To Karl Frantz, Village Administrator

From Matthew Dregne, Village Attorney
Laura Callan

Date February 3, 2015

Re Corrected Memorandum: Wisconsin and the Village's Ethic Laws: Conflicts of Interest[1]

INTRODUCTION AND SUMMARY

A question has arisen out of Trustee Tim Rikkers' participation in the Board's deliberations of proposed amendments to the lease with Blackhawk Country Club, Inc. ("BCC" or the "Club"). Mr. Rikkers participated in a number of committee and board meetings regarding the BCC lease, at a time when his wife was a social member of BCC. Mr. Rikkers' participation in those meetings violated section 1.08(3) of the Village Ordinances, which required him to abstain from taking any official action on the lease amendments and to recuse himself from participating in all discussions regarding the lease. Questions have been raised about whether Mr. Rikkers' participation in the process has "tainted" the process.

We have determined that Mr. Rikkers' participation in the process has not created a legal deficiency with the process. For example, if the Village conducts a referendum on a new lease, and the Village Board subsequently approves the new lease, we do not believe the validity of the lease would be subject to a legal challenge based on Mr. Rikkers' past participation in the process. However, some may still believe that Mr. Rikkers' participation has "tainted" the process, and that belief could have practical and political implications relating to the referendum.

This memorandum identifies and analyzes the legal issues arising out of Mr. Rikkers' conflict of interest. We provide the following discussion of the procedural

[1] We issued a memorandum to the Village dated December 15, 2014. Marilyn Townsend requested that we issue a corrected memorandum, deleting certain language relating to Ms. Townsend appearing in opposition to the Blackhawk lease amendment. Ms. Townsend also noted an error regarding the date and the nature of the November 12, 2014 Village Board meeting. This corrected memorandum is intended to replace and take the place of our December 15, 2014 memorandum.

Madison Office
222 West Washington Avenue
P.O. Box 1784
Madison, Wisconsin
53701-1784
608.256.0226
888.655.4752
Fax 608.259.2600
www.staffordlaw.com

Milwaukee Office
1200 North Mayfair Road
Suite 430
Milwaukee, Wisconsin
53226-3282
414.982.2850
888.655.4752
Fax 414.982.2889
www.staffordlaw.com

history of the lease negotiations to place our discussion of the issues in their proper context.

STATEMENT OF FACTS

The Village leases certain property to the Club pursuant to a written lease having a term ending December 31, 2025 and a percentage rent provision. Sometime in the winter of 2014 BCC requested that the Village amend the lease to replace percentage rent with fixed rent and extend the term. This request triggered the formation of a five-member Village negotiating committee comprised of the Village President and two trustees (John Imes and Tim Rikkers), two residents (Fred Wade and Dave Ahmann), appointed by the Village President. The committee was tasked with the preliminary (and non-binding) discussion of terms with BCC. One or more meetings between BCC representatives and the committee led to a first draft of a restated lease for the Board's consideration.

Thereafter the Board conducted three meetings or "work sessions" (on October 27, November 12 and 17) to consider different drafts of a restated lease. The work sessions included a discussion of base rent and the lease term, as well as a wide variety of other lease provisions. Mr. Rikkers' involvement with the lease discussions was significant. From Mr. Rikkers' appointment to the committee until sometime after November 13 but before November 17, Mr. Rikkers' wife was a member at BCC.

At the October 27 meeting, a trustee questioned whether Mr. Rikkers had a conflict of interest. Mr. Rikkers said he did not have a conflict of interest, but did not elaborate.

At the November 12 meeting, a resident, Marilyn Townsend, appeared and raised the conflict of interest question, specifically questioning the status of Mr. Rikkers' wife as a Club member. While Mr. Rikkers acknowledged his wife was a BCC member, he denied a conflict existed. There is no indication on the record that any other board member or the Village attorney present at the November 12 meeting recognized Mr. Rikkers had a conflict requiring him to abstain from lease deliberations.

It is our understanding that shortly after the November 12 meeting, Mr. Rikkers' wife terminated her membership in BCC. Mr. Rikkers participated in considering the restated lease at the November 17 meeting, after assuring the Board that his conflict had been eliminated.

At the November 17 meeting, Ms. Townsend renewed her concern about an ethics code violation, and suggested that the "process has been tainted." The six trustees present at the November 17 meeting approved moving forward with a public

informational meeting on the substance of the restated lease. When one trustee expressed concern about the conflict, the Board agreed to consider the issue at a future meeting.

Section 1.09 of the Village's Ordinances requires that an amendment to the lease be submitted to the electorate in an advisory referendum prior to the Board taking action to approve the amendment. Following the December 15 public informational meeting, the Village Board will decide how to proceed, including whether to negotiate further changes to the amended lease, and whether to place a referendum question regarding the lease on the ballot at a future election.

DISCUSSION

1. Wisconsin Ethics Law.

Ethics laws governing the conduct municipal officials are embodied in Wisconsin common law, statutory law and the Village's Code of Ordinances. Wisconsin's statutory conflict of interest laws are aimed avoiding conflicts between public officials' personal interests and their public responsibilities, improving standards of public service and promoting and strengthening the faith and confidence of the people of Wisconsin in their public officials. Wis. Stat. § 19.41(1).

Section 19.59(1m), Wisconsin Statutes, empowers a village to enact an ordinance establishing a code of ethics for village trustees which is not in conflict with, but in addition to, the State code of ethics for local government officials. In accordance with this authority, the Village enacted an ethics code that adopts and adds to the State code. Section 1.08(1) of the Village's Ordinances incorporates by reference sections 19.42 and 19.59, Wisconsin Statutes, the State ethics code for local public officials. Section 1.08(3) goes beyond the State code by expressly prohibiting a trustee from taking "any official action relating to Lease renewal, extension, or modification of rent . . . if the Trustee or any member of the Trustee's immediate family is a member of [the Club]" and requires the trustee to "recuse him or herself from participation in any such discussions and actions." "Immediate family" is defined in Section 1.08(2) to mean the trustee's spouse or domestic partner and "Lease" is defined to mean the lease with BCC.

The language of section 1.08(3) establishes an absolute and objective standard of conduct for trustees in considering BCC lease extensions, renewals and rent modifications. In enacting section 1.08, the Village Board was concerned with the mere existence of a membership relationship between a trustee (or the trustee's spouse or partner) and the Club and not the nature or extent of the relationship. Any membership (social or golf, used or unused, in good standing or delinquent) is sufficient to disqualify the trustee from participating in negotiations to modify rent or extend the lease. Section

1.08 reflects a perception by the Board that there is an inherent, impermissible conflict of interest in the situation where a trustee or the trustee's spouse or partner is a member of BCC and the Village is considering certain material lease amendments.

Additionally, section 1.08 imposes strict liability. Section 1.08 does not require an actual showing of bias by Mr. Rikkers. Nor does the provision require proof of intent to violate the section, knowledge of a violation, injury to the Village or the acquisition of an advantage to Mr. Rikkers or his spouse. Section 1.08(3) establishes a prescription that was violated each time Mr. Rikkers participated in discussions regarding rent or extension of the lease term while his wife was a member of the Club.

Section 1.08(1) of the Ordinance adopts section 19.59(1)(c)1., Wisconsin Statutes. This statute prohibits a local official from taking action affecting a matter in which the official, an immediate family member, or an organization with which the official is associated has a "substantial financial interest." The determination under section 19.59(1)(c) of whether a particular financial interest is sufficiently substantial to disqualify a board member is necessarily factual in nature and depends on the circumstances of each case.

A cardinal rule of statutory interpretation of ordinances is that a specific statute takes precedence over a general statute. Applying this rule to the Village's Ordinances, we assume that the specific conflict prohibition in section 1.08(3) take precedence over the general conflict prohibition in section 1.08(1) (adopting section 19.59 of the Wisconsin Statutes). Thus, we assume the Board, in enacting an ethics code, did not intend to make every violation of section 1.08(3), a violation of section 19.59(1)(c)1. and thus section 1.08(1). We further assume the Board intended section 1.08(3) be construed so that "everything which is not forbidden is allowed." Under this interpretation, a trustee would not be disqualified from taking action on a lease amendment not involving a renewal, extension or rent modification even though the trustee or his or her spouse or partner is a member of the Club. Accordingly, our discussion is limited to Mr. Rikkers' conduct under section 1.08(3).

In our opinion, during such time as Mr. Rikkers' wife was a member of BCC, Mr. Rikkers' participation in lease negotiations violated Section 1.08(3).

2. Although Mr. Rikkers Most Likely No Longer Has a Technical Legal Conflict of Interest, People May Perceive That He Has a Conflict of Interest, and That Perception May Have Practical and Political Implications for the Village.

Whether Mr. Rikkers' conflict ended when his wife terminated her membership presents both legal and practical considerations. The argument that the conflict ended

when Mr. Rikkers' spouse terminated her membership is supported by a strict interpretation of section 1.08(3). This interpretation confines the phrase "is a member" to times simultaneous with the official action. This interpretation finds support from opinions issued by the Government Accountability Board to the effect that a violation of an ethics law can be avoided if the public official divests or withdraws from the private interest creating the conflict. *See* 2008 GAB 09; 1994 Wis. Eth. Bd. 03; 1992 Wis. Eth. Bd. 33.

While this interpretation is reasonable, and probably correct, it may not advance "the faith and confidence of the people of Wisconsin in their state public officials," (Wis. Stat. § 19.41(1)), because a member of the public might reasonably perceive that a significant and relatively recent, albeit former and indirect, involvement with BCC would continue to affect Mr. Rikkers' objectivity or independence of judgment. This is especially true where the issue at has is significant, and potentially controversial.

We think Mr. Rikkers' legal conflict is cured by his wife's resignation from BCC. That said, Mr. Rikkers must decide for himself whether his continuing participation in further deliberations and in a vote on the lease will serve the Village's best interest.[2] It should be noted here that the other trustees do not have the legal authority to prevent him from participating and voting as an elected Village trustee, even if they believe he has an actual or perceived conflict of interest.

3. Effect of Violation on Lease Amendment Process and the Future Vote.

The discussion in the preceding section brings us to consider the effect of the conflict on the lease amendment process and the legal status of the lease amendment at this stage in the process. Two Wisconsin cases have addressed a legal challenge to official action in light of a conflict of interest. In *Ballinger v. Door County*, 131 Wis. 2d 422, 388 N.W.2d 624 (Ct. App. 1986), a county board supervisor was a periodic employee of an entity seeking a rezoning ordinance. There, the court of appeals rejected a challenge to the legality of a zoning ordinance amendment on the basis that the employee-supervisor directly participated in the presentation and debate on the ordinance where the ethics rule required a supervisor to refrain from voting on a question in which he has a direct personal or pecuniary interest not common to other members of the board of supervisors. The court held: "Because this supervisor abstained from the final vote, we interpret this argument to be that this conflict, which was revealed to the board prior to the final vote, somehow tainted the votes of those supervisors voting on the ordinance.

---

[2] According to one commentator, for a person in public office to appear to take advantage of the office will invariably be bad politics. Public skepticism and disillusionment will be heightened if a disqualified official continues to participate in the deliberations or on the vote. If Mr. Rikkers elects to disqualify himself, the GAB advises that he should physically remove himself from the presence of the board and the minutes should reflect the absence. GAB 1240.

We will not, however, review the motives or inducements of legislators when enacting legislation." *See also Board of Supervisors of Oconto County v. Hall*, 47 Wis. 208, 2 N.W. 291 (1879) (the court voided the votes of two of the seven member board of supervisors who were disqualified from voting as a result of a direct pecuniary interest in the matter before the board with the result that the matter did not pass).

Ballinger stands for the proposition that the participation by a disqualified member does not taint the process in which such member participated. *Hall* stands for the proposition that a court may invalidate a vote cast by a disqualified member, which may then have the effect of invalidating the action. Implicit in *Hall* is the proposition that a vote cast by a disqualified member (if immaterial to the outcome) does not invalidate the decision. Taking these cases together, a Wisconsin court is unlikely to invalidate the qualified vote of the other six members of the Village Board of Trustees on the lease following the referendum, based on the fact that Mr. Rikkers had a conflict of interest during lease negotiations before approximately November 17.

4. Enforcement Proceedings Relating to Ethics Violations.

A person who violates section 1.08 of the Village Code is subject to prosecution by the Village. Although we have never seen such a case, we believe the Village Board could request and authorize the Village Attorney to prosecute such a violation. The forfeiture for each violation of section 1.08 is not less than $5 and not more than $500.

The Code of Ethics for local public officials in the Wisconsin statutes contains its own enforcement mechanisms. We are not addressing those enforcement mechanisms in this memorandum.