

STATE OF MICHIGAN

MIKE COX, ATTORNEY GENERAL

APPOINTMENT: A person appointed to a local planning
commission may not assume the duties of
OATH OF OFFICE: office before the appointment is approved
by the municipality's governing body
MICHIGAN PLANNING ENABLING
ACT:

PUBLIC OFFICERS AND EMPLOYEES:

Under section 15(1) of the Michigan Planning Enabling Act, 2008 PA 33, MCL 125.3815(1), while a person appointed to a planning commission may take his or her oath of office before the appointment is approved by the legislative body of the municipality, he or she may not assume the duties of that office until after the appointment is approved by a majority vote of the members of the municipality's legislative body elected and serving.

Opinion No. 7236

November 3, 2009

Honorable Lesia Liss
State Representative
The Capitol
Lansing, MI 48913

You have asked a question arising under the Michigan Planning Enabling Act, 2008 PA 33, MCL 125.3801 *et seq.* Paraphrasing your question, you ask whether an individual appointed by a municipality's chief elected official as a member of the municipality's planning commission may assume the duties of that office immediately upon taking the oath of office or must wait to assume the duties of office until after his or her appointment is approved by a majority vote of the municipality's legislative body.

In the Michigan Planning Enabling Act (Act), 2008 PA 33, MCL 125.3801 *et seq.*, the Legislature consolidated the State's myriad land use planning laws that previously lacked

uniformity and rendered land use practices and projects difficult to implement. The Act provides that a local unit of government may adopt an ordinance creating a planning commission. MCL 125.3811. Section 15(1) of the Act, MCL 125.3815(1), provides for the appointment of members to a planning commission of a municipality:

In a municipality, the chief elected official shall appoint members of the planning commission, *subject to approval by a majority vote of the members of the legislative body elected and serving.* [Emphasis added.¹]

Const 1963, art 11, § 1 requires all public officers to take an oath of office before entering upon the duties of their respective offices:

All officers, legislative, executive and judicial, *before entering upon the duties of their respective offices*, shall take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of according to the best of my ability. No other oath, affirmation, or any religious test shall be required as a qualification for any office or public trust. [Emphasis added.]

Similarly, MCL 15.151 states:

All persons now employed, or who may be employed by the state of Michigan or any governmental agency thereof, and all other persons in the service of the state or any governmental agency, shall, as a condition of their employment, take and subscribe to the oath or affirmation required of members of the legislature and other public officers by section 2 of article 16 of the constitution of 1908 of the state of Michigan [see now Const 1963, art 11, § 1].

It is clear that a member of a local planning commission is an officer subject to this requirement, and that taking the oath of office is a condition precedent to entering upon the duties of planning

¹ The Act defines municipality as "a city, village, or township." MCL 125.3803(h). However, MCL 125.3815(1) does not apply to the appointment of members of a planning commission established by a city or home rule village charter provision. MCL 125.3881(2).

commission member.² Your question is understood as asking whether, assuming an individual takes his or her oath of office upon being appointed to the municipality's planning commission by the municipality's chief elected officer, that individual may assume the duties of that office before his or her appointment has been approved by the municipality's legislative body.

Section 15 of the Act provides that an appointment to the planning commission is "subject to approval" by a majority vote of the members of the legislative body elected and serving. The Legislature has not defined "subject to approval" as used in the Act. Therefore, well established principles of statutory interpretation must be utilized in ascertaining the meaning of undefined statutory terms. The fundamental rule of statutory construction is to give effect to the Legislature's intent. "If the intent is clear, and the statute is unambiguous, the statute must be read as the Legislature wrote it." *Dewan v Khoury*, 477 Mich 888, 889; 722 NW2d 215 (2006). Undefined statutory terms are to be given their plain and ordinary meanings. *Donajkowski v Alpena Power Co.*, 460 Mich 243, 248-249; 596 NW2d 574 (1999). See also MCL 8.3a ("All words and phrases shall be construed and understood according to the common and approved usage of the language"). Under that circumstance, dictionary definitions may be consulted to provide guidance concerning the commonly accepted meaning of words. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002).

Although the word "subject" has several meanings and uses, each can be understood in a common sense depending on the context. The *American Heritage Dictionary, Second College*

² See *Meiland v Wayne Probate Judge*, 359 Mich 78, 87; 101 NW2d 336 (1960) (identifying the five "indispensible" elements in determining whether a position is a "public office of a civil nature"); *People v Freeland*, 308 Mich 449, 457; 14 NW2d 62 (1944). Nothing in the Act or the 1963 Constitution prohibits an appointee from taking the oath of office prior to the appointment's approval by the legislative body.

Edition (1991), defines the word "subject" when used as an adjective to mean: "Contingent or dependent: *subject to approval*." *Id.* at 1211. The Webster's on-line dictionary defines "subject to" when used in the context of qualification as "conditioned upon" and in the context of uncertainty as "contingent on" and "dependent on."³

These definitions are consistent with the longstanding historical application of the term "subject to approval" in the area of appointment of public officers. For example, in Mechem, A Treatise on the Law of Public Offices and Officers, § 114, p 46 (1890),⁴ the general rule was stated:

What constitutes Appointment.—Where the power of appointment is absolute, and the appointee has been determined upon, no further consent or approval is necessary, and the formal evidence of the appointment, the commission, may issue at once. *Where, however, the assent or confirmation of some other officer or body is required, the commission can issue or the appointment be complete only when such assent or confirmation is obtained.*

In either case the appointment becomes complete when the last act required of the appointing power is performed. [Emphasis added.]

The Mechem Treatise, § 124, pp 59-60, further explains that the approval of the legislative body is required before an appointment that is subject to such approval may be deemed complete and before the appointee may be regarded as qualified to commence official duties:

Discretion of appointing Power.—Where the authority to make appointments is absolute, the appointing power is subject to no other condition or qualification than that it shall be exercised at the time, in the manner and to the extent prescribed by law, and that the appointee shall be eligible. *Where, however, it can be exercised only by and with the consent and approval of the*

³ See <<http://www.websters-online-dictionary.org/definition/subject+to>> (accessed October 16, 2009).

⁴ The Michigan Supreme Court and Michigan Court of Appeals have relied on various editions of the Mechem treatise when deciding cases. See, e.g., *Doyle v Dearborn*, 370 Mich 236, 240-241; 121 NW2d 473 (1963); *Krajewski v City of Royal Oak*, 126 Mich App 695, 698; 337 NW2d 635 (1983).

senate or other similar body, its exercise has no effect unless such consent or approval be given. [Emphasis added.]

More contemporary legal encyclopedias state the same governing principles today:

Constitutional or statutory provisions may require that appointments to public office or to certain designated offices be approved or confirmed by somebody other than the appointing power, and until this is done, the appointee may not be legally entitled to the office.

There is a distinction between a confirmation of an appointment to public office and the appointment itself. In this regard, in confirming the appointment the legislature or other body does not in any sense choose the appointee; confirmation is a separate and distinct function that makes the appointment of a qualified candidate valid and final, vesting entitlement to the office for the entire statutory term in that appointed person. [63C Am Jur 2d, Public Officers and Employees, § 103.]

In addition, prior opinions of the Attorney General have described as "well established" the principle that, where the law requires the approval or confirmation of an appointment by a governing legislative body, the appointment is not complete until the approval or confirmation is made. See, e.g., OAG, 1939-1940, pp 141, 142 (July 7, 1939), cited in OAG, 2007-2008, No 7200, p 15 (February 23, 2007); OAG, 1965-1966, No 4531, p 393 (December 27, 1966).⁵ This is in contrast to legal provisions that indicate an appointment is subject to the *disapproval* of a particular legislative body. For example, Const 1963, art 5, § 6 defines "[a]ppointment by and with the advice and consent of the senate" to mean appointment "subject to disapproval" by a majority vote of the members of the Senate elected and serving. This definition was included by the framers of the 1963 Michigan Constitution to alter the prevailing practice under which gubernatorial appointments that required the advice and consent of the Senate had been considered. As summarized in OAG, 1963-1964, No 4329, pp 494, 495 (November 3, 1964),

⁵ To the extent OAG, 1961-1962, No 4081, p 486 (August 3, 1962), concludes otherwise, it is superseded by this opinion.

under the 1908 Michigan Constitution, the law in Michigan was clear that a person appointed by the Governor to fill a vacancy while the Senate was in session "was not entitled to assume office unless and until confirmation was had" by the Senate.⁶

Thus, construing MCL 125.3815(1) according to the common and approved usage of the language leads to the conclusion that the Legislature intended to require the approval of a majority of the members of the legislative body of the municipality before an appointment to a planning commission is complete and effective.

It is my opinion, therefore, that, under section 15(1) of the Michigan Planning Enabling Act, 2008 PA 33, MCL 125.3815(1), while a person appointed to a planning commission may take his or her oath of office before the appointment is approved by the legislative body of the municipality, he or she may not assume the duties of that office until after the appointment is approved by a majority vote of the members of the municipality's legislative body elected and serving.

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⁶ While no Michigan cases directly on point have been located, other states' courts have construed the explanatory phrase "subject to approval" to mean "contingent upon" that approval. See, e.g., *Huyett v Idaho State Univ*, 140 Idaho 904, 909; 104 P3d 946 (2004).