); MSA 4.1801(2)(b):

"(b) 'Public body' means:

"(i) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.

"(ii) An agency, board, commission, or council in the legislative branch of the state government.

"(iii) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.

"(iv) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority.

"(v) The judiciary, including the office of the county clerk and employees thereof when acting in the capacity of clerk to the circuit court, is not included in the definition of public body."

A private nonprofit corporation is not an instrumentality of either state or local government but, rather, a private entity organized on a membership basis whose members include both public and private members. Accordingly, a private nonprofit corporation would constitute a "public body" for purposes of FOIA, if at all, only by operation of section 2(b)(iv) above, which purports to include "[a]ny other body...which is primarily funded by or through state or local authority."

However, the title to the FOIA refers only to public bodies and makes no reference to the fact that the FOIA would also apply to certain private bodies as well. Const 1963, art 4, § 24, states, in pertinent part, that "[n]o law shall embrace more than one object, which shall be expressed in its title." The purpose of this constitutional provision is to prevent the Legislature from passing laws not fully understood, Maki v City of East Tawas, 385 Mich 151, 157; 188 NW2d 593, 595 (1971).

Nowhere in the title to FOIA is there any indication that the Act would include certain private bodies within its scope. Accordingly, it must be concluded that the last clause of FOIA, MCL 15.232(b)(iv); MSA 4.1801(2)(b)(iv), which purports to make FOIA applicable to private bodies which are "primarily

funded by or through state or local authority," violates Const 1963, art 4, § 24. Because this provision was invalidly enacted, it is void and cannot be applied to a private nonprofit corporation. A similar conclusion was reached regarding the Open Meetings Act in OAG, 1977-1978, No 5207, p 157 (June 24, 1977).

The last clause of FOIA, MCL 15.232(b)(iv); MSA 4.1801 (2)(b)(iv), is independent of the remainder of FOIA and can, therefore, be severed from the Act. The remainder of FOIA is complete in itself and may be carried out without the unconstitutional portion. Maki, supra, 385 Mich at 159.

It is my opinion, in answer to your final question, that the Freedom of Information Act does not apply to a private nonprofit corporation.


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