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January 24, 2020

Renee Lauber, DCTA Planner
Dane County Towns Association
1252 Morrison Court
Madison, WI 53703

Re: Role of Public Officials
Obligation to Remain Unbiased in Quasi-Judicial Matters
Identification of Quasi-Judicial Matters

Dear Ms. Lauber:

From time to time certain issues arise that may require public officials to be impartial. When a quasi-judicial issue arises, officials who have expressed opinions or have shown bias may need to recuse themselves or they jeopardize the validity of the municipality's decision. We have recently seen significant issues arise in this regard in many municipalities. I am writing to urge caution in this regard.

The law is as follows:

1. Quasi-Judicial, Legislative or Administrative Issue? Municipal governing bodies generally have three distinct roles. Many times, they act in a legislative capacity, by making laws. At other times, they apply the laws, however, either in a quasi-judicial capacity or in an administrative capacity. These roles can be summarized as follows:

<table>
<tr><td colspan="3">RULES FOR DECISION-MAKING</td></tr>
<tr><td rowspan="2"><u>Making Laws</u>

Legislative decisions
Wide public discussion
Wide discretion</td><td colspan="2"><u>Applying Laws</u></td></tr>
<tr><td>Quasi-judicial decisions
Due process
Limited discretion</td><td>Administrative decisions
Administrative due process
Narrow discretion</td></tr>
<tr><td>1. Decision-makers represent constituents.
2. Public discussion is encouraged.
3. Decisions must be constitutional and reasonable.
4. Land use decisions should be based on a land use plan.</td><td>1. Notice of pending decisions.
2. Opportunity for a hearing.
3. Opportunity to introduce evidence & examine witnesses.
4. Decisions based on pre-existing standards.
5. Decisions based on factual evidence in a reviewable record.
6. Written decisions.
7. Unbiased decisionmakers.
8. Opportunity for appeal.</td><td>1. Decision-maker must be impartial.
2. Discretion is limited to routine ordinance/policy interpretation.</td></tr>
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2. <u>Impartial Application of Laws</u>. Legislative decisions involve a great deal of discretion. Legislators take positions well in advance of making the decision, and their positions are often embedded in their campaign platform. Legislators come to legislative issues often with clearly stated predisposition, for or against the legislation. That is all acceptable and possibly even necessary for legislative issues.

   The same is not true for quasi-judicial issues, however.[1] When municipal officials act as judges, applying the laws that have been created, they need to be unbiased like judges. They need to hear the evidence and base their decisions solely upon the evidence that they hear. Municipal officials making quasi-judicial decisions cannot have made up their minds in advance of the hearing, and they, moreover, cannot have made statements that give the appearance that they have made up their minds before the hearing. Let me underscore the importance of remaining impartial by the following examples.

   a. In the case of *Marris v. Cedarburg*, 176 Wis. 2d 14 (1993), a member of a zoning board made negative comments about the applicant and her

[1] As shown in the chart, the same issues can arise regarding Administrative decisions, as apply regarding quasi-judicial decisions. For brevity, I will refer to both as "quasi-judicial" in this correspondence.

request before the hearing, referring to it as a "loophole in need of closing," and "let's get her on the Leona Helmsley rule." When the permit was denied, the action taken by the zoning board was appealed, and the denial was overturned by the court, due this impermissible appearance of bias.

b. Another decision that is unpublished but instructive is *Ogden Development Group v. Buchel*. In this case, a developer was proposing to construct apartment buildings. When an initial proposal was presented to the Plan Commission, Christine Swannell appeared before the Plan Commission and expressed concerns. Ms. Swannell also signed a petition expressing strong opposition to the apartment buildings. In a subsequent application, that was described as being 50 percent smaller than the proposal that Swannell publicly opposed, the plaintiff required a variance before the Village of West Milwaukee Zoning Board of Appeals, and Swannell was the chair of the Zoning Board of Appeals. Swannell ultimately abstained from voting in the matter, but participated in the hearing prior to the vote. The court found that this denied the applicant the requisite due process. The court held the fact of her abstention was immaterial, because the applicant was entitled to an impartial fact-finding process which preceded the decision and which would be untainted by board members who had prejudged the facts or the application of the law. Also, the fact that the proposal that came before Swannell and the Zoning Board of Appeals was smaller, by 50 percent, than the one initially publicly opposed by Swannell, was immaterial, because the opposition was to apartment buildings, not to the size of the apartment building development. The court remanded the matter for rehearing before the Zoning Board of Appeals.

c. The issue does not only arise before Zoning Boards of Appeals, it can arise in other land use situations before other land use review committees. For example, the issue was raised in *Sills v. Walworth County Land Management Committee*, 254 Wis. 2d 538 (Ct. App. 2002). The issue in this case was the grant of a conditional use permit to allow a 13-bedroom Queen Anne-style residence built in 1888 to be preserved as a museum. The court analyzed the *Marris* decision and concluded that:

> *Thus, although we reject the neighbor's overbroad interpretation of these cases, we agree with the general proposition that they assert, which is that the public policy of promoting confidence in impartial tribunals may justify expansion of the certiorari record where evidence outside of that record demonstrates procedural unfairness.* (Id. at p. 565.)[2]

[2] The issue in this case was narrow, relating to the scope of the record on appeal and the bounds of discovery. The zoning board was ultimately upheld. The issue of whether an impartial board was required however, was a relevant issue, and the zoning board was only upheld because no bias was shown.

That is to say, the court agreed that the zoning board which would determine whether to grant a conditional use permit for a residence to operate a museum, must be an impartial body.

d. In another case, *Keen v. Dane County Board of Supervisors*, 269 Wis. 2d 488 (2004), a county zoning committee member signed a letter in favor of the grant of a conditional use permit in advance of the conditional use hearing. The court overturned the decision, saying that the zoning committee member was not unbiased, he was an advocate and he therefore could not participate in the hearing. In both cases, participation in the hearing by the biased municipal official warranted overturning the municipal decision.

3. New Laws Increase the Risk. The risks of violating these limitations has increased somewhat by the adoption of 2017 Wisconsin Act 67, which includes new laws concerning conditional use permits. This new law defines the term "conditional use" quite broadly as follows:

> "Conditional use" means a use allowed under a conditional use permit, special exception, or other special zoning permission issued by a city, but does not include a variance."

Any "special zoning permission" is included in the definition of a conditional use. The new law then establishes a quasi-judicial proceeding for consideration of conditional use permits, per Section 62.23(7)(de), Wis. Stats. Zoning decisions, where special zoning permission is required, now require impartial decision makers. This is therefore now widely applicable to many land use decisions.

4. Recommendations. Many development proposals, permits, applications, and land use applications give rise to quasi-judicial proceedings. It is not always clear initially whether quasi-judicial issues may arise, moreover. Caution is warranted. In such quasi-judicial matters, it is important that the public officials remain unbiased. They should not say things like "I will never approve that," or "I think this is a great proposal," because they may later be asked to sit as judges about whether the proposal meets the required specifications. This risk arises with regard to any of your Village officials who have decision making authority.

5. Ethics Opinion. In situations where governing body members are uncertain whether an issue is legislative or quasi-judicial, and whether they can participate regarding any particular issue arising before the governing body, Wisconsin Statutes Section 19.59(5) allows me to provide a confidential legal opinion to the official. The governing body member must make this request to me in writing, outlining each and every fact that is relevant to the possible ethical concern. I am prohibited from providing copies of this opinion to others. The governing body member is presumed by law to be acting lawfully if they act in compliance with my legal opinion in the matter. This can be a good method to protect public officials from the penalties and adverse publicity for violating these standards and requirements. This can also help protect the municipality as a whole, because one consequence of a public official violating these requirements can be that the municipal decisions are overturned, along with other possible liabilities.

If you should have any questions or concerns regarding these matters, please do not hesitate to contact me. I am providing this correspondence to you on a personal and confidential basis with the understanding that you will forward this letter to those officials that you believe can benefit from this analysis and these recommendations. My advice is to those officials, so the confidentiality of this correspondence is intended to be preserved among all of those to whom you forward the correspondence.

Yours very truly,

MUNICIPAL LAW & LITIGATION GROUP, S.C.

Eric J. Larson

Eric J. Larson

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