

Common Council Handbook
City of Baraboo, Sauk County, Wisconsin



Congratulations on your successful election and welcome to the Baraboo Common Council. This Handbook will set forth some basics regarding Council proceedings, and the requirements of State Law that effect the operations of the Council. This Handbook is meant to be a guide. Should you have other questions, or specific concerns regarding any situation, you should contact the City Administrator or the City Attorney for guidance regarding your situation or issue.



Where laws end, tyranny begins. –
William Pitt, the Elder.

1.86 CODE OF CONDUCT FOR ELECTED AND APPOINTED OFFICIALS

(1) The proper operation of democratic government requires that public officials be independent, impartial, and responsible to the people; that decisions and policy be made in the best interests of the people, the community, and the government; that public office not be used for personal gain; and that the public has confidence in the integrity of its government. In recognition of these goals, this Code of Conduct shall apply to all elected and appointed officials of the City of Baraboo. Nothing contained herein is intended to deny to any individual those rights granted by the United States Constitution, the constitution and laws of the State of Wisconsin. The purpose of this code is to establish a minimum standard of conduct to assist public officials in avoiding those acts or actions that are incompatible with the best interests of City government and the people of the City of Baraboo. Further, this Code provides the process by which determinations are made that public officials have acted in ways which are incompatible with the best interests of City government and of the people of the City of Baraboo. This Code of Conduct neither supplants the City of Baraboo Code of Ethics, nor supersedes State Laws relating to the conduct of public officials.

(2) **COUNCIL CONDUCT WITH ONE ANOTHER.** Councils are composed of individuals with a wide variety of backgrounds, personalities, values, opinions, and goals. Despite this diversity, all have chosen to serve in public office in order to preserve and protect the present and the future of the community. In all cases, this common goal should be acknowledged even as Council may “agree to disagree” on contentious issues.

(a) **IN PUBLIC MEETINGS.** Elected and appointed officials shall conform with the following standards in public meetings:

1. Practice civility and decorum in discussions and debate. Councilmembers and members of committees shall not make personal, slanderous, threatening, or abusive comments. No shouting or physical actions that could be construed as threatening are allowed.
2. Honor the role of the Chair in maintaining order. Councilmembers and members of committees shall honor the Chair in focusing discussion on current agenda items. Disagreements regarding the agenda or the Chair’s actions, shall be voiced politely and with reason, following procedures outlined in parliamentary procedure.
3. Release of Confidential Information Prohibited. Members of Council and committees have a duty to hold in strict confidence all information concerning matters dealt with in Closed Session. The release of any confidential information to third parties is prohibited, including but not limited to the release of records prohibited by §19.35, §19.356, §19.36, Wisc. Stats., or any other statutory or common law limitation on the release of records, and any document made available as a part of a closed session by the Council or committee. A Councilmember or a committee member shall not, either directly or indirectly release, make public, or in any way divulge any such information, or any aspect of the closed session deliberations to anyone, unless expressly authorized by Council or required by law to do so;

(b) **IN PRIVATE ENCOUNTERS.** Elected and appointed officials shall conform with the following standards in private encounters with the public:

1. Continue respectful behavior in private. The same rules regarding respect and consideration of differing view points and speakers applicable to meetings shall be maintained in private conversations regarding City business.
2. Be aware that written notes, voicemail messages, and email may be public records. Written notes, voicemail messages and email are subject to the same rules regarding respect and consideration as would be applicable to conduct in public meetings and private encounters. Such items shall be treated as public communications subject to the Wisconsin Open Records Law.
3. Applicability of City Harassment Policy. The City of Baraboo maintains a Harassment Policy. City elected and appointed officials are subject to this policy the same as City employees. Violations of the Harassment Policy by elected or appointed official may subject the City and its taxpayers to liability. Without limiting the generality of the foregoing, members of council and committees shall not engage in any of the following when directed at or to City officials, employees, contractors and their employees, and the general public while engaged in City business:

Prohibited Activity (Sexual Harassment and Harassment)

Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

Submission to such conduct is made either explicitly or implicitly a term or condition of employment; or

Submission to or rejection of such conduct by an employee is used as the basis for employment decisions affecting the employee; or

Such conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile, or offensive working environment.

Harassment is any verbal, written, visual, or physical act that creates a hostile, intimidating, or offensive work environment or interferes with an individual's job performance.

No employee shall either explicitly or implicitly ridicule, mock, deride, or belittle any person.

Employees shall not make offensive or derogatory comments to any person, either directly or indirectly, based on race, color, sex, religion, age, disability, marital status, sexual orientation, national origin, and other forms of discrimination prohibited by the Wisconsin Fair Employment Act. Such harassment is a prohibited form of discrimination under state and federal employment law and/or is also considered misconduct subject to disciplinary action by the City.

- (3) **Council Conduct with City Staff.** Governance of a City relies on the cooperative efforts of elected officials and committee members, who set policy, and City staff who implements and administers the Council's policies. Therefore, every effort should be made to be cooperative and show mutual respect for the contributions made by each individual for the good of the community. Elected and appointed officials shall therefore:

Democracy is two wolves and a lamb voting on what to have for lunch. – Benjamin Franklin.

- (a) Treat all staff as professionals.
- (b) Council questions/inquiries to City staff.

1. **General.** Council and committee communications with City staff should be limited to normal City business hours unless the circumstances warrant otherwise. Responses to questions posed outside of normal business hours should be expected no earlier than the next business day.

- 2. **Requests for General Information and Inquiries.** Councilmembers and members of committees may contact staff directly for information made readily available to the general public on a regular basis or for easily retrievable information not routinely requested by the general public. Under these circumstances staff shall treat the Councilmembers and members of committees no differently than they would the general public, and the Councilmembers and members of committees shall not use their status to secure preferential treatment.
- 3. **Non-Routine Requests Requiring Special Effort.** Any Councilmembers and members of committees requests or inquiries that requires staff to compile information that is not readily available or easily retrievable and/or that requests staff to express an opinion (legal or otherwise) must be directed to the City Administrator, or to the City Attorney, as appropriate. The City Administrator (or City Attorney as appropriate) shall be responsible for distributing such requests for follow-up and shall review them for potential conflicts of interest. Advisory Legal Opinions from the City Attorney may be requested pursuant to §1.83, Ordinances.
- 4. **Public Safety and Personnel Restrictions.** Requests for information regarding personnel or Police Department actions are legally restricted. It is the policy of the City of Baraboo to adhere to confidentiality with all applicable legal authorities governing the release of personnel information, law enforcement, and other public records.

- (c) Councilmembers and members of committees shall not disrupt City staff while they are in meetings, on the phone, or engrossed in performing their job functions in order to have their individual needs met.
- (d) Councilmembers and members of committees shall not attempt to influence City staff on the making of appointments, awarding of contracts, selecting of consultants, processing of development applications, or granting of City licenses and permits, when the Councilmembers or members of committees may have a conflict of interest. Such attempts may violate the criminal laws of the State of Wisconsin and thereafter result in prosecution by the District Attorney.

- (e) Check with City staff on correspondence before taking action. Before sending correspondence, Councilmembers and members of committees shall check with City staff to see if an official City response has already been sent or is in progress.
- (f) Limit requests for staff support. Routine secretarial, exchange server support for public email accounts, and consultative support will be provided to all Councilmembers and members of committees. Requests for additional staff support – even in high priority or emergency situations – shall be made to the City Administrator.
- (g) Do not solicit political support from staff. Councilmembers and members of committees shall not solicit any type of political support (financial contributions, display of posters or lawn signs, name on nomination petitions, etc.) from City staff at the workplace or during work hours.

I must study politics and war that my children may have liberty to study philosophy and mathematics. – John Adams.

(4) COUNCIL CONDUCT WITH THE PUBLIC.

(a) **In Public Meetings.** No signs of bias, prejudice or disrespect should be evident on the part of individual Councilmembers and members of committees toward an individual participating in a public forum. All efforts shall be made to be fair and impartial in listening to public testimony.

1. Public speakers shall be treated with respect.
2. Ask for clarification, but do not debate and argue with the public. Only the Chair – not individual Councilmembers and members of committees – may interrupt a speaker during a presentation. A speaker shall never be belligerently challenged or belittled. Councilmembers and members of committees’ personal opinions or inclinations about upcoming votes shall not be revealed until after the public hearing is closed.
3. No personal attacks of any kind, under any circumstance. Councilmembers and members of committees shall be respectful of all speakers before them, and shall not be intimidating.

(b) **IN UNOFFICIAL SETTINGS.** Elected and appointed officials shall:

1. Make no promises on behalf of the Council, and shall not overtly or implicitly promise Council action, or promise City staff will do something specific (fix a pothole, remove a library book, plant new flowers in the median, etc.).
2. Members of Council and committees shall accurately communicate the attitudes and decisions of the Council or committee, even if they disagree with Council’s or the committee’s decision, such that respect for the decision-making processes is fostered.

(5) **COUNCIL CONDUCT WITH OTHER PUBLIC AGENCIES.** In dealing with other public agencies, bodies and commissions, elected and appointed officials shall:

- (a) Be clear about representing the city or personal interests. If a Councilmembers or members of committees appears before another governmental agency or organization to give a

statement on an issue, Councilmembers and members of committees must clearly state: 1) if his or her statement reflects personal opinion or is the official stance of the City; 2) whether this is the majority or minority opinion of the Council. If the Councilmembers and members of committees is representing the City, the Councilmembers and members of committees must support and advocate the official City position on an issue, not a personal viewpoint. [See Baraboo Code of Ethics, §§1.70-1.85, Ordinances.]

- (b) Correspondence must be equally clear about representation. City letterhead may be used when the Councilmembers or a committees chair is representing the City and the City's official position. A copy of official correspondence shall be given to the City Clerk as part of the permanent public record. City letterhead shall not be used for personal correspondence of Councilmembers or other public officials or representatives. Councilmembers and committee chairs may use City letterhead for correspondence sent in an official capacity regarding an issue the City is involved in.

(6) **COUNCIL CONDUCT WITH BOARDS AND COMMISSIONS.** The City has established several Committees and Commissions as a means of gathering more community input and the more in depth examination of issues affecting the City. Citizens who serve on Committees and Commissions become more involved in government and serve as advisors to the City Council. They are a valuable resource to the City's leadership and should be treated with respect.

- (a) If attending a Board or Commission meeting, be careful to only express personal opinions. Councilmembers may attend any Committee or Commission meeting. However, they should be sensitive to the way their participation – especially if it is on behalf of an individual, business or developer – could be viewed as unfairly affecting the process. Any public comments by a Councilmembers at a Committee or Commission meeting should be clearly made as individual opinion and not a representation of the feelings of the entire City Council.
- (b) Limit contact with Committee and Commission members to questions of clarification. It is inappropriate for a Councilmembers to contact a Committee or Commission member to lobby on behalf of an individual, business, or developer in circumstances when the Conflicts of Interest rules apply. (See §1.77, Ordinances). It is acceptable for Councilmembers to contact Committee or Commission members in order to clarify a position taken by the Board or Commission.
- (c) Committees and Commissions serve the community, not individual Councilmembers. The Mayor or City Council appoints individuals to serve on Committees and Commissions, and it is the responsibility of Committees and Commissions to follow policy established by the Council. Committee and Commission members do not report to individual Councilmembers, nor do Councilmembers have the power or right to threaten Committee and Commission members with removal if they disagree about an issue. A Committee or Commission appointment shall not be used as a political “reward.”
- (d) Be respectful of diverse opinions. A primary role of Committees and Commissions is to represent many points of view in the community and to provide the Council with advice based on a full spectrum of concerns and perspectives. Councilmembers may have a closer working relationship with some individuals serving on Committees and Commissions, but must be fair

The measure of a man's character is what he would do if he knew he would never be found out. – Thomas Babington Macauley.

and respectful of all citizens serving on Committees and Commissions.

- (e) Keep political support away from public forums. Committee and Commission members may offer political support to Councilmembers, but not in a public forum while conducting official duties. Conversely, Councilmembers may support Committee and Commission members who are running for office, but not in an official forum in their capacity as a Councilmembers and members of committees.
- (7) **COUNCIL CONDUCT WITH THE MEDIA.** The Mayor is the official spokesperson and representative on City positions. The Mayor shall be the designated representative of the Council to present and speak on the official City position. If individual Councilmembers or members of a committee are contacted by the media, the Councilmember or member of a committee should be clear about whether their comments represent the official City position or a personal viewpoint.
- (8) **ALCOHOL AND OTHER INTOXICANTS.** Elected and appointed officials shall not engage in any official duties while under the influence of alcohol, an intoxicant, a controlled substance, a controlled substance analog, or any combination of substances, to a degree which renders them incapable of exercising sound judgment in their official duties.
- (9) **VIOLATIONS OF CRIMINAL LAW.** It is a violation of the ethical standards of the City of Baraboo for a Councilmember or member of a committee to engage in violations of criminal law. A violation of criminal law occurs when, during their term of office, there is a guilty plea or plea of no contest to the criminal laws of any state or the United States or the ordinances of any municipality substantially conforming to a criminal statute.
- (10) **SANCTIONS.** Councilmembers and members of committees should point out to offending members infractions of the Code of Ethics or Code of Conduct. If offenses continue, the matter should be referred to the Mayor in private. If the Mayor is the individual whose actions are being challenged, then the matter should be referred to the Council President.

The Mayor may privately address any conduct concern with Councilmembers or committee members, including but not limited to: discussing and counseling the individual on the violations, referring the matter to the Ethics Board for consideration, or recommending sanction to the full Council to consider in a public meeting. Nothing in this section shall act to limit or restrict the right of any official or citizen to refer a matter to the Ethics Board pursuant to the procedures established in §1.84, Ordinances.

The Mayor and all Councilmembers may initiate action by referral of the matter to the Ethics Board if a Councilmembers or committee member's behavior may warrant sanction. City Councilmembers and members of committees who intentionally fail to follow proper conduct may be reprimanded or formally censured by the Council, lose committee assignments, or have official travel restricted. Serious infractions of the Code of Ethics or Code of Conduct are neglect of duty and may lead to removal from office for cause, pursuant to §§17.12(1)(a), and 62.11(3), Wisconsin Statutes.

The greatest enemy of a good plan,
is the dream of a perfect plan. –
Carl von Clausewitz.

ROBERT'S RULES IN SHORT: A GUIDE TO RUNNING AN EFFECTIVE MEETING

Importance of Rules to an Effective Meeting:

While groups sometimes proceed informally or by consensus, it is generally accepted that deliberative bodies operate much more effectively when they follow known rules of procedure.

In most instances and except as changed by the deliberative body, the rules to be followed are **Robert's Rules of Order** (hereinafter referred to as RR). These rules were first established by General Henry M. Robert in 1876. The latest edition of RR is the 10th edition.

A complete copy of RR runs nearly 700 pages. Even abridged versions, which are quite useful, often run 200 pages. This manual will be much shorter.

RR defines the role of the chair, of members of the body, and establishes rules of procedure. These rules have been crafted and adjusted over the years to assist in effective meetings, and to balance carefully the rights of the majority to act and the rights of the minority to be heard, and in some cases, prevent action.

Proper Notice and Agenda for a Meeting:

While RR require that there be an order of business for a meeting, the major law governing notice and agenda for meetings is the Wisconsin Open Meetings Law, §19.81, *et seq.*, Wisc. Stats., and §2.02(5), Baraboo Ordinances. This manual is not a complete analysis of the Open Meetings Law, but those conducting a meeting should know some of the basic rules. They are:

1. All meetings must be preceded by adequate notice. This is generally 24 hours, although it may be two hours in the case of an emergency. The giving of the notice should be coordinated through the City Clerk's Office.
2. The notice must include all items to be taken up at the meeting in such a manner as to apprise the public of the nature of the public business. Broad items such as "Report of the Chair" should be avoided.
3. Except for meetings that provide for public comment, there can be no discussion of any item not on the agenda. Nor can there be action on any item not on the agenda. A "Public Comment" section allows the public to talk about anything, and the board may question them, but no further action or discussion is allowed.
4. There may be action on any item on the agenda, unless the agenda explicitly states something to the effect of "for information only – no action."

5. Special rules govern when a body may go into closed session. Consult the City Attorney for procedures.

Those who can make you believe absurdities can make you commit atrocities. - Voltaire

Rascals, do you want to live forever? – Frederick II the Great, King of Prussia.

Special Procedures, Chapter 2,

Baraboo Ordinances:

The Baraboo Common Council has a body of standing rules set out in Chapter 2, Baraboo Ordinances. In addition, every board or commission has the right to adopt its own rules of procedure. To the extent there are not specific rules, Robert's Rules of Order are to be applied. §2.04(18), Ordinances.

This manual will not review all of the provisions in Chapter 2 of the Standing Rules of the Common Council. In a number of instances, those rules simply adopt a provision of RR. However, some key rules are:

Section 2.03(3), Order of Business. This sets out the normal order of business for the council, which may be modified by a suspension of the rules on a two-thirds vote. It often is modified.

Section 2.04(2), Introduction of Business. Generally, any item to be taken up by the Council must be in writing and first be reviewed by the appropriate committee, board, or commission

Section 2.04(9)(c), Majority Vote of All Members Required. The Council requires a majority vote of the Council members present to pass ordinances, resolutions, and motions. A quorum of the Council is comprised of 2/3rds of the members of the Council. §2.04(9)(a).

Section 2.04(12), Ordinances. Under the Council rules, no ordinance shall be passed except upon the affirmative vote of the Council at two consecutive meetings. The Council may suspend the rules to allow both readings at the same meeting, but the motion to suspend for this purpose requires the unanimous approval of the Council. All other motions to suspend the rules require a 2/3rds affirmative vote of the Council §2.04(20)(a).

Section 2.04(15), Committee of the Whole. The Council may, by a majority vote, enter into a Committee of the Whole. This is generally done to give guidance to the Council or to discuss in a general way a specific topic. Actions or votes of any kind taken while action as a Committee of the Whole are deemed advisory only and do not authorize any official act by the Council.

It should be noted that under the Council's operations, a report and recommendation of a committee or commission will contain recommendations. In almost all instances, this report and the recommendations contained therein become the main motion on the floor when an alder moves the adoption of an action.

Robert's Rules of Order / Common Motions

This section will summarize some of the provisions of RR.

- A. Proceed by Motion. The most basic element of RR is that matters come before the body by motion. An alder makes a motion simply by saying “I move that “ or “Move adoption of”, or “Move referral of”, or “I move to amend”. It is not the form of the motion, but the substance of it which governs.
- B. Role of the Chair. It is the obligation of the Chair to run an orderly meeting. The Mayor is the Chair of Council meetings, and when he is not present, the Council President presides. Members of the body are not to speak until they have been recognized by the Chair. Except for a limited class of motions, a member may not interrupt another member when they have the floor. The Chair also rules on any votes and rules on any questions of proper procedure. In the event of a disruption in the meeting, the Chair may call on the Police Chief or others to return the meeting to order.
- C. Types of Motions. Under RR, motions generally fall into one of four classes. These are:
1. The Main Motion: This is the matter that is before the body at that moment. Nearly all other motions bear some relation to the main motion.
 2. Subsidiary Motions: These are a series of motions which propose to do something to or with the main motion. Examples include amendment, referral, laying on the table, calling the question. These motions are all subject to an order of precedence which will be discussed below.

Note that what is the “main motion” for application of the rules of precedence may change during the course of consideration of a matter. For example, if the main motion is to adopt a resolution, and a member offers a subsidiary motion to amend the resolution, the proposal for amendment becomes the main motion for purposes of consideration of the order of precedence of other motions. That is, the motion to amend is subject to further amendment, referral, laying on the table, etc. It is only when that motion has been disposed of that the motion to adopt is then back before the body for consideration.
 3. Incidental Motions: Incidental motions relate to the pending matter, but generally relate to it in a procedural way such that the incidental motion must be dealt with before the body may return to either the main or subsidiary motion before it. Incidental motions take precedence over whatever motion is before the body, and in some instances, may be made when the mover does not have the floor. Examples of incidental motions are a point of order or procedure, appeal of a ruling on a point of order or procedure, a point of information, call for a roll call (division of the assembly), or a suspension of the rules.
 4. Privileged Motions: These are very few motions that take precedence over all other motions. They include motion to recess, question of privilege, and a motion to adjourn.
- D. Common Motions. An almost limitless number of motions may be made. RR lists at least 84 potential motions. This section will discuss some common motions; the reader is also referred to the accompanying “cheat sheet” attached as an appendix to this manual.

1. Adjourn: To end the meeting. Not debatable.
2. Adoption: This is to adopt the matter before the body.
3. Amendment: To modify the main motion before the body.
4. Division of Assembly / Roll Call: A call for division is the same as calling for a roll call vote. Any member may do this and the motion need not be seconded; it is simply granted when asked for. It is not debatable.
5. Division of the Question / Separation: This is a request to have separate votes on different paragraphs or portions of the proposal before the body. It is not debatable, but does require a second.
6. Lay on the Table / Take off the Table: This is a motion to temporarily defer consideration of a matter and then to ask that the matter be taken up again. It is often used, when, for some reason, a member of the assembly or some information necessary for consideration is temporarily unavailable. Motions to lay on the table or take off the table are not debatable. The motion is often made simply as a motion to “table”. The motion should not be used if the intent is essentially to kill a proposal.
7. Place on File/Postpone Indefinitely: This is a common motion used in proceedings of the Madison Common Council and is the equivalent of a motion to postpone or defer indefinitely. This is the motion to be used if the intent is to not adopt the matter before the Council, without explicitly voting it down.
8. Point of Information: This is an incidental motion in which a member of the assembly desires some information prior to proceeding to a vote on the matter before the body. It does not require a second and no vote is actually taken on the point of information. A member simply says “I rise to a point of information” or “Point of Information?” It is proper when another has the floor.
9. Point of Order or Procedure: This is another incidental motion and again is not subject to a second or a debate. It raises a question about the procedure being followed by the body. The ruling on the Point of Procedure is committed to the Chair of the body. If a member of the body disagrees with the ruling, they may appeal the ruling of the Chair to the full body. An appeal does require a second, and a majority of the body must disagree with the Chair's ruling for it to be reversed.
10. Point of Privilege: This is one of the privileged motions, and again does not require a second, nor is it debatable. This normally relates to some personal matter or something relating to the operation of the body, such as a room that is too hot, too cold, too loud, some confidential information which should not be discussed before the body, etc.
11. Previous Question: This is a motion requesting that the body immediately vote on whatever matter is otherwise before it; it cuts off debate and proceeds to an immediate

Every post is honorable in which a man may
serve his country. – George Washington.

vote. The motion can be made either by “calling the question”, “moving the previous question”, or simply stating “Question”. The motion requires a second and is non-debatable and requires a two-thirds vote.

12. Recess. The motion asks that the body take a short break. The length of time of the recess should be established. This is a privileged motion, in that it takes precedence over almost all other pending motions. It requires a second, it is not debatable, and requires a majority vote.

13. Reconsideration: A motion for reconsideration asks that the body reconsider something it has already acted upon. It must be made either at the same meeting at which the matter was considered, or at the next succeeding meeting. If it is to be made at the next succeeding meeting, it must be on the official agenda of the meeting.

A motion to reconsider may only be made by a member who voted on the winning side of the prior question. This normally will be a member in the majority, but if a matter fails because it does not reach the required majority, it may be that the motion for reconsideration may be made by a member who actually is less than a majority. For example, if a matter needing a 2/3rd vote falls one vote short of 2/3rd, reconsideration may only be moved by a member of the minority. If the motion to reconsider is approved, the prior proposal is then again before the body.

14. Motion to Refer/Commit: This is a subsidiary motion which asks that a matter be referred to another body, or to another meeting of the same body. Called a motion to commit in RR.

15. Suspension of the Rules: This is an incidental motion because it relates to the manner in which the body will take up an issue. It requires a two-thirds majority, but is not debatable.

E. Debate. Once a debatable motion is before the body, members of the body proceed to debate. In both the making of motions and in debating the motions, members should wait to be recognized by the Chair. The standing rules of the Common Council limit the number of times and length of time that a member of the body may participate in debate.

F. Unanimous Consent. Asking for unanimous consent is a quick way to dispose of non-controversial items. The Common Council does this by proposing a “consent agenda” near the beginning of every meeting. Items that no member of the body objects to are disposed of by unanimous approval. The Chair may ask for unanimous consent, or a member may ask for it on any pending matter. The Chair may do this by asking: “Is there any objection to recording a unanimous vote on item?”

Precedence of Motions

Some common motions are listed in descending order of precedence, that is, a motion is not in order if it has a higher number than the pending matter.

Undebatable Motions

1. Adjourn
2. Recess
3. Question of Privilege
4. Lay on the Table
5. Previous Question
6. Limit or Extend Debate

Debatable Motions

7. Postpone to a Definite Time
8. Refer or Commit
9. Amend
10. Postpone Indefinitely / Place on File
11. Main Motion

Divide and rule, a sound motto. Unite and lead,
a better one. – Johann Wolfgang von Goethe.

Incidental Motions (e.g., Point of Order, Point of Information, Suspend the Rules, Division of the Assembly or of the Question) take precedence over whatever matter is pending.

Recognizing & Avoiding Conflicts of Interest

By: Claire Silverman, Legal Counsel, League of Wisconsin Municipalities

I. Introduction

A. Coverage. This outline provides an overview of state laws that guide the actions of municipal officials when those officials (or a member of their family or an organization with which they are associated) have a financial or other special interest in a governmental matter. In particular, this outline provides an overview of the state ethics code applicable to local officials, the statute governing private interests in public contracts, statutory provisions defining official misconduct, and the compatibility doctrine.

B. Identifying Potential Conflict Situations. The state statutes contain minimum standards of ethical conduct by local government officials. The statutes relating to ethics and conflicts of interest are interrelated and can be quite complicated.

Problems in this area can be avoided primarily by using common sense and applying the “smell test.” Stated broadly, when an official, a member of the official's family or a business organization with whom the official is associated is involved in a municipal matter, the official needs to step back and question whether there are problems concerning his or her involvement in the matter. The official may want to discuss the situation with the municipal attorney. Local officials may also contact the League's attorneys to discuss ethics issues.

Many times it might not be clear whether a conflict, as defined by state law, exists. In these gray areas, the official needs to balance the benefits of involvement (e.g., representing the electors, using the official's expertise) against the drawbacks (e.g., how it would look, the risk of violating a law). Sometimes, even if it may be legal to act on a matter, you may not feel comfortable doing so or it may not look good to do so.

Against stupidity, the gods themselves contend in vain. – Frederich von Schiller.

II. State Code of Ethics for Local Government Officials. (Sec. 19.59, Stats.)

A. Background. The state code of ethics for local officials was created in the 1991 legislative session and took effect in 1992. The law applies to “local governmental units,” including counties, cities, villages and towns, as well as special purpose districts, such as town sanitary districts. Sec. 19.42(7u), Stats. The law also covers joint bodies and subunits of local governmental units.

B. Municipal Officials Affected. The state ethics code applies to “local public officials” who hold “local public office.” Sec. 19.42(7w) and (7x), Stats.

1. “Local public office” includes elected municipal officers; city and village managers, appointed municipal officers and employees who serve for a specified term; and officers and employees appointed by the governing body or executive or administrative head who serve at the pleasure of the appointing authority.
2. The term does not include independent contractors and persons who perform only ministerial (i.e., non-discretionary) tasks, such as clerical workers. In addition, the term omits officials and employees who are appointed for indefinite terms and are only removable for cause, such as police chiefs and fire chiefs.

C. Prohibited Conduct. The state ethics law for local officials, sec. 19.59, Stats., prohibits the following conduct:

- 1. Use of Office for Private Gain.** Public officials are prohibited from using their offices to obtain financial gain or anything of substantial value for the private benefit of themselves, their immediate families, or organizations with which they are associated. Sec. 19.59(1)(a), Stats.
- 2. Offering or Receiving Anything of Value.** No person may give and no public official may receive “anything of value” if it could reasonably be expected to influence the local public official's vote, official action or judgment, or could reasonably be considered as a reward for any official action or inaction. Sec. 19.59(1)(b), Stats.

3. Taking Action Affecting a Matter in Which Official Has Financial Interest. Local officials may not take official action substantially 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. Nor may an official use his or her office in a way that produces or assists in the production of a substantial benefit for the official, immediate family member or organization with which the official is associated. Sec. 19.59(1)(c), Stats.

a. Exceptions. The prohibitions under no. 3 above do not prohibit local officials from taking lawful actions concerning payments for employee salaries, benefits, or expense reimbursements. The above prohibitions also do not prohibit local officials from taking action “to modify” an ordinance. Sec. 19.59(1)(d), Stats.

B. Definitions:

1. “Immediate Family” means an official's spouse or relative by marriage, lineal descent or adoption who receives, directly or indirectly, more than one-half of his or her support from the official or contributes, directly or indirectly, that amount for the official's support. Sec. 19.42(7), Stats.

2. “Organization” is broadly defined to cover “any corporation, partnership, proprietorship, firm, enterprise, franchise, association, trust or other legal entity other than an individual or body politic.”

3. “Associated” with an Organization. An official is “associated” with an organization for purposes of the state ethics law when the individual or a member of the individual's immediate family is an officer, director or trustee, or owns at least 10% of the organization. An individual is not associated with an organization merely because the individual is a member or employee of an organization or business. Sec. 19.42(2), Stats.

4. “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. Sec. 19.42(1).

C. Abstaining from Official Action. The Wisconsin Board of Ethics suggests that when a matter in which a local official should not participate comes before a board, commission or other body which the official is a member, the official should leave that portion of the body's meeting involving discussion, deliberations, or votes related to the matter. When, because of a potential conflict of interest, an official withdraws from the body's discussion, deliberation, and vote, the body's minutes should reflect the absence.

D. Local Ordinances. Municipalities can adopt ethics ordinances that:

- require disclosure of economic interests
- establish ethics boards

- prescribe standards of conduct
- establish forfeitures not exceeding \$1,000

E. Ethics Advisory Opinions. Local officials may request advisory ethics opinions from the municipal ethics board or, if there is none, from the municipal attorney.

1. Effect of Opinion. The local ethics board or attorney may issue a written advisory opinion. If the official follows the advice in the opinion, it is evidence of intent to comply with the law.

F. Penalties & Enforcement. Any person who violates the state ethics law may be required to forfeit up to \$1,000. The law is enforced by the district attorney.

G. Interpretation. The state code of ethics for local officials has not been interpreted in any published court decisions. However, the Wisconsin Ethics Board has issued guidelines.

1. Participating in General Policy Decisions. The Wisconsin Ethics Board has advised that an official may participate in an action in which he or she has a personal interest as long as: (a) the action affects a class of similarly-situated interests; (b) the interest of the official, an immediate family member an organization with which the official is associated not significant when compared to other members of the class; and (c) the effect of the action on the interests of the official, an immediate family member an organization with which the official is associated not significant when compared to other members of the class.

No problem can stand the assault of sustained thinking. – Voltaire.

2. Receipt of Goods & Services. Under the state ethics code, local officials may receive: (a) items and services that are unrelated to their public service; (b) payment or reimbursement for costs relating to their work as public officials; and (c) items of insubstantial value.

Under the state ethics code, local officials may not: (a) receive items or services offered because of their public position, unless the value of such items or services is insubstantial; (b) receive items or services that could reasonably be expected to influence their judgment or could reasonably be considered a reward for official action or inaction. See Eth 219 (attached).

3. Seminars & Conferences. Generally, officials attending such functions may accept the meals and refreshments provided or approved by the event's organizer and approved by the local governmental unit. An official should generally not accept food, drink or entertainment offered outside of the conference or activities at hospitality suites, receptions or similar activities.

III. Private Interest in Public Contracts (Section 946.13, Stats.)

A. General Prohibition. To protect against self dealing by public officials, sec. 946.13, Stats., generally prohibits municipal officials from having a private financial interest in a public contract. Thus, local governing body members are generally prohibited from entering into a contract for goods, services, construction or employment with the municipality.

1. Prohibition Against Official Action. A public official may not participate in the making of a contract in his or her official capacity if the official has a direct or indirect financial interest in the contract. Sec. 946.13(1)(b).

Since this is a prohibition on official action, abstaining from voting on the contract will prevent violation .

2. Prohibition Against Private Action. A public official may not in his or her private capacity negotiate or bid for or enter into a contract in which the public official has a direct or indirect financial interest if the official is “authorized or required by law to participate in his capacity as such officer or employee in the making of that contract.” Sec. 946.13(1)(a).

This latter provision is a prohibition on private action and a public official cannot avoid violating it merely by abstaining from voting because all that is necessary for a violation to occur is that the official be authorized to vote on or exercise discretion with regard to a contract in which the official has a private financial interest and the official has negotiated, bid for, or entered into the contract.

3. Exceptions:

a. \$15,000. Contracts in which receipts and disbursements do not, in the aggregate, exceed \$15,000 in any one year. This means that a municipal governing body member can enter into a total of \$15,000 in business with the municipality in any calendar year. Note: Since the law refers to payments and disbursements in any year, if amounts in excess of \$15,000 are involved, payments may be spread out over more than one year to avoid violating the law.

b. Bankers. Bankers who receive less than \$10,000 per year for serving on the city council or village board are exempted, unless the banker's compensation is directly dependent on procuring public business.

c. Attorneys. Partners in a law firm that serves as legal counsel to the municipality who receive less than \$10,000 per year for serving on the city council or village board are exempted, unless the individual has an interest in the law firm greater than 2% of its net profit or loss; the individual participates in the making of a contract between the municipality and the law firm; or the individual's compensation from the law firm is directly dependent on procuring public business.

d. 2% of stock. There is an exception from sub. (1)(b), the prohibition on official action, for persons who own no more than 2% of the stock of the corporation involved.

4. Penalty: Violation of the statute is a Class E felony and subjects the person to a fine of not more than \$10,000, imprisonment for not more than 2 years, or both.

IV. Incompatibility Doctrine

A. Common law Prohibition. The same person cannot hold two offices or an office and a position where one post is superior to the other or where, from a public policy perspective, it is improper for one person to discharge the duties of both posts. For example, in *Otradovec v. City of Green Bay*, 118 Wis.2d 393 (Ct. App. 1984), the court held that a common council member could not work as assistant appraiser in the city assessor's office.

1. Result. If a second office is taken that is incompatible with an existing office, the first office is vacated. In the case of office/position incompatibility, the outcome is unclear -- person runs risk of losing first post, but court might allow choice.

2. General Rule of Thumb: Municipal governing body members may not hold other municipal offices or positions, unless specifically authorized by statute. This is because the governing body exercises control over such matters as the salaries, duties, and removal or discipline of most other municipal officers and employee.

3. Statutory Exception. Elected city, village and town officers can also serve as volunteer firefighters, EMTs or first responders when annual compensation from one or more of those positions, including fringe benefits, does not exceed \$15,000. Sec. 66.0501(4).

B. Related Statutory Provisions.

1. Section 66.0501(2) generally prohibits governing body members from taking municipal jobs. Under the statute:

a. Governing body members are prohibited, during the term for which the member is elected, from taking new municipal jobs created during their term of office even if they resign.

b. A governing body member may be appointed to an office or position which was not created during the member's term in office as long as the member resigns first.

c. Governing body members may run at any time for new or existing elective office, but the compatibility doctrine applies if elected and the official would be required to choose between the two offices. Individuals may run for two elected local offices at the same time. Sec. 8.03(2m).

d. Governing body members may be appointed to serve on local boards and commissions (e.g., library board, police and fire commission and plan commission) where no additional remuneration is paid to such officers except that such officers may be paid a per diem if other members of the board or commission are paid a per diem.

2. Section 59.10(4), Stats., provides that municipal governing body members may serve as county board supervisors.

V. Other Statutory Prohibitions

A. Misconduct in Office. Section 946.12 is a criminal statute that prohibits public officers and employees from intentionally performing, or refusing to perform, certain acts. A violation of sec. 946.12 is punishable by up to two years in prison, a fine of up to \$10,000, or both.

1. Section 946.12(1) intentionally failing or mandatory, of his office or employment within the time or in the manner required by law.”

One man with courage makes a majority. – Andrew Jackson.

prohibits a public official from refusing to perform a “known nondiscretionary, ministerial duty

2. Section 946.12(2) prohibits a public official from doing an act which he or she knows is forbidden by law to do in an official capacity.

3. Section 946.12(3) provides that a public official may not, by an act of commission or omission, exercise a discretionary power in a manner inconsistent with the duties of office or the rights of others, with an intent to obtain a dishonest advantage for himself or another.

B. Bribery. Section 946.10(2) prohibits public officials from taking bribes. Section 12.11 prohibits public officials from promising an official appointment or anything of value to secure votes.

C. Sale to Employees Prohibited. No municipal department or member of a municipal governing body may sell or procure for sale any municipal article, material or product to city or village employee; except meals, public services and special equipment necessary to protect the employee's safety and health. Sec. 175.10. This statute is designed to prohibit governmental acquisition of products for resale to government employee.

D. Sale to Licensees Prohibited. No municipal governing body member may sell to any person holding or applying for an alcohol beverage license any bond, material, product or thing which may be used by the licensee in carrying on the licensee's business. Sec. 125.51(1)(b).

VI. A Final Word

Ordinances and Common Law Rules Relating to Ethics. This outline focuses on state statutes that establish minimum standards of ethical conduct for public officials. These laws provide a good starting point for local officials seeking to assure themselves that they are acting appropriately. However, municipal officials should be mindful of other relevant laws governing ethical issues. These include ordinances, local rules of procedure and the common law (i.e., published court decisions).

For example, the Wisconsin Supreme Court has held that members of a legislative body or municipal board are disqualified to vote on propositions in which they have a direct pecuniary interest adverse to the municipality. *Board of Supervisors of Oconto County v. Hall*, 47 Wis. 208 (1879). Additionally, many municipalities have adopted *Robert's Rules of Order* (Newly Revised) as their local rules of procedure. Section 44 of *Robert's* provides: “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.”

Chance Committee Meeting? Are You Breaking the Law?

by James H. Schneider, League Legal Counsel

The Open Meetings Law¹ is probably the single most important state law for governing body members to be aware of. This law establishes the basic policy of open government and therefore requires that meetings of governmental bodies must be properly noticed and open to the public, although in certain cases they may be closed.² Judging from the number of questions at ETN programs on this topic, there is a continuing need for information on this law. With the recent election of municipal officials, now is a good time for an overview of the Open Meetings Law.

Definitions - The definitions are important because they are the basis for the applicability of the law. The two key terms are “governmental body” and “meeting.”³

A “governmental body” includes a local board, committee, council and “formally constituted” subunits of any of these bodies. A governmental body does not include, however, a body, committee or subunit formed for the purpose of collective bargaining.⁴ Thus, a common council and village board are obviously subject to the Open Meetings Law, as are municipal committees, boards and commissions.

A “meeting” is defined as the convening of members of a governmental body for the purpose of exercising the responsibilities of that body. A meeting does not include social or chance gatherings not intended to avoid the law. Furthermore, when one-half or more of the members of a governing body are present, a meeting is “rebuttably presumed” to be for official purposes.

In addition, an “open session” is defined as a meeting “which is held in a place reasonably accessible to members of the public and open to all citizens at all times.”⁵

When Is There A Meeting Subject To The Law?

The simplistic answer to this question is, “Whenever a governmental body meets.” In most cases, there is no question of the applicability of the law - whenever the council, board or local committees or commissions meet they are subject to the law. However, the answer to the question of when there is a “meeting” is sometimes far from clear and there are pitfalls to be avoided.

The statutory definition of a meeting, which provides that a meeting is presumed if one-half of the members of a governmental body are present at a meeting, may lull officials into a false sense of security. The trouble is that the courts have interpreted the law to apply when there is less than one-half of the body present. Most people (including most attorneys) would not guess that this is the law from a reading of the statute. In the Showers case (1987),⁶ the Wisconsin Supreme Court ruled that the test of whether a meeting occurs is twofold:

“First, there must be a purpose to engage in governmental business, be it discussion, decision or information gathering. Second, the number of members present must be sufficient to determine the parent body's course of action regarding the proposal discussed.”

With regard to the second test, when a proposal requires a two-thirds vote of the entire body, such as a change in a budget under sec. 65.90(5), Stats., if one-third plus one of the governmental body members are present at a meeting, a court would find that there had been an Open Meetings Law violation if that particular proposal were discussed. This is what happened in the Showers case, where four out of 11 members met to discuss a budget matter. Similarly, where the vote of a majority of all members is required, as in the case of confirmation of mayoral appointments under sec. 62.11(3)(b), for example, a minority plus one may determine the outcome. This test is theoretically easy to apply when the vote required is expressed as a fraction of the whole body, as in the Showers case.

The same principle would seem to apply with regard to matters which may be passed by a vote based on the quorum rather than total membership, such as a majority or fraction of a quorum. In such cases, the safest approach to figure the number of votes to block the matter is to subtract from the quorum the number of votes required to pass the measure and then add one. However, it will be noted that this minimum figure for determining whether the Open Meetings Law is triggered may be lower than the figure obtained if it is assumed that more than a quorum will be present at a subsequent meeting on the issue. For example, if a village board has seven members and all attend a meeting, a matter requiring a majority vote may be blocked by four members. But if four members attend, the matter may be blocked by only two.⁷

Also in this vein it should be noted that the courts have said that a series of gatherings of a small enough number of officers so as not to trigger the law at one specific gathering may constitute an illegal meeting.⁸

In addition to being careful about the number of members of a particular body that gather to talk about topics pertaining to that body, it is important to be aware that a “meeting” might take place when a sufficient number of members are present at other meetings. Of course joint meetings of governmental bodies must be noticed, but if, for example, another unit of government has a meeting to talk about an issue pertaining to a municipality and a sufficient number of members of a governmental body of the municipality are present in the audience and discuss the issue, a court might find that an illegal meeting of the municipal body had occurred.⁹ If there is any question about whether there is a meeting, it is best to play it safe and follow the Open Meetings Law.

One village officer called recently with an interesting misunderstanding. He was afraid that a village board meeting would have to be noticed whenever the village public safety committee met because that committee had three members and that made up a quorum of the board. Here, although the numbers test is satisfied, the question remains as to whether the purpose test is met. There is no problem as long as the members of the committee (at a properly noticed committee meeting) confine their discussion and actions to committee matters, but if they go outside of the purview of the committee and discuss other village matters, then they are probably acting as the village board at an improperly noticed meeting.

Also, too much reliance should not be placed on the exception to the definition of a meeting for chance or social gatherings. Remember, that exception is qualified by the tag “not intended to avoid” the law. If a negative quorum (or more) of a body gets together by chance or for a social occasion there is no problem unless the discussion turns to matters pertaining to that body, in which case there is probably a violation of the law.

It should by now be clear that governmental body members should be very careful when discussing public body business with other members outside of a properly noticed meeting. This is particularly true where a violation might be deemed to occur when only two members of a body meet to talk. The obvious problem is that this does not jibe with how government works - officials need to discuss matters they are working on. There was a suggestion in an earlier case that such one-to-one discussions would be protected by the First Amendment and would not constitute violations of the Open Meetings Law, but, unfortunately, this was not discussed in the recent Showers case.¹⁰

If governmental body members should violate the law by discussing matters outside of a meeting, a wise course to take would be to make sure that the matter is fully discussed at a properly noticed meeting before it is voted on. This could very likely avoid prosecution and ensure that a court would not void the action.

Notice Requirements

The presiding officer of a governmental body, or that person's designee (typically the clerk), must give proper notice¹¹ of a meeting 24 hours in advance. Notice may be given, however, two hours in advance of the meeting for good cause. If the notice is mailed, it must be mailed early enough to allow it to arrive within the statutory time frame.¹² The notice must specify the time, place and subject matter of the meeting, and any contemplated closed sessions must be included.

The notice must be in such form as is "reasonably likely to apprise" the public and news media.¹³ Therefore, the notice of the subject should be fairly explicit,¹⁴ although it is permissible to take up unforeseen matters under an "other business" category.¹⁵ In most cases late-breaking events may either be noticed by an amended notice, at least two hours' prior to the meeting, or the matter may be put off until the next meeting.¹⁶ Minor matters may appropriately be subsumed under broader topics, but matters of particular interest should be given explicit notice. A good test is for the person writing the notice and agenda to ask if he or she would be interested in an item if he or she were a reporter, and to consider whether anyone is likely to get upset or excited over a matter. If the answer is yes to either of these questions, the matter should be explicitly noticed.

Notice has to be given to any news medium that has requested the notice, and must be given to a news medium, such as a newspaper, TV or radio station, that is likely to give notice in the area.¹⁷ There is no requirement that the notice actually be published,¹⁸ although certain notices under other statutes must be published [e.g., a proposed zoning amendment under sec. 62.23(7)(d)2].¹⁹ As an alternative to written notice, telephone or other verbal communication to members of the news media is sufficient.²⁰

The law also requires some form of direct notice to the public; this requirement may be met by posting the notice in one, or preferably several, public places.²¹

An exception to the notice requirement is that subunits of governmental bodies²² may meet during the meeting of the parent body, during a recess, or directly after such meeting to discuss or act on matters that were the subject of the meeting of the parent body.²³ The presiding officer of the parent body must announce the time, place and subject matter of the subunit meeting in advance at the meeting of the parent body. This announcement must mention any contemplated closed session.²⁴

Finally, no charge may be made for providing notice to meet the requirements of the Open Meetings Law. However, once these notice requirements have been met, charges may be made, under the public records law, for additional notices and supplementary information.²⁵

Closed Sessions

The law authorizes, but does not require, meetings to be closed for certain purposes. Going into closed session without authority, along with attending improperly noticed meetings, is the source of most of the prosecutions under the Open Meetings Law. It is therefore a good idea to remember the statutorily expressed policy of open government²⁶ and err on the side of openness.

Before mentioning reasons for closing a meeting, a suggestion: use the term “closed session” or “closed meeting” instead of “executive session.” The use of the latter term is better avoided because it suggests that meetings may be closed whenever the body wishes to take action on a matter.

Meetings may be closed for a number of authorized reasons,²⁷ including the following: (a) deliberating after a quasi-judicial hearing; (b) considering the discipline of an employee or person licensed by the municipality; (c) considering employment, promotion, compensation or performance evaluation data of a public employee; (d) deliberating or negotiating the purchase of public properties, or conducting other business whenever competitive or bargaining reasons require a closed session; (e) considering financial, medical, social, personal history and disciplinary data of specific persons or specific personnel problems which, if discussed in public, would be likely to have a substantially adverse effect on the person's reputation; and (f) conferring with legal counsel with respect to litigation in which the body is involved or is likely to become involved. Here a good rule of thumb is to ask the preliminary question, “Is there a reason why this matter is best discussed privately, other than the desire to escape the glare of the public eye or the media?”

When closing a meeting is appropriate, it is important to follow the statutory procedures. As mentioned above, closed sessions planned in advance must be specified in the public notice; however, if the closed session was not contemplated, it may be closed for a valid reason.²⁸ The body must first convene in open session and vote to go into closed session. The vote of each member must be recorded and preserved. The presiding officer must announce the nature or the business to be discussed and the specific statutory provision which authorizes the closed session.²⁹

Attendance at the closed session is limited to the body, necessary staff and other officers, such as the clerk and attorney, and any other persons whose presence is necessary for the business at hand. If the meeting is of a subunit³⁰ of a parent body, such as a committee meeting, the members of the parent body (i.e., the common council or village board) must be allowed in the closed session, unless the rules of the parent body provide otherwise.³¹

Finally, it should be noted that the discussion in closed session must be limited to the topics for which the meeting was closed,³² and the body may not reconvene in open session until 12 hours have elapsed (and proper notice given), unless the subsequent open session was noticed at the time of the notice of the meeting convened prior to the closed session.³³

Penalties and Remedies

Violations of the Open Meetings Law may be prosecuted by the district attorney, the attorney general (which is rarely, if ever, done), or by a private individual, if the district attorney does not take the case.³⁴

Governmental body members who violate the Open Meetings Law are subject to a forfeiture of between \$25 and \$300; this is a personal liability which may not be reimbursed by the municipality.³⁵ However, members may seek reimbursement for costs incurred in prosecutions which were successfully defended or dismissed.³⁶ Members may protect themselves from liability by voting in favor of a motion to prevent the violation (e.g., voting against going into an unauthorized closed session).³⁷

In addition to finding personal liability for violations of the law, a court may also order the violations to cease and void action illegally taken.³⁸

Conclusion

The above discussion should make it clear that it is important for every member of local governmental bodies to be well-acquainted with the Open Meetings Law. As with other legal matters, officials should consult their municipal attorneys if they have questions. Further information may be found in the League opinions footnoted in this Comment and especially in chapter 2 of the League handbooks, "The Conduct of Common Council Meetings" and "The Conduct of Village Board Meetings." A copy of the appropriate procedural handbook was sent to each clerk after publication in 1987.³⁹ In addition, a talk on the Open Meetings Law and the Public Records Law will be given by the League Legal Counsel at the New Officials' Workshops, which are scheduled in Madison (Friday, June 2), Appleton (Wednesday, June 7) and Eau Claire (Friday, June 9).

NOTES:

1 Secs. 19.81 to 19.98, Stats.

2 Secs. 19.81 and 19.83, Stats.

3 Sec. 19.82(1) and (2), Stats.

4 Note that final ratification or approval of a collective bargaining agreement must be done in open session. Sec. 19.85(3), Stats.

5 Sec. 19.82(3), Stats.

6 State ex rel. *Newspapers, Inc. v. Showers*, 135 Wis.2d 77 (1987).

I speak Spanish to God, Italian to women, and German to my horse. – Charles V, King of France.

7 A recent law review note criticized the *Showers* court for not considering this issue, and recommended that "To be safe, officials will need to hold in public all meetings at which at least a majority of a quorum is present." 1988 Wis. L. Rev. 827, 851, 856. This is hardly the safe approach where, as in the example in the above text, less than a majority of the quorum can block a matter. Consider also an 11 member village board. A quorum is six and four is thus a majority. So three can defeat a matter if only six are present.

8 See *Showers*, 398 N.W.2d at 161, 164; 1988 Wis. L. Rev. at 846-7, 855.

9 See 66 OAG 254 (1977); and *Paulton v. Volkmann*, 141 Wis.2d 370 (Ct. App. 1987). In *Paulton* the court held that there was no meeting of a school board when a quorum of the board attended a meeting in a neighboring town. It seems that this fact-specific decision, which was based on a fine distinction, might have been decided the other way.

10 The earlier case is *State v. Conta*, 71 Wis.2d 662 (1976), and this issue is discussed in *Governing Bodies #309*, which was published in the July 1987 issue of *THE MUNICIPALITY*, pp.262-263.

11 See sec. 19.84, Stats.

12 OAG 69-88 (Dec. 19, 1988).

13 Sec. 19.84(2).

14 In a recent case a court ruled that a notice stating the intent to go into closed session under sec. 19.85(1)(b), Stats., “to conduct a hearing to consider the possible discipline of a public employee” was sufficient. *State ex rel. Schaeve v. Van Lare*, 125 Wis.2d 40 (Ct. App. 1985). Note that the employee did not have to be named in the notice.

15 66 OAG 68 (1977); 66 OAG 143 (1977); 66 OAG 195 (1977).

16 *Governing Bodies #266*; See 66 OAG 93 (1977).

17 Sec. 19.84(1)(b).

18 *Martin v. Wray*, 473 F. Supp. 1131 (E.D. Wis. 1979); OAG 69-88 (Dec. 19, 1988).

19 Notice requirements of other statutes must be met in addition to the requirements of the Open Meetings Law. Sec. 19.84(1)(a).

20 OAG 69-88 (Dec. 19, 1988).

21 Sec. 19.84(1)(b); 63 OAG 509, 510-11 (1976); 66 OAG 93, 95 (1977).

22 The League has opined that statutory boards or commissions,

such as a library board, a utility commission and a police and fire commission, are probably not subunits of a common council or village board, although committees (e.g., a finance committee, a public safety committee) are subunits. *Governing Bodies #310*.

23 Sec. 19.84(6).

24 65 OAG Preface vi (1976).

25 OAG 69-88 (Dec. 19, 1988); *Governing Bodies #323*.

26 Secs. 19.81 and 19.83, Stats.

27 Sec. 19.85(1), Stats.

- 28 Sec. 19.84(2), Stats.
- 29 Sec. 19.85(1), Stats. These requirements also apply to a closed session of a subunit meeting without notice as provided by sec. 19.84(6). 65 OAG Preface vi (1976).
- 30 See footnote 22.
- 31 Sec. 19.89, Stats.
- 32 Sec. 19.85(1), Stats.
- 33 Sec. 19.84(2), Stats.
- 34 Sec. 19.97(1), (2) and (4), Stats.
- 35 Sec. 19.96, Stats.
- 36 Secs. 62.115, 895.35 and 895.46(1)(a), Stats.; OAG 39-88 (Aug. 18, 1988).
- 37 Sec. 19.96, Stats.
- 38 Sec. 19.97(3), Stats.
- 39 Extra copies of the handbooks may be ordered from the League at a cost of \$6.00 each.

FREQUENTLY ASKED QUESTIONS

(Answered by the League of Municipalities)

Can members of a governmental body violate the open meeting law by communicating regarding city or village business via telephone or e-mail?

Yes, members of a governmental body can violate the open meeting law by communicating regarding city or village business if there is communication amongst a sufficient number of the members. The Wisconsin Supreme Court has held that the open meeting law applies whenever members of a governmental body meet to engage in government business, whether it's for purposes of discussion, decision or information gathering, if the number of members present are sufficient to determine the parent body's course of action regarding the proposal discussed at the meeting. *State ex rel. Showers*, 135 Wis.2d 77, 398 N.W.2d 154 (1987). In *Showers*, the court recognized that members of a governmental body can violate the open meeting law by participating in what is called a "walking quorum." A walking quorum is a series of gatherings among separate groups of members, each less than quorum size, who agree, tacitly or explicitly, to act and vote in a certain manner in numbers sufficient to reach a quorum. See Informal Op. Att'y Gen to Paul Kritzer dated August 20, 1996; 69 Op. Att'y Gen. 143 (1980); and League opinion Governing Bodies 339.

What action can a governmental body take against a member who discloses confidential information obtained during a closed session?

If a member discloses confidential information obtained during a closed session, it is not a violation of the open meetings law. However, such behavior is understandably a matter of concern for governmental bodies and governing bodies can prohibit and establish consequences for such behavior. Some municipalities have local rules or ordinances which prohibit the use or disclosure of confidential information by municipal officials. Possible penalties include a fine or public censure. Another potential consequence for violation of these local restrictions is criminal prosecution under Wis. Stat. sec. 946.12 for misconduct in public office.

*Cedant arma togae, concedant
laurea laudi. – Cicero.*

Do the open meeting law exceptions for closed sessions in Wis. Stat. sec. 19.85 compel the use of a closed session?

No. The authorizations for closed sessions set forth in Wis. Stat. sec. 19.85 merely permit closed sessions in the specified circumstances. None of the authorizations require a closed session. However, the closed session exceptions encompass some subject areas that implicate other legal duties. These non-open meeting law duties can prohibit public disclosure and discussion of certain information (e.g., confidentiality of health care records).

How specific does an agenda item have to be to satisfy the open meeting law notice requirement?

Wisconsin's open meeting law provides that "the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." Wis. Stat. sec. 19.81(1). To that end, the law requires that all meetings of governmental bodies be preceded by public notice. The notice must set forth the time, date, place and subject matter of the meeting "in such form as is reasonably likely to apprise members of the public and the news media thereof." Wis. Stat. secs. 19.84(1) and (2).

In *State ex rel. Buswell v. Tomah Area School District*, 2007 WI 71, 301 Wis. 2d 178, 732 N.W.2d 804, overruling *State ex rel. H.D. Enterprises v. City of Stoughton*, 230 Wis. 2d 480, 602 N.W.2d 72 (Ct. App. 1999), the Wisconsin Supreme Court held that notice of an agenda item must be reasonably specific and that reasonably specific notice will depend on the particular circumstances associated with the item and other considerations including:

1. The burden of providing more detailed notice. The public official must consider the amount of time and effort required to assess what information should be included in the notice, keeping in mind that the demands of specificity should not "thwart the efficient administration of governmental business."
2. The public interest in the subject matter. The public official must consider the number of interested citizens and the intensity of the interest. The greater the public interest, the greater specificity required.

3. The public ability to anticipate the subject matter. If the item involves a “novel” or non-routine matter that the public is unlikely to anticipate under more general agenda language, then greater specificity is required.

All three of the above considerations require a case-by-case analysis based on what the public officer preparing the meeting notice knows, or reasonably should know, at the time the notice is provided. Accordingly, the presence of a large crowd at a meeting that the official did not know would be present or did not have any reasonable basis to believe would be present will not determine compliance or noncompliance with the open meeting law notice requirement under the *Buswell* standard.

Does the Open Meeting law apply to city or village committees created by a city council or village board?

Yes. The Open Meeting law applies to governmental bodies and "governmental body" is defined to include a "state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order . . . or a formally constituted subunit of such body." Wis. Stat. Sec. 19.82(1). Thus, city or village committees created by a city council or village board pursuant to a city or village ordinance, rule or order are subject to all Open Meeting law requirements.

What law requires that ordinances be read a certain number of times before they are voted on?

There is no state law which governs the reading of ordinances prior to their being voted on by the governing body. Many municipalities, however, have local rules of procedure which do require a certain number of readings. Local rules of procedure can often be waived by a requisite number of governing body members. Because any requirement that ordinances be given a certain number of readings is local in nature, it can be modified or eliminated if the governing body desires.

Does an e-mail message sent to or by a municipal employee or official constitute a public record under the public records law?

Yes, provided the message relates to the employee or official’s responsibilities and is not purely personal in nature. A “record” under the public records law is broadly defined to include any material on which written, printed, visual or electromagnetic information is recorded or preserved which has been created or is being kept by a municipal employee, official or office. Wis. Stat. sec. 19.32(2). Clearly, e-mail constitutes a record subject to the public records law. E-mail should be retained as long as any written communications are required to be retained, which is generally seven years in the absence of a records retention ordinance establishing a reduced retention period.

The City provides council members with an email address through the City's domain (www.CityofBaraboo.com). In order to remain in compliance with the public records law, you should conduct City business involving emails through your City email account.

RULES FOR DEALING WITH THE PUBLIC AND OTHER AGENCIES

The Council has adopted as §1.86, Code of Ordinances, a Code of Conduct for Elected and Appointed Officials. The entire Code is printed above. This article emphasizes those sections relating to dealing with the public and other agencies as a member of the Council.

While elected officials remain citizens and do not give up any of their Constitutional and 1st Amendment rights, Council members should be aware of the possibility of conflicts between their personal positions and decisions and policies established by the Council. The City has adopted a Code of Conduct for Elected Officials that includes the following provisions.

Elected officials shall make no promises on behalf of the Council, and shall not overtly or implicitly promise Council action, or promise City staff will do something specific (fix a pothole, remove a library book, plant new flowers in the median, etc.).

In dealing with other public agencies, bodies and commissions, elected and appointed officials shall be clear about representing the city or personal interests. If Council members appear before another governmental agency or organization to give a statement on an issue, Council members must clearly state: 1) if his or her statement reflects personal opinion or is the official stance of the City; 2) whether this is the majority or minority opinion of the Council. If the Council member is representing the City, the Councilmember must support and advocate the official City position on an issue, not a personal viewpoint.

Correspondence, whether public or private, must be equally clear about representation. City letterhead may be used when the Council member is representing the City and the City's official position. A copy of official correspondence shall be given to the City Clerk as part of the permanent public record. City letterhead shall not be used for personal correspondence of Council members. Council members may use City letterhead for correspondence sent in an official capacity regarding an issue the City is involved in.

If attending a Board or Commission meeting *not* as a member of that Board or Commission, be careful to only express personal opinions. Council members may attend any Committee or Commission meeting. However, they should be sensitive to the way their participation – especially if it is on behalf of an individual, business or developer – could be viewed as unfairly affecting the process. Any public comments by a Council member at a Committee or Commission meeting should be clearly made as individual opinion and not a representation of the feelings of the entire City Council.

Limit contact with Committee and Commission members to questions of clarification. It is inappropriate for a Council member to contact a Committee or Commission member to lobby on behalf of an individual, business, or developer in circumstances when the Conflicts of Interest rules apply. (See §1.77, Ordinances). It is acceptable for Council members to contact Committee or Commission members in order to clarify a position taken by the Board or Commission.

Committees and Commissions serve the community, not individual Council members. The Mayor or City Council appoints individuals to serve on Committees and Commissions, and it is the responsibility of Committees and Commissions to follow policy established by the Council. Committee and Commission members do not report to individual Council members, nor do Council members have the power or right to threaten Committee and Commission members with removal if they disagree about an issue. A Committee or Commission appointment shall not be used as a political “reward.”

Be respectful of diverse opinions. A primary role of Committees and Commissions is to represent many points of view in the community and to provide the Council with advice based on a full spectrum of concerns and perspectives. Council members may have a closer working relationship with some individuals serving on Committees and Commissions, but must be fair and respectful of all citizens serving on Committees and Commissions.

Keep political support away from public forums. Committee and Commission members may offer political support to Council members, but not in a public forum while conducting official duties. Conversely, Council members may support citizens who are running for office, but not in an official forum in their capacity as a Council members.

The Mayor is the official spokesperson and representative on City positions. The Mayor shall be the designated representative of the Council to present and speak on the official City position. If individual Council members or members of a committee are contacted by the media, the Councilmember or member of a committee should be clear about whether their comments represent the official City position or a personal viewpoint.

And when Alexander saw the breadth of his domain, he wept, for there were no more worlds to conquer. – Plutarch.