
2002 Wis Eth Bd 02
LOCAL OFFICIALS – DISQUALIFICATION

The Ethics Board advises that :

- 1) Under §19.59, *Wisconsin Statutes*, the village trustee whose property abuts the property that is the subject of the company's rezoning petition, and who is an employee of the company, should not participate in discussion, debate, or votes on the petition;
- 2) Section 19.59, *Wisconsin Statutes*, is unlikely to restrict the village trustee who is an employee of a company that sells supplies to the company seeking the rezoning to vote on the petition; and
- 3) Section 19.59, *Wisconsin Statutes*, is unlikely to restrict the village trustee who owns a company that, in the past, has done business with the company seeking the rezoning to vote on the petition.

Facts

¶1 This opinion is based upon these understandings:

- a. You are a village attorney.
- b. A local company has petitioned the village to rezone a parcel of property from residential to commercial in order to use the property for its business.
- c. One member of the village board (village trustee 1) resides in a home near the parcel and is an employee of the company.
- d. A second village board member (village trustee 2) is an employee of a company that supplies products to the company seeking the rezoning. The company seeking the rezoning is a substantial account for the supplier. The employee is not a shareholder in the supplying company but does receive retirement account distributions based on the company's year-end performance.
- e. A third village board member (village trustee 3) owns a business that used to do work for the company seeking the rezoning and bids yearly for a contract with the company.
- f. There is no suggestion or evidence that if the rezoning is not approved the company would leave the village. Rather, the company would look for another site in the area to which to relocate.

Question

¶2 The Ethics Board understands your question to be:

Under §19.59, *Wisconsin Statutes*, may the three members of the village board participate in the decision on the company's petition for a rezoning?

Discussion

¶3 You have tentatively concluded that the first village board member should not participate in the rezoning petition, but that the other village board members may participate. We agree with your conclusions.

¶4 *Applicable provisions*

Section 19.59(1)(a) and (c)2, reduced to their elements, provide:

No local public official

May use his or her office

To obtain anything of substantial value or benefit

For the official or an organization with which the official is associated.¹

¶5 Section 19.59(1)(c)1, reduced to its elements, provides:

¹ Section 19.59(1)(a), *Wisconsin Statutes*, provides:

19.59 (1)(a) No local public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated. A violation of this paragraph includes the acceptance of free or discounted admissions to a professional baseball or football game by a member of the district board of a local professional baseball park district created under subch. III of ch. 229 or a local professional football stadium district created under subch. IV of ch. 229. This paragraph does not prohibit a local public official from using the title or prestige of his or her office to obtain campaign contributions that are permitted and reported as required by ch. 11.

Section 19.59(1)(c)2., *Wisconsin Statutes*, provides:

19.59(1)(c) Except as otherwise provided in par. (d), no local public official may:

2. Use his or her office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for the official, one or more members of the official's immediate family either separately or together, or an organization with which the official is associated.

No local public official
May take any official action
Substantially affecting a matter
In which the official or an organization with which the official is
associated
Has a substantial financial interest.²

¶6 Section 19.59(1)(b), reduced to its elements, provides:

No local public official
May accept from any person
Anything of value
If it could reasonably be expected to influence the official's vote, actions,
or judgment.³

¶7 A member of a village board is a local public official.⁴ Participating in
official debate, discussions, or votes is a use of office and official action.⁵

² Section 19.59(1)(c)1, *Wisconsin Statutes*, provides:

19.59(1)(c) Except as otherwise provided in par. (d), no local public official may:
1. Take any official action substantially affecting a matter in which the official, a
member of his or her immediate family, or an organization with which the official is
associated has a substantial financial interest.

³ Section 19.59(1)(b), *Wisconsin Statutes*, provides:

19.59(1)(b) No person may offer or give to a local public official, directly or indi-
rectly, and no local public official may solicit or accept from any person, directly or
indirectly, anything of value if it could reasonably be expected to influence the local
public official's vote, official actions or judgment, or could reasonably be considered
as a reward for any official action or inaction on the part of the local public official.
This paragraph does not prohibit a local public official from engaging in outside
employment.

⁴ Section 19.42(7u), *Wisconsin Statutes*, provides:

19.42(7u) "Local governmental unit" means a political subdivision of this state, a
special purpose district in this state, an instrumentality or corporation of such a
political subdivision or special purpose district, a combination or subunit of any of
the foregoing or an instrumentality of the state and any of the foregoing.

Section 19.42(7w)(a), *Wisconsin Statutes*, provides:

19.42(7w) "Local public office" means any of the following offices, except an office
specified in sub. (13):
(a) An elective office of a local governmental unit.

⁵ 1999 Wis Eth Bd 3, ¶5; 1997 Wis Eth Bd 1, ¶4; 1995 Wis Eth Bd 6, ¶4; 1995 Wis Eth Bd 3,
¶4.

¶8 *Village trustee 1*

We agree that village trustee 1 should not participate in the rezoning decision at issue.

¶9 First, it seems likely that the value of the trustee's land could be affected by the change in use of the property abutting the trustee's residence. If this is so, then the trustee could have a substantial financial interest in the outcome of the zoning decision. Similarly, the trustee could obtain something of substantial value from the decision.⁶ Obtaining something of value may include an avoidance of financial loss.⁷

¶10 Whether the trustee's voting for or against the proposal to rezone the property in question will result in obtaining something of substantial value for private benefit for the official is a question of fact that we are not in a position to evaluate.⁸ Indeed, it is the trustee who is in the best position to make that determination. In this circumstance, before participating in a matter, the burden should be on the trustee to demonstrate that the trustee's actions in the consideration of the proposed rezoning are unlikely to result in a substantial financial gain, or avoidance of a substantial financial loss, for the trustee's property.⁹

¶11 Second, the trustee is an employee of the company seeking the rezoning. In our view, the village trustee's continued employment by the party having a demonstrated interest in the village's decision on the rezoning petition could reasonably be expected to influence the trustee's judgment in

⁶ "Substantial value" is contrasted with mere token or inconsequential value. 1997 Wis Eth Bd 2, ¶4; 1995 Wis Eth Bd 5, ¶6; 1993 Wis Eth Bd 8, ¶6; 7 Op. Eth. Bd. 1 (1983); 5 Op. Eth. Bd. 97 (1982).

⁷ 1995 Wis Eth Bd 3, ¶9 (legislator should not vote to retain his or her salaried position on the governing board of a governmental entity); 1995 Wis Eth Bd 1, ¶6 (an agency official should not participate in a rulemaking proceeding that allocates business opportunities, if the official would receive an allocation, even if the official would be no better off under an allocation system than under the current unregulated approach).

⁸ 1998 Wis Eth Bd 1, ¶9 ("Whether a member of the governing body of the municipality's voting for or against the extension of water and sewer will result in something of value for private benefit for the official is a question of fact. For an individual with a failing septic system, voting for the extension may lead to substantial financial savings and the receipt of a valuable service. For others, voting against the extension may result in the avoidance of a substantial assessment not offset by any savings.").

⁹ 1999 Wis Eth Bd 3, ¶9; 1992 Wis Eth Bd 20, ¶6 ("[A] village board member should not participate in official decisions that affect bars if the Village's actions would affect the official's bar in a way that differs significantly from the action's effect upon other bars . . .").

the village's decision.¹⁰ This comports with common sense. Thus, unless there are mitigating factors of which we are unaware, we advise that village trustee 1 refrain from participating in the rezoning decision.¹¹

¶12 We note that our advice is consonant with common law principles that a member of a legislative body is disqualified to vote on propositions in which he or she has a direct pecuniary interest.¹² This standard is also incorporated in manuals governing legislative procedure.¹³

¶13 *Village trustee 2*

Village trustee 2 is an employee of a company that supplies products to the company seeking the rezoning. You have stated that the trustee is not "associated" with the supplying company within the meaning of the statute.¹⁴ You have also said that there is no suggestion or evidence that the company will leave the village if the rezoning is not approved. The fact that the trustee's employer has a financial connection to the company is not consequential

¹⁰ See, e.g., *Zagoreos v. Conklin*, 491 N.Y.S.2d (A.D. 1985); *Sokolinski v. Woodbridge Township Municipal Council*, 469 A.2d 96 (N.J. Super. A.D. 1983).

¹¹ 1994 Wis Eth Bd 5, ¶9. Our advice is consistent with the view of the courts expressed in several cases that if a local official votes on a contract in which the official's employer has an interest, the contract is void. *Heffernan v. City of Green Bay*, 266 Wis. 534 (1954) (if alder person who voted to approve contract had been employee of individual's company when another company owned by the individual bid for the contract, the contract would have been illegal and void); *Edward E. Gillen Co. v. City of Milwaukee*, 183 N.W. 679 (Wis. 1921); *Ballenger v. Door County*, 131 Wis. 2d 422 (Ct. App. 1986).

¹² *The Board of Supervisors of Oconto County v. Hall*, 47 Wis. 208 (1879). As the Attorney General has said:

A pecuniary interest sufficient to disqualify exists . . . where it is one which is personal or private to the member, not such interest as he has in common with all other citizens or owners of property, nor such as arises out of the power of the [government] to tax his property in a lawful manner.

36 Op. Att'y Gen. 45 (1947). See also 1997 Wis Eth Bd 1; 1995 Wis Eth Bd 3; 67 C.J.S. Officers §204.

¹³ Mason's Manual of Legislative Procedure, §522 (1989); Robert's Rules of Order Newly Revised, §44 (9th ed. 1990).

¹⁴ Section 19.42(2), *Wisconsin Statutes*, provides:

19.42(2) "Associated", when used with reference to an organization, includes any organization in which an individual or a member of his or her immediate family is a director, officer or trustee, or owns or controls, directly or indirectly, and severally or in the aggregate, at least 10% of the outstanding equity or of which an individual or a member of his or her immediate family is an authorized representative or agent.

as long as the trustee's income, benefits, and status with his or her employer will not be affected by the trustee's or village's action on the zoning petition.¹⁵ From the facts you have provided, we believe that §19.59 does not appear likely to restrict village trustee 2 from participating in the rezoning decision.

¶14 *Village trustee 3*

Village trustee 3 owns a company that, in the past, has done business with the company that is seeking the rezoning. Although the trustee bids each year for a contract with the company, you have indicated that the contract is awarded to the low bidder. In analyzing this situation, you have concluded any affect on the trustee's prospects of obtaining a contract from the company as a result of the trustee's vote on the rezoning petition is remote and speculative. We agree. Thus, we conclude that §19.59 does not appear likely to restrict village trustee 3 from participating in the rezoning decision.

Advice

¶15 The Ethics Board advises that :

- 1) Under §19.59, *Wisconsin Statutes*, the village trustee whose property abuts the property that is the subject of the company's rezoning petition, and who is an employee of the company, should not participate in discussions, debates, or votes on the petition;
- 2) Section 19.59, *Wisconsin Statutes*, is unlikely to restrict the village trustee who is an employee of a company that sells supplies to the company seeking the rezoning to vote on the petition; and
- 3) Section 19.59, *Wisconsin Statutes*, is unlikely to restrict the village trustee who owns a company that, in the past, has done business with the company seeking the rezoning to vote on the petition.

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¹⁵ 1992 Wis Eth Bd 10.