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**1999 Wis Eth Bd 3**  
LOCAL CODE - DISQUALIFICATION

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A village trustee should not participate in the discussion, consideration, or vote on a proposal to ban or regulate a business activity in the village in which the trustee is engaged unless the trustee can demonstrate that the trustee's official actions will not result in a substantial financial gain, or avoidance of a substantial financial loss, for the trustee's business.

Facts

¶ 1 This opinion is based upon these understandings:

- a. You are a village attorney.
- b. A member of the village board is a 50 percent owner of a business.
- c. The business features an activity for customers.
- d. The village board member indicates that it is difficult to determine the amount of income generated by the activity, but estimates that as much as 15 percent of the business's customers enter the portion of the business premises where the activity occurs.
- e. The village is considering an ordinance that would prohibit or restrict the activity.

Questions

¶ 2 The Ethics Board understands your question to be:

Does §19.59, *Wisconsin Statutes*, restrict the village board member from participating in consideration of the proposed village ordinance?

Discussion

¶ 3 Three provisions of §19.59, *Wisconsin Statutes*, the Code of Ethics for Local Government Officials, potentially limit a village board member's ability to act on the matter you have asked about. They are found at §19.59(1)(a), (1)(c)1., and (1)(c)2.

*Section 19.59 (1)(c) 1. and 2.:*

*Substantial benefit from, or interest in, matter affected by official action*

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

No local public official  
May take any official action  
Substantially affecting a matter  
In which the official has a substantial financial interest.<sup>1</sup>

and

No local public official  
May use his or her public office or position  
To produce or assist in the production of  
A substantial benefit  
For the official.<sup>2</sup>

¶ 5 A member of a village board is a local public official.<sup>3</sup> Participating in official debate, discussions, or votes is a use of office and official action.<sup>4</sup>

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</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.

Voting to block a proposal that could adversely affect the board member's business by banning a portion of that business, and thereby reducing the number of individuals patronizing that business, could have substantial financial consequences. Were it not for §19.59(1)(d), *Wisconsin Statutes*, §19.59(1)(c), on its face, would prevent an official whose business would apparently be affected by the proposed ordinance from participating in that decision in an official capacity.

¶ 6 Section §19.59(1)(d), *Wisconsin Statutes*, provides an exception to the restrictions in §19.59(1)(c). Notwithstanding any restraint that §19.59(1)(c) would otherwise impose, §19.59(1)(d) provides that it “does not prohibit a local public official from taking official action with respect to *any* proposal to modify a municipal ordinance.”<sup>5</sup> (Emphasis added.) Thus, §19.59(1)(c) will not be a bar to the official’s action *to modify a municipal ordinance* to ban or regulate the activity in question.<sup>6</sup>

*Section 19.59(1)(a):*

*Use of position to obtain a private benefit having substantial value*

¶ 7 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.<sup>7</sup>

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

<sup>5</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 employe 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.

<sup>6</sup> The section may remain an obstacle to a local official’s acting officially on related matters, such as the grant or denial of a license to a particular establishment.

<sup>7</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

¶ 8 We have previously established that a member of a village board is a local public official and that participating in official debate, discussions, or votes is a use of office. The exception in §19.59(1)(d) does not refer to §19.59(1)(a).<sup>8</sup> The question, then, is: By using public office to attempt to block a proposal to ban or restrict part of the board member's business, would a village trustee obtain something of substantial value?<sup>9</sup>

¶ 9 Section 19.42(1), *Wisconsin Statutes*, provides that “anything of value” includes any money, favor, service, or payment.<sup>10</sup> Obtaining something of value may include an avoidance of financial loss.<sup>11</sup> “Substantial value” is contrasted with mere token or inconsequential value.<sup>12</sup> Whether a village board member’s voting for or against the proposal to ban or regulate the activity in question will result in obtaining something of substantial value for

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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>8</sup> See, e.g., 1998 Wis Eth Bd 1; 1996 Wis Eth Bd 10

<sup>9</sup> *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 1995 Wis Eth Bd 3; 67 C.J.S. Officers §204.

<sup>10</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 permitted 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>11</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>12</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).

private benefit for the official is a question of fact.<sup>13</sup> We recommend that the trustee demonstrate that the trustee's actions in the consideration of the proposed ordinance are unlikely to result in a substantial financial gain, or avoidance of a substantial financial loss, for the trustee's business.<sup>14</sup> 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.<sup>15</sup> This standard is also incorporated in manuals governing legislative procedure.<sup>16</sup>

### Advice

¶10 The Ethics Board advises that the village trustee not participate in the discussion, consideration, or vote on a proposal to ban or regulate a business activity in the village in which the trustee is engaged unless the trustee can demonstrate that the trustee's official actions will not result in a substantial financial gain, or avoidance of a substantial financial loss, for the trustee's business.

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<sup>13</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>14</sup> 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 . . .”).

<sup>15</sup> *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.

<sup>16</sup> 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.

<sup>16</sup> Mason’s Manual of Legislative Procedure, §522 (1989); Robert’s Rules of Order Newly Revised, §44 (9<sup>th</sup> ed. 1990).