

---

**2003 Wis Eth Bd 17**  
**LOCAL CODE - DISQUALIFICATION**

---

The Ethics Board advises that a member of the Village's governing board may participate in the consideration or decision about improvements the village will make to the village's sewage system and the financing of those improvements as follows:

1. If the sewer improvement does not personally and substantially benefit the property interest of a village trustee, the trustee is disqualified neither from participating in the designation of the sewer improvement nor from determining how the improvement's cost will be met.
2. If the sewer improvement personally and substantially benefits the property interest of a village trustee, but the improvement also confers a substantial benefit on all or a sizeable portion of the village's property owners, the trustee is disqualified neither from participating in the designation of the sewer improvement nor from determining how the improvement's cost will be met.
3. If the sewer improvement produces a substantial or personal benefit to the trustee's property interest that is not common to all or a sizeable portion of the village's property owners, but the village assesses the improvements' costs to the property owners who are the beneficiaries of the improvement, the trustee is disqualified neither from participating in the designation of the sewer improvement nor from determining how the improvement's cost will be met.
4. If the sewer improvement produces a substantial or personal benefit to the trustee's property interest that is not common to all or at least to a sizeable portion of the village's property owners, and the village assesses the improvements' costs to all of the village's property owners or at least to property owners who do not benefit from the improvements ordered, the trustee should not participate in discussions and actions that have as their goal the transfer of the costs of the sewer improvements to the trustee's property to others in the village.

Facts

This opinion is based upon these understandings:

- a. You are a village attorney and write on behalf of the village board.
- b. The Village has a wastewater treatment system that serves several hundred customers; one-half of the properties in the

Village use private systems that are not connected to the public sewer system.

- c. Approximately one-fifth of the customers of the public system use private pumps to bring their sewage into the public sewer main. The pumps are owned, operated, and maintained by the customers and are not part of the public sewer system. Approximately 20 of these users deposit their waste into a force main, rather than into a gravity main.
- d. The Village has been experiencing sewage backup from the force main.
- e. In the interest of environmental protection, the Village hired a consultant that has developed several alternatives for improving the sewage system.
- f. For each alternative, there are a number of different financing schemes available. Depending on which improvement proposal is selected and its method of financing, owners of the properties using pumps could pay more than others or costs could be spread more evenly among all sewage system users.
- g. The village board comprises five members. Two members of the village board, one of whom is also a member of the board's Wastewater Committee, own property that use pumps delivering sewage into the force main. Neither is currently experiencing sewage problems.

### Questions

¶1 The Ethics Board understands your question to be:

How, if at all, does §19.59, *Wisconsin Statutes*, affect the ability of a member of the village board to participate in decisions concerning improvements to the sewage system and the payment of the costs of those improvements?

### Discussion

#### **Statutory elements**

¶2 Section 19.59 (1) (a), *Wisconsin Statutes*, reduced to its elements, provides:

No local public official

May use his or her public position or office

To obtain financial gain or anything of substantial value  
For private benefit of the official, the official's immediate family, or an  
organization with which the official is associated.<sup>1</sup>

¶3 A member of the village board is a local public official.<sup>2</sup> Participating in official debate, discussions, or votes is a use of office.<sup>3</sup> Sewage system improvements and their financing may provide a service or benefit of substantial value for the official and the official's immediate family. Section 19.42 (1), *Wisconsin Statutes*, provides that "anything of value" includes any money, favor, service, or payment.<sup>4</sup> Obtaining something of value may include an avoidance of financial loss.<sup>5</sup>

---

<sup>1</sup> 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 game by a member of the district board of a local professional baseball park district created under subch. III 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.

<sup>2</sup> 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.

Section 19.42 (7x), *Wisconsin Statutes*, provides:

**(7x)** "Local public official" means an individual holding a local public office.

<sup>3</sup> 1997 Wis Eth Bd 1 ¶3; 1995 Wis Eth Bd 6 ¶4; 1995 Wis Eth Bd 3 ¶4.

<sup>4</sup> Section 19.42 (1), *Wisconsin Statutes*, provides:

**19.42 Definitions.** In this subchapter:

**(1)** "Anything of value" means any money or property, favor, service, payment, advance, forbearance, loan, or promise of future employment, but does not include compensation and expenses paid by the state, fees and expenses which are permit-

¶4 “Substantial value” is contrasted with mere token or inconsequential value.<sup>6</sup> Whether a village board member’s voting for or against a particular proposal or financing scheme will result in the member’s obtaining something of substantial value for the official’s private benefit is a question of fact.<sup>7</sup>

¶5 Your letter of inquiry informed us that the village board will make and implement its decisions by adoption of one or more ordinances. Without any independent inquiry, we accept that assertion as a given. Accordingly, we have omitted all discussion of the limitations of §19.59 (1) (c) that would otherwise pertain.<sup>8</sup>

---

ted and reported under s. 19.56, political contributions which are reported under ch. 11, or hospitality extended for a purpose unrelated to state business by a person other than an organization.

<sup>5</sup> 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).

<sup>6</sup> 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).

<sup>7</sup> 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.”).

<sup>8</sup> Section 19.59 (1) (d), *Wisconsin Statutes*, provides:

**19.59 (1) (d)** Paragraph (c) does not prohibit a local public official from taking any action concerning the lawful payment of salaries or employee benefits or reimbursement of actual and necessary expenses, or prohibit a local public official from taking official action with respect to any proposal to modify a county or municipal ordinance.

The paragraph referred to 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.
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.

**Determination of the village board's action's effect  
on a trustee's private interests**

¶6 To the extent that the village's decision on the type of sewer improvements it will make will personally and substantially benefit a village board member two questions must be asked: Who else will benefit? and Does the allocation of costs to board member fairly account for the benefit to that property owner?

¶7 Four situations merit consideration.

ONE. The sewer improvement does not personally and substantially affect the property interest of a village trustee. The trustee is disqualified neither from participating in the designation of the sewer improvement nor from determining how the improvement's cost will be met. This is because the situation is not one which a member has a personal or private interest.

TWO. The sewer improvement personally and substantially affects the property interest of a village trustee, but the improvement also confers a substantial benefit on all or a sizeable portion of the village's property owners. The trustee is disqualified neither from participating in the designation of the sewer improvement nor from determining how the improvement's cost will be met. This is because the situation is one in which the member's interest is in common with all or at least a great number of the trustee's fellow citizens so that there is no special advantage to the trustee.

THREE. The sewer improvement produces a substantial personal benefit to the trustee's property interest that is not common to all or a sizeable portion of the village's property owners, but the village assesses the improvements' costs to the property owners who are the beneficiaries of the improvement. The trustee is disqualified neither from participating in the designation of the sewer improvement nor from determining how the improvement's cost will be met. This is because each beneficiary pays for the improvement to his or her property so that there is no special advantage to the trustee.

On many occasions the Ethics Board has said that, even if a local official has a substantial financial interest in a legislative matter, the official may still participate in the matter's consideration, as long as:

- A. The official's action affects a whole class of similarly-situated interests;
- B. The official's interest is insignificant when compared to all affected interests in the class; and
- C. The official's action's effect on the official's private interests is neither significantly greater nor less than upon other members of the class.<sup>9</sup>

The Ethics Board developed this test in recognition that the law favors an official's exercise of the official's public duties. As the Attorney General has put it, "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."<sup>10</sup>

FOUR. The sewer improvement produces a substantial personal benefit to the trustee's property interest that is not common to all or at least to a sizeable portion of the village's property owners, and the village assesses the improvements' to all of the village's property owners or at least to property owners who do not benefit from the improvements ordered. The trustee should not participate in discussions and actions that have as their goal the transfer of the costs of the sewer improvements to the trustee's property to others in the village.

¶8 The issue here is whether the class of individuals affected by the village board's decision is large enough so that the interests of an affected board member can be considered insignificant when compared to the all affected interests in the class. This is not a question that can be answered with mathematical precision. The effects, their magnitude, and the identification of their beneficiaries are matters of fact. In the first instance, it is the members of the village board who must determine those facts.

¶9 When determining whether the benefit of altering the sewer system is limited to the twenty property owners who deposit waste into a force main or a benefit for the entire village, you may account for these considerations: To what extent is a sewer backup a public safety issue? To what extent is a

---

<sup>9</sup> 1992 Wis Eth Bd 22 ¶6-8; 1990 Wis Eth Bd 20 ¶4.

<sup>10</sup> 36 Op Att'y Gen 45 (1947). See also *The Board of Supervisors of Oconto County v. Hall*, 47 Wis. 208 (1879).

sewer backup likely to contaminate ground water? To what extent is publicity concerning a sewer backup likely to affect the village's interest in tourism? The overwhelming majority of the sewer system's customers do not have to purchase and maintain pumps and backflow valves, to what extent, if any, should the deposit of waste into a force main be considered an initial design error that the village should rectify? In the case of a sewer backup onto the property from which waste is deposited into a force main, is the cost of clean up borne entirely by the property owner or is the cost of clean up borne by the village, in which case the village would benefit from a new engineering solution?

**If the village board's action's effect on a trustee's interest is speculative**

¶10 We have also previously recognized that public policy supports a public official's exercise of official duties when the financial effect of an official decision on the official's personal interests is uncertain and speculative. In 1998, the question was whether a member of a city council could properly vote on whether to extend public utilities to an area in which the member owned a house. The Board said:

It is not clear that extension of service to the affected area or retention of the status quo will result in a private benefit of substantial value. You have indicated that the municipality is likely to require a substantial payment from the owner of each property to which water and sewer service is extended. On the other hand, these households may avoid the cost of maintaining wells and septic systems. Property values may be affected. The private benefits and costs are several and, in part, offsetting. In contrast, the public benefits from the provision of public water and sewer service may include added groundwater protection and improved public health. *If a public official's participation or action on government policy is neither forbidden nor antagonistic to public policy, then public policy favors a public official's exercise of his or her official duties.*

98 Wis Eth Bd 01 ¶10 (emphasis added).<sup>11</sup>

---

<sup>11</sup> See, e.g., 1995 Wis Eth Bd 3 ¶12; 8 Op Eth Bd 33 (1985). We also note the expression of the legislature's intent set out in §19.45 (1), *Wisconsin Statutes*. Although that portion of the Ethics Code is addressed to state officials, we believe it has relevance to local officials as well. In that section, the legislature has stated:

**19.45 (1)** The legislature hereby reaffirms that a state public official holds his or her position as a public trust, and any effort to realize substantial personal gain through official conduct is a violation of that trust. This subchapter does not prevent any state public official from accepting other employment or following any pursuit which in no way interferes with the full and faithful dis-

Advice

¶11 A member of the Village's governing board may participate in the consideration or decision about improvements the village will make to the village's sewage system and the financing of those improvements as follows:

1. If the sewer improvement does not personally and substantially benefit the property interest of a village trustee, the trustee is disqualified neither from participating in the designation of the sewer improvement nor from determining how the improvement's cost will be met.
2. If the sewer improvement personally and substantially benefits the property interest of a village trustee, but the improvement also confers a substantial benefit on all or a sizeable portion of the village's property owners, the trustee is disqualified neither from participating in the designation of the sewer improvement nor from determining how the improvement's cost will be met.
3. If the sewer improvement produces a substantial or personal benefit to the trustee's property interest that is not common to all or a sizeable portion of the village's property owners, but the village assesses the improvements' costs to the property owners who are the beneficiaries of the improvement, the trustee is disqualified neither from participating in the designation of the sewer improvement nor from determining how the improvement's cost will be met.
4. If the sewer improvement produces a substantial or personal benefit to the trustee's property interest that is not common to all or at least to a sizeable portion of the village's property owners, and the village assesses the improvements' costs to all of the village's property owners or at least to property owners who do not benefit from the

---

charge of his or her duties to this state. The legislature further recognizes that in a representative democracy, the representatives are drawn from society and, therefore, cannot and should not be without all personal and economic interest in the decisions and policies of government; that citizens who serve as state public officials retain their rights as citizens to interests of a personal or economic nature; that standards of ethical conduct for state public officials need to distinguish between those minor and inconsequential conflicts that are unavoidable in a free society, and those conflicts which are substantial and material; and that state public officials may need to engage in employment, professional or business activities, other than official duties, in order to support themselves or their families and to maintain a continuity of professional or business activity, or may need to maintain investments, which activities or investments do not conflict with the specific provisions of this subchapter.

improvements ordered, the trustee should not participate in discussions and actions that have as their goal the transfer of the costs of the sewer improvements to the trustee's property to others in the village.

WR1158