

**In the Matter of  
Arbitration  
Between and Among**

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Members of the Board of Trustees  
of the Village of Shorewood Hills  
of Dane County, Wisconsin

FINAL AWARD

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PROCEDURAL HISTORY

This proceeding was commenced by stipulation of the parties pursuant to a process (“the process”) for the resolution of disputes arising under the ethics code of the Village of Shorewood Hills of Dane County, Wisconsin (“the Village”). The process was adopted by the Village on January 20, 2009.

The process provides that, in the event that a member (“trustee”) of the board of trustees of the Village (“the board”) forms the belief that another trustee is about to commit a violation of the ethics code, found in sec. 1.08 of the Village ordinances, that trustee may request that the trustee as to which the belief exists refrain from acting in his or her official capacity as to the affected matter while it is under consideration by the board. The process further provides that, in the event that the trustee requested to refrain from participating in the matter declines to do so, the involved trustees may submit to the board written statements of their respective positions on the question, and, further, that in the event that the challenged trustee is unpersuaded by the contentions of the challenging trustee, the question may be submitted for decision by a disinterested arbitrator.

A trustee has filed a statement positing that three other trustees should have refrained from participating in deliberations of the board as to the disposition of a request, made in 2008, by the Blackhawk Country Club (“the Club”) for permission to construct a deck on property the Club leases from the Village (“the project”). The parties have filed their position statements as provided in the process, and, in light of those statements, two of the challenged trustees have remained steadfast in their positions that they were entitled to deliberate and vote on the request of the Club in their capacities as trustees, while one of the three trustees has concluded that he should not have done so.

While the request of the challenging trustee was pending, the board, with the active participation of the three challenged trustees, voted to approve the Club's request, and the deck construction project has since been completed.

The parties have submitted for decision the following question:

Should the challenged trustees have refrained from deliberating and voting on approval of the project where:

- a. the Club had asked the Village board, pursuant to the terms of a lease agreement between the Village and the Club, for permission to construct a deck on property the Club rents from the Village;
- b. the deck would be for the use of Club members and their guests;
- c. the challenged trustees were members of the Club; and
- d. the Village ethics code prohibits a trustee from participating in and voting on matters in which the trustee "has a direct personal interest not common to other citizens of the Village."

In addressing the question presented, this arbitrator has considered not only the statements of position filed by the parties and the language of the Village ethics code and its explanatory drafters' commentary, but also the minutes of the Village board reflecting its deliberations on the project as well as the membership recruitment materials customarily supplied by the Club to its candidates for membership. The latter materials have been submitted by the Village, at the request of the arbitrator, to complete the record in this proceeding.

#### CONTENTIONS OF THE PARTIES

The contentions of the parties may be briefly summarized as follows:

The challenging trustee ("Trustee D") asserts, among other things, that –

The purpose of the deck construction project was to benefit members of the Club and their guests.

Each of the challenged trustees is a member of the Club.

Their memberships create a direct personal interest in the project not held in common with other citizens of the Village.

Membership in the Club is by invitation only.

A trustee of the Village who is also a member of the Club risks antagonizing the leadership of the Club if that trustee votes to disapprove a project of the Club.

Under the Club's bylaws, a member of the Club may be expelled by its board of directors for "conduct detrimental to the Club," which might be construed to include voting against approval of the project by the Village board.

Therefore, each of the challenged trustees should have refrained from deliberating and voting on approval of the project.

One of the challenged trustees ("Trustee A") asserts, among other things, that –

This trustee is a "social member" of the Club, and therefore does not have voting privileges with regard to the governance of the Club.

Every resident of the Village is entitled to use the Club's golf course under Village-run golf programs.

Every resident of the Village is free to join the Club.

Every resident of the Village has full use of the Club's bar and dining privileges in the first quarter of each calendar year.

The Club is the 3rd largest source of revenue for the Village, and every resident of the Village, as a property owner, benefits from the leasehold relationship between the Village and the Club.

Every resident of the Village enjoys golf privileges at the Club.

Every resident of the Village is entitled to use the bar and lounge of the Club while engaging in winter sports on Saturdays and Sundays.

Organizations of the Village may use the Club's clubhouse 24 times each year.

Because every resident of the Village is a beneficiary of the leasehold relationship between the Village and the Club, all issues arising between the Village and the Club are common to every resident.

For all of these reasons, it was not a violation of the Village ethics code for the challenged trustees to deliberate and vote on the question of the Club's deck construction project.

Another of the challenged trustees ("Trustee B") asserts, among other things, that –

The Club is fully accessible to all Village residents for one calendar quarter of each year.

Numerous Village-sponsored events are held at the Club annually.

The number of Village residents using the Club's amenities is not insignificant.

It is common for residents of the Village to use, or at least to be able to use, the Club's facilities.

It is important for trustees to be able to advocate for or against questions involving the Club in order to ensure that the Village's interests are properly represented.

The third challenged trustee ("Trustee C") asserts, among other things, that –

The spirit of the Village ethics code requires that trustees do everything possible to avoid potential conflicts of interests, whether real or perceived, in connection with deliberations on questions that may come before its board of trustees.

Because a perception of a conflict of interests might have arisen with regard to this trustee's participation in the approval of the Club's deck construction project, this trustee should not have taken part in the vote of the board approving it.

The parties have agreed that the final award in these proceedings should briefly specify the essential reasons therefor. Those reasons follow:

#### FINDINGS AND CONCLUSIONS

1. The parties have, in the submission of this proceeding to arbitration, complied with the provisions of the prescribed process of the Village of Shorewood Hills of Dane County, Wisconsin, for the resolution of disputes as to the interpretation and application of the Village ethics code.
2. The ethics code of the Village of Shorewood Hills, section 1.08 of the Village ordinances, provides, in pertinent part, that:

[N]o local official shall participate, in an official capacity, in the discussions, negotiations or votes on a matter in which he/she has a direct personal interest not common to other citizens of the Village.
3. Each of the interested trustees was at the time here pertinent a member of the Blackhawk Country Club and in a position to enjoy benefits of such membership which were not available to non-member residents of the Village.

4. Each of the trustees whose conduct is challenged in this proceeding is a “local official” within the meaning of the Village ethics code.
5. Each of these trustees participated in an “official capacity” within the meaning of the same code in connection with the deliberations and voting on the question of approval of the Club’s request for permission to construct a deck on land leased to the Club by the Village.
6. By virtue of their separate memberships in the Club, each of these trustees had at the time a “direct personal interest not common to other citizens of the Village” in the matter under consideration within the meaning of the Village ethics code.
7. In the circumstances here presented, the challenge of Trustee D to the participation of the challenged trustees in the deliberations and voting of the Village board on the question of the Club’s construction project was justified.
8. Had all three of the challenged trustees declined to vote for approval of the project, it would nonetheless have been approved by the Village board by virtue of the votes of the remaining eligible members of the board who voted for approval.
9. There is nothing in the record before this tribunal to suggest that any trustee of the Village has proceeded in this matter other than in the utmost good faith.
10. This proceeding is governed by the Wisconsin Arbitration Act, chapter 788 of the Wisconsin Statutes.

#### ANALYSIS

This appears to be a case of first impression under the Village code of ethics. If also appears that there is presently available little or no direct precedent interpreting code provisions comparable to those here in question. This analysis therefore relies upon consideration of the precise language of the code and its accompanying drafters’ commentary, as informed by the importance of the integrity of the process of municipal governance and “the interests of the Village as a whole”. As to the latter consideration, see the previously referenced ethics code drafting committee’s commentary.

It should first be noted that the State of Wisconsin has a statutory ethics code regulating the conduct of municipal officials in this state. That statutory code, found in sec. 19.59, Wisconsin Statutes, is not at issue in this proceeding. This is because Wisconsin municipalities are free under that law to adopt, by ordinance, measures prescribing standards of ethical conduct for officials subject to their jurisdiction which are not in conflict with, but in addition to, the provisions of the statute. See Wis. Stat. 19.59 (1m) and (3)(e). The ethics code of the Village of Shorewood Hills, part of the Village ordinances, is such an additional standard, and only the provisions of that code are in issue here.

## **Interests Not Fully Common to Other Village Residents Govern the Question**

At the core of this proceeding is the proper interpretation of the phrase “direct personal interest not common to other citizens of the Village.” Two of the challenged trustees argue, in effect, that Village residents have access to at least some of the benefits of membership in the Club at least some of the time, so that, to this extent, it might be said that benefits of membership in the Club are held in common by residents of the Village whether or not they are members of the Club. From this they reason that, because non-Club member residents enjoy some of the benefits of membership in the Club some of the time, the commonality of those shared benefits makes the trustee-members’ withdrawal from consideration of approval of the project unnecessary under the ethics code. This contention is fundamentally flawed. The Village ethics code does not proceed on the basis of consideration of which interests are held in common by trustees who are members of the Club with residents who are not members of the Club. Instead it asks the question:

*Which interests are not held in common as between trustees who are members of the Club and those residents of the Village who are not members of the Club?*

This is why the operative language of the code is expressed in the negative, i.e.: “direct personal interest **not common** to other citizens....” (emphasis added)

Thus, when Trustee A recites, for example, that: “[e]very resident of the Village has full use of the Club’s bar and dining privileges in the first quarter of each calendar year”, he ignores the fact that a necessary implication of this proposition is that non-members of the Club do not have such access for the remaining three-quarters of the year. It is this access which is **not fully shared in common** that defines the conflicts of interests which are prohibited by the code.

The same fundamental flaw attends Trustee’s A’s contention that trustee withdrawal is not required with regard to participation in deliberations on the project because every resident of the Village is entitled to use the bar and lounge of the Club while engaging in winter sports on Saturdays and Sundays. This trustee’s focus on what is held in common ignores what is by necessary implication not held in common between a Club member trustee and other residents of the Village, which is the other five days of the week in winter and all seven days of the week in the other three seasons of the year. To repeat, it is only access to the Club’s **benefits not fully held in common** which determines a trustee’s disqualification under the code.

Trustee A also errs by arguing that he should not be disqualified from participating in the project deliberations and voting because all citizens of the Village are free to join the Club. The fallacy of this argument is found in the fact that membership in the Club is by invitation only, and by the further fact that, as recited in the Club’s bylaws, membership

in the Club is limited to 290 regular (voting) members and 300 social (non-voting) members, whereas the population of the Village numbers more than 1500. It is therefore a quantitative impossibility for all residents of the Village to be members of the Club.

Moreover, the membership recruitment packet employed by the Club to attract new members lists “reciprocal benefits” available only to members. These include:

- “**Private Club Network** You are welcome to enjoy any of more than 200 private golf course experiences no matter where your travels take you in the United States. It’s one of the many value-added benefits of membership at the Club.”
- “**Big Ten Club Association** As a Blackhawk member, you can enjoy the amenities of a superb reciprocal club in each Big Ten university location.”
- “**Area Dining**  
The Madison Club  
Bishops Bay Country Club  
Nakoma Golf Club  
Milwaukee Yacht Club  
Wisconsin Club”

This list of “reciprocal benefits” of membership in the Club underscores some of the opportunities available to Club members which are not available to non-members among the citizens of the Village, i.e.: “not common to other citizens of the Village.” These unshared benefits are substantial in character and they have substantial economic value, as is implicit in the fees and dues structure of the Club. Its official schedule of fees recites, for example, that regular Club members must pay an initiation fee of \$2,000.00 and annual dues of \$7,745.00, while social members must pay an initiation fee of \$250.00 and annual dues of \$2,140.00. These are not insubstantial sums, and they stand as a strong indicator of the considerable economic value of Club membership, and, therefore, its potential to influence even the most scrupulous trustee.

### **Lack of Economic Value or Impact Does Not Excuse a Disqualifying Interest**

However, it is important to note in this connection that the reach of the ethics code is not bounded by questions of economic value. The language of the code relates only to the existence of a “direct personal interest” held by a trustee, without regard to the economic value of that interest, if any. And, in its drafting committee’s commentary to the code, the code’s drafters make clear that:

*“direct personal interest” encompasses non-pecuniary interests such as ... Blackhawk Country Club membership. (emphasis added)*

This is supported by the fact that the Village's code of ethics was evidently adapted from Robert's Rules of Order (Newly Revised), which has become the source of many modern municipal ethics codes. Sec. 44 of the Rules provides as follows:

*No member should vote on a question in which he has a direct personal or pecuniary interest not common to other members of the organization.*  
(emphasis added)

That the Village drafting committee omitted the phrase "or pecuniary" in adapting the Rules to create the ethics code illustrates that it intended to eliminate any question of negligible economic value or impact as an excuse for a trustee's disqualifying interests.

Therefore, so long as a trustee has a "direct personal interest" in the Club, as by way of membership in the Club, it is not necessary for anyone to inquire into or to calculate the economic value of that interest, or the potential economic impact of the issue in question on the interested trustee, in order to reach a conclusion that the trustee is, or is in danger of becoming, in violation of the code.

#### **No Distinction Between Regular (Voting) and Social (Non-Voting) Memberships**

It should also be noted that there is no distinction to be made under the code between voting (or regular) membership in the Club and non-voting (or social) membership. The presence of voting power adds an element of control over the affairs of the Club which makes even more clear that the trustee who has a regular (voting) Club membership has a direct personal interest in the Club that is not held in common with other citizens of the Village. But the absence of such voting power in a social membership in the Club does not remove a trustee who is a social member from the prohibition of the code so long as that trustee enjoys other benefits of Club membership not shared in common with other Village residents, including, but not limited to, those recited in the list of "reciprocal benefits" set out above.

#### **Trustee's Earnest Belief in the Absence of Influence is No Excuse**

Further, it is worth noting that the drafting committees' commentary to the code clearly indicates that it is intended to impose an objective standard, rather than a subjective one, on the resolution of questions of conflicts of interests arising under its provisions. Thus the question to be asked is not whether a trustee believes he or she will be influenced by the existence of an interest such as membership in the Club. Instead, according to the code's drafting committee's commentary, the question is:

*[whether the interest in issue is] "sufficient to lead a fair and reasonable person [other than the trustee] to perceive that such influence might exist, [in which event] the official may not participate in an official capacity in discussions or vote on a matter.*

Thus it is of no consequence whether a trustee genuinely believes that he or she will not be improperly influenced by the existence of a disqualifying interest such as membership in the Club. It matters only whether a disinterested observer might reasonably perceive otherwise.

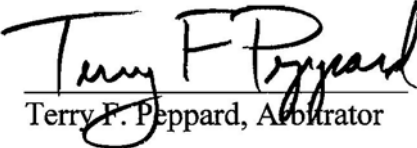
**Trustee's Desire to Advocate on Vital Issues Does Not Change the Outcome**

Finally, it may be mentioned that the rationale of Trustee B, to the effect that this trustee's participation in the deliberations and voting on the question of the Club's project was necessary in order to permit this trustee to advocate effectively on a matter of public importance, is misplaced. The language of the code anticipates this concern by including the phrase "in an official capacity" in the prohibition against participation by a trustee who is burdened by a disqualifying interest. The necessary implication of this language is that a disqualified trustee must refrain from official participation with and among the other (non-disqualified) trustees, but may, for example, repair to the audience at a public meeting treating the issue and participate in the same ways and to the same extent as may any other non-trustee citizen. Under the code, so long as the trustee remains a member of the Club, that is the trustee's only option for advocacy on such an issue.

AWARD

Accordingly, upon consideration of all of the papers, exhibits and arguments presented in this proceeding, it is the decision of this tribunal, in full and final resolution of the issues presented, that, by virtue of the provisions of sec. 1.08 of the Village ordinances, each of the challenged trustees should have refrained from participating in an official capacity in the deliberations and voting on the question of approval of the Blackhawk Country Club's request for permission to construct a deck on land leased to the Club by the Village.

So entered, as at the Village of Shorewood Hills of Dane County, Wisconsin, this 9<sup>th</sup> day of February, 2010.

  
Terry F. Peppard, Arbitrator