



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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FILE NO. 12-002

GOVERNMENTAL ETHICS AND
CONFLICT OF INTEREST:
Municipal Attorney's Authority
to Prosecute Alleged Violations
of a Municipality's Ethics Ordinance

The Honorable Eric C. Weis
State's Attorney, Kendall County
Kendall County Courthouse
807 West John Street
Yorkville, Illinois 60560

Dear Mr. Weis:

I have your letter inquiring whether a municipal attorney may prosecute alleged violations of a municipal ethics ordinance, adopted pursuant to section 70-5 of the State Officials and Employees Ethics Act (Ethics Act) (5 ILCS 430/70-5 (West 2010)), if the violations carry penalties in excess of the limitations ordinarily applicable to penalties for municipal ordinance violations. For the reasons stated below, it is my opinion that a municipal attorney may

prosecute alleged violations of a municipality's ethics ordinance, as long as the penalties prescribed in the ordinance are consistent with the provisions of the Ethics Act, regardless of whether those penalties would otherwise exceed the general limitations applicable to municipal ordinance violations.

BACKGROUND

The Ethics Act represents a comprehensive revision and expansion of State statutes regulating ethical conduct, political activities, and the making and acceptance of gifts by public officers and public employees. Although the provisions of the Ethics Act are directly applicable only to the officers and employees of the executive and legislative branches of State government (*see generally* 5 ILCS 430/1-5 (West 2010), as amended by Public Act 97-813, effective July 13, 2012; 5 ILCS 430/20-5(d) (West 2011 Supp.); 5 ILCS 430/25-5(d), 30-5(a) (West 2010)), subsection 70-5(a) of the Ethics Act (5 ILCS 430/70-5(a) (West 2010)) requires that all units of local government and school districts:

adopt an ordinance or resolution that regulates, in a manner no less restrictive than Section 5-15^[1] and Article 10^[2] of this Act, (i) the political activities of officers and employees of the governmental entity and (ii) the soliciting and accepting of gifts by and the offering and making of gifts to officers and employees of the governmental entity.

¹Section 5-15 of the Ethics Act (5 ILCS 430/5-15 (West 2010)) prohibits State officers and employees from engaging in various political activities while on compensated time.

²Article 10 of the Ethics Act (5 ILCS 430/10-10 *et seq.* (West 2010)) limits the circumstances in which State officers and employees may accept gifts from, among others, a "prohibited source," as that term is defined in the Act.

Section 50-5 of the Ethics Act (5 ILCS 430/50-5 (West 2010)) contains the penalty provisions for a violation of the Act and provides, in pertinent part:

(a) A person is guilty of a Class A misdemeanor if that person intentionally violates * * * Section 5-15 * * *.

* * *

(c) A person who intentionally violates any provision of Article 10 is guilty of a business offense and subject to a fine of at least \$1,001 and up to \$5,000.

As required by subsection 70-5(b) of the Ethics Act (*see* 5 ILCS 430/70-5(b) (West 2010)), in 2004, this office drafted and published a Model Ethics Ordinance (the Model Ordinance)³ to provide guidance to units of local government in complying with their obligation to adopt appropriate ethics regulations. Although not required by the Ethics Act, this office also published a companion document entitled "A Guide to the Implementation of the Model Ethics Ordinance" (the Guide).⁴ The Guide is keyed to the provisions of the Model Ordinance and provides analysis regarding the Ethics Act and the requirements for units of local government in adopting ordinances that implement the provisions of the Ethics Act. In keeping with the Ethics Act's requirement that an ordinance be "no less restrictive" than its provisions, both the Model Ordinance and the Guide suggest that a violation of a unit of local government's ethics ordinance should result in penalties equal to those found in the Ethics Act.

³Illinois Attorney General, Model Ethics Ordinance, http://www.illinoisattorneygeneral.gov/government/model_ethics_ordinance.pdf.

⁴Illinois Attorney General, A Guide to the Implementation of the Model Ethics Ordinance, http://www.illinoisattorneygeneral.gov/government/ethics_ordinance_guide.pdf.

You have asked whether a municipal attorney has the authority to prosecute a violation of a municipal ethics ordinance adopted pursuant to the Ethics Act, if the penalty for a violation includes "criminal penalties," such as a term of incarceration, or whether only the State's Attorney may prosecute such violations.

ANALYSIS

State's Attorneys' duties include prosecuting actions on behalf of the people of the State or county for violations of State law. 55 ILCS 5/3-9005(a)(1) (West 2011 Supp.). Nothing in the Ethics Act provides that a violation of a local ethics ordinance constitutes a violation of State law. Further, a State's Attorney is under no duty to prosecute ordinance violations adopted by units of local government other than those of the county he or she serves, regardless of the penalty prescribed. *See Hazen v. County of Peoria*, 138 Ill. App. 3d 836, 842 (1985); 1977 Ill. Att'y Gen. Op. 31. Consequently, a State's Attorney's duties do not include the prosecution of alleged violations of a municipality's ethics ordinance.

Whether a municipal attorney has the authority to prosecute a violation of a municipal ethics ordinance carrying a penalty of incarceration in excess of six months necessarily depends on whether the municipality has been delegated the requisite authority to adopt an ethics ordinance which imposes such penalties. *See generally Scadron v. City of Des Plaines*, 153 Ill. 2d 164, 174 (1992) (non-home-rule municipalities possess only those powers that are expressly granted to them by the constitution or by statute, together with those powers necessarily implied therefrom to effectuate the powers that have been expressly granted); *see also* Ill. Const. 1970,

art. VII, §6(a) ("a home rule unit may exercise any power and perform any function pertaining to its government and affairs[,] except to the extent home rule powers have been limited pursuant to article VII, section 6, of the Constitution).⁵ If so, it follows that an attorney representing the municipality has the authority to prosecute violations of the ordinance.

Under the plain and unambiguous language of section 70-5, units of local government are expressly authorized to adopt ethics ordinances and resolutions addressing the political activities of officers and employees and the solicitation and acceptance of gifts. The penalties for violations of section 5-15 and article 10 of the Ethics Act exceed the penalties that Illinois statutes generally allow municipalities to impose for ordinance violations. *See, e.g.*, 65 ILCS 5/1-2-1, 1-2-1.1 (West 2010).⁶ Specifically, a violation of section 5-15 is a Class A

⁵Article VII, subsection 6(e), of the Illinois Constitution of 1970 provides that:

A home rule unit shall have only the power that the General Assembly may provide by law (1) to punish by imprisonment for more than six months[.]

⁶Section 1-2-1 of the Municipal Code provides, in pertinent part:

The corporate authorities of each municipality may pass all ordinances and make all rules and regulations proper or necessary, to carry into effect the powers granted to municipalities, with such fines or penalties as may be deemed proper. *No fine or penalty, however, except civil penalties provided for failure to make returns or to pay any taxes levied by the municipality shall exceed \$750 and no imprisonment authorized in Section 1-2-9 for failure to pay any fine, penalty or cost shall exceed 6 months for one offense. (Emphasis added.)*

Similarly, section 1-2-1.1 of the Municipal Code provides, in pertinent part:

The corporate authorities of each municipality may pass ordinances, not inconsistent with the criminal laws of this State, to regulate any matter expressly within the authorized powers of the municipality, or incidental thereto, making violation thereof a misdemeanor punishable by incarceration in a penal institution other than the penitentiary not to exceed 6 months. The municipality is authorized to prosecute violations of penal ordinances enacted under this Section as criminal offenses by its corporate attorney in the circuit court by an information, or complaint sworn to, charging such offense. (Emphasis added.)

misdemeanor with a penalty of up to 364 days of imprisonment and a fine not to exceed \$2,500. *See* 730 ILCS 5/5-4.5-55(a), (e) (West 2010), as amended by Public Act 97-697, effective June 22, 2012. A violation of article 10 of the Ethics Act is a business offense punishable by a fine of not less than \$1,001 nor more than \$5,000. *See* 730 ILCS 5/5-4.5-80(a) (West 2010) (the fine for a business offense is generally "the amount specified in the statute defining that offense").

Subsection 70-5(a) of the Ethics Act, however, expressly provides that local ethics ordinances must be "no less restrictive" than the State statute's provisions. Section 70-10 (5 ILCS 430/70-10 (West 2010)) establishes that this requirement also extends to the penalties for violations of the ordinances. In section 70-10, the General Assembly empowered units of local government to impose penalties equivalent to those imposed by the Ethics Act by authorizing "[a] governmental entity [to] provide in the ordinance or resolution required by this Article * * * penalties similar to those provided in this Act for similar conduct." Accordingly, a local ordinance must impose equivalent penalties for violations of equivalent prohibitions. A lesser penalty would clearly be "less restrictive" than the provisions of the Ethics Act.

The power to adopt penal ordinances and the penalties that may be imposed are generally dependent upon a grant of authority from the General Assembly. Although the Ethics Act does not expressly state that its provisions constitute a grant of authority from the General Assembly to units of local government to impose penalties in the amounts set out by law, it must necessarily be interpreted as just that. A unit of local government which does not have the power

to enact penal ordinances or to impose fines consistent with those of the Ethics Act could not adopt regulations "no less restrictive" than those of the Act.

Consequently, it is my opinion that the Ethics Act is intended to provide units of local government with all of the power necessary to effectuate the General Assembly's purposes. By requiring that a unit of local government's ordinance be "no less restrictive" than the Ethics Act's provisions, the Ethics Act grants municipalities the authority to adopt ethics ordinances which impose such penalties. It then follows, in my opinion, that an attorney representing a municipality that has adopted such an ethics ordinance possesses the authority to prosecute the violations of the ordinances so adopted.

CONCLUSION

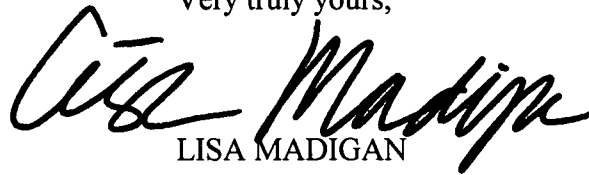
The State Officials and Employees Ethics Act requires units of local government, including municipalities, to enact ethics ordinances or resolutions that provide equivalent penalties to those imposed by the Ethics Act for similar conduct, and concomitantly empowers units of local government to enforce those ordinances. In the case of a municipality, providing for the enforcement of ordinance violations is the responsibility of the corporate authorities. The corporate authorities may assign the prosecutorial function to a municipal attorney or to outside counsel.⁷ Accordingly, it is my opinion that a municipal attorney may prosecute alleged

⁷Pursuant to sections 3 and 5 of the Intergovernmental Cooperation Act (5 ILCS 220/3, 5 (West 2010)) and article VII, subsection 10(a), of the Illinois Constitution of 1970, a county board, with the approval of the State's Attorney, could enter into a contract with a municipality's corporate authorities (*e.g.*, the city council, village board, or town board, as the case may be) under the terms of which the State's Attorney's office would prosecute municipal ordinance violations.

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violations of the municipality's ethics ordinance, adopted pursuant to section 70-5 of the Ethics Act, notwithstanding that the penalties prescribed therein exceed the limitations ordinarily applicable to punishment for municipal ordinance violations.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lisa Madigan". The signature is fluid and cursive, with the first name "Lisa" written in a smaller, more compact script than the last name "Madigan".

LISA MADIGAN
ATTORNEY GENERAL