CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511

Date: September 14, 2007

OPINION NO. 07-003

TO: Nan Fey, Chair, Plan Commission

FROM: Michael P. May, City Attorney

RE: Potential for Disqualifying Conflict of Interest or Risk of Bias for Plan Commission Members

You requested my opinion on potential conflicts faced by an Alderperson who sits on a board, commission, or committee, such as the Plan Commission, when a proposal in the Alderperson's district comes before the body. I also will comment on the difference in the analysis of bias when an Alderperson acts on similar matters when they come before the Common Council. Finally, some aspects of this discussion on potential conflicts also apply to non-Alderperson members of boards, commissions, and committees, when they act in a quasi-judicial capacity.

There are two aspects to potential conflicts, one based on common law and the other on statutory law. The first relates to providing any applicant a fair hearing. The second relates to conflicts under the City's Ethics Code. I will discuss each of them in turn.

FAIR HEARING PROCEDURES

Although this question has arisen in the context of an Alderperson acting as a member of the Plan Commission, it is an issue that all Alderpersons, and members of boards, commissions, or committees may face in their various roles on the Common Council, boards, commissions, and committees. All parties who appear before municipal bodies are entitled to due process and fair play, in other words, a fair and impartial hearing. *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 24 (1993). A fair hearing is compromised when there exists bias in fact or when the risk of bias is impermissibly high. *Marris,* 176 Wis.2d at 25.

Marris involved the determination of a building's nonconforming status by the Board of Zoning Appeals. Like the Plan Commission and some other boards, commissions and committees, the Zoning Board of Appeals' actions are characterized as quasi-judicial. Quasi-judicial determinations occur when factual determinations are made and then applied to criteria or standards in an ordinance. *Marris,* 176 Wis.2d at 24-25. These individualized determinations are in contrast to the broader, policy based legislative actions of Alderpersons when acting in their role as members of the Common Council.

Determining whether potential bias exists may vary depending on whether the action in question is quasi-judicial or legislative. Unlike quasi-judicial actions, legislative actions are presumptively valid, resulting in a more limited standard of judicial review. In other words, courts are less likely to second-guess a legislative action than a quasi-judicial one. As I will discuss later, the distinction between quasi-judicial and legislative action and how it impacts the evaluation of potential bias may not be the same in all contexts. For example, budget determinations and zoning determinations may require different considerations.

In *Marris,* the Board chair made several questionable comments about Marris and her building project prior to the hearing before the Board. Marris alleged that the Chair had prejudged the merits of her case, and asked that he recuse himself from consideration of her project. He declined. The Wisconsin Supreme Court agreed with Marris that the comments created an impermissibly high risk of bias and warranted recusal. The Court noted that:

> "Zoning decisions implicate important private and public interests. They significantly affect individual property ownership rights as well as community interests in use and enjoyment of land. Furthermore, zoning decisions are especially vulnerable to problems of bias and conflict of interest because of the localized nature of the decisions, the fact that members of zoning boards are drawn from the immediate geographical area and the adjudicative, legislative and political nature of the zoning process." *Id*. at 25.

Recognizing the complexity of the issue, the *Marris* court also noted that members of local governmental bodies often are chosen because they have a particular expertise and are familiar with local conditions and people in the community, and that having opinions, even strong opinions, need not disqualify a person from serving on a body. *Id.* at 26. Care must be taken, however, to use expertise, opinions, etc., to evaluate each project on its merits and to not form conclusions before all opportunities to consider a project, including public hearings, are completed.

In a more recent case, *Keen v. Dane County Board of Supervisors*, 2004 WI App 26, 269 Wis. 2d 488 (2003), the Wisconsin Court of Appeals invalidated the grant of a conditional use by the Dane County Zoning and Natural Resources Committee because a committee member, who also was a county supervisor, created an impermissibly high risk of bias when a letter he had written in support of the applicant was submitted as part of the application. *Keen*, 2004 WI App ¶ 15, 269 Wis. 2d at 498. The Court found that:

> "Hamre became an advocate for P & D when P&D submitted his letter as part of its permit application. *He cannot be both an advocate and an impartial decisionmaker on this issue*." (emphasis added) *Id*.

Neither *Marris* nor *Keen* means that an impermissibly high risk of bias is inherent when an Alderperson-member of a board, commission, or committee acts on a matter in the member's district, one that falls within the particular expertise of the member, or one that implicates issues about which the member has strong opinions. The key is to accord each applicant the same impartial consideration based on the relevant factual determinations and standards.

If an Alderperson, acting as a board, commission, or committee member in a quasi-judicial capacity, believes he or she views a particular project as an advocate rather than an impartial decision maker, recusal would be appropriate. Recusal likewise would be in order should some personal or professional history with a project or applicant suggest a lack of impartiality on the part of any member of a board, commission, or committee. Again, the *Marris* court found that here need not be actual bias to support recusal – an impermissibly high risk of bias is equally problematic.

Bias, as it relates to an Alderperson's actions on the Common Council, is evaluated somewhat differently. Common law principles of fair play are less likely to be a factor in legislative actions, in large part because they tend to be broadly applied policy actions and are presumptively valid. Zoning determinations, however, present a case where the line between the character of legislative and quasi-judicial action is less clear.

Wisconsin courts are clear that zoning actions are legislative in nature. *Step Now Citizens Group v. Town of Utica Planning & Zoning Committee,* 2003 WI App 109 ¶ 26, 264 Wis.2d 662, 678 (2003). Nonetheless, zoning actions, particularly individual rezonings, are similar to quasi-judicial actions in that their impact tends to be narrow and the rezoning decision often is informed by factual determinations on a specific property. In addition, zoning actions are subject to public hearings, suggesting that the common law principles of fair play are not irrelevant. The *Marris* court recognized the somewhat unique status of zoning when it stated

> "Although the parties characterize the Board's hearing as adjudicative, we need not label these proceedings quasi-legislative or quasi-judicial to determine whether the decision-maker must be impartial. In this case, the Board must make factual determinations about an individual property owner and then apply those facts to the ordinance. We conclude that common law notions of fairness require an impartial decision-maker under these circumstances." *Marris,* 176 Wis.2d at 25, FN 6.

As noted earlier, legislative actions are less likely to be overturned by courts than are quasi-judicial actions, so in the context of judicial review, the principles of *Marris* are less important than in a quasi-judicial context. Zoning actions, though they are legislative, do bear enough similarities to quasi-judicial determinations that the unwillingness of courts to overturn legislative policy decisions (based on

separation of powers considerations) may not be as steadfast as for less individualized types of legislative actions.

The application of common law principles of fair play will vary with the type of decision that is being made, not only whether it is quasi-judicial or legislative in nature but how narrowly or broadly its impacts are felt. Broad policy legislative determinations are less likely to be vulnerable to a challenge of bias than are those legislative determinations, such rezonings, which tend to be less policy based and more individualized in their impact.

It is impossible to establish clear lines of when bias exceeds the level necessary for a fair determination, since each case is very fact intensive. *See,* for example, the myriad examples with different outcomes depending on the facts in the annotation *Bias or Interest of Administrative Officer Sitting in Zoning Proceeding as Necessitating Disqualification of Officer or Affecting Validity of Zoning Decision,* 4 A.L.R. 6th 263 (2005). However, we can offer Alderpersons and other members of boards, committees or commissions the following guidelines:

1. When the board, committee or commission is quasi-judicial in nature, that is, when it involves the application of standards to a specific individualized factual setting (this includes some matters before bodies such as the Plan Commission, the Alcohol License Review Committee and the Police and Fire Commission), an Alderperson or member should recuse himself or herself if they have become an advocate for one position and can no longer consider the case impartially.

2. When an Alderperson has recused himself or herself in such a situation and the matter comes before the Common Council for approval of the action of the board, committee or commission, the Alderperson has more leeway to act. The actions of the Common Council partake more of the legislative character, so that an impermissible bias at the board, committee or commission level may not rise to the level of recusal at the Common Council stage. Each situation must be judged on its facts.

3. On matters which are exclusively legislative in character, such as ordinances of general application or resolutions, the members of boards, committees and commissions, and Alderpersons on the Common Council, have the strongest presumption that their actions are proper and the actions will be disturbed in only the most severe circumstances amounting to fraud.

CONFLICTS UNDER THE ETHICS CODE

Recusals based on the principles of *Marris* and *Keen* are relatively rare. More commonly, reasons for recusal are based on Sec. 3.35, MGO (renumbered from 3.47, MGO), the City of Madison Code of Ethics applicable to Alderpersons and all members of boards, committees, and commissions. The Code of Ethics applies to all actions, regardless of whether they are quasi-judicial or legislative.

Determinations under sec. 3.35 also are very fact based and may be easier to make due to specific ordinance language. The most generally applicable rules for conflicts under the Ethics Code are set out in sec. 3.35(5)(a), which provides in part:

> Standards of Conduct.
>
> (a) 1. Use of Office or Position. No incumbent may use or attempt to use her or his position or office to obtain financial gain or anything of value or any advantage, privilege or treatment for the private benefit of herself or himself or her or his immediate family, or for an organization with which she or he is associated. This paragraph does not prohibit an incumbent from using the title or prestige of her or his office to obtain campaign contributions that are permitted and reported as required by Ch. 11, Wis. Stats.
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> 2. Influence and Reward. No person or entity may offer or give to an incumbent or member of an incumbent's immediate family, directly or indirectly, and no incumbent may solicit or accept from any person or entity, directly or indirectly, anything of value if it could reasonably be expected to influence the incumbent's vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on her or his part.
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> 3. Limitations on Actions. Except as otherwise provided in paragraph 4, no incumbent may:
>
> a. Take any official action affecting, directly or indirectly, a matter in which she or he, a member of her or his immediate family, or an organization with which she or he is associated has a financial or personal interest;

b. Use her or his office or position in a way that produces or assists in the production of a benefit, direct or indirect, for her or him, a member of her or his immediate family either separately or together, or an organization with which the incumbent or her or his immediate family member is associated.

These rules set out in the Ethics Code must be applied in light of the detailed definitions in sec. 3.35(2) and (3). For example, "incumbent" is a very important definition, because it covers all elected officials, all members of boards, committees and commissions and all city employees.

These most basic rules may be summarized as follows: An incumbent may not

- Use or attempt to use his or her office for financial gain for himself or herself, family members or associated businesses.

- Accept, and no person may offer, anything of value if it could be considered as a reward or may influence action.

- Take action or use his or her office on a matter in which he or she, family members or associated businesses have an interest, or which might produce a benefit for them.

These rules can be applied with some ease for Plan Commission members. If a project in one's neighborhood could have a benefit or detriment to the member, the member's family or an associated business (which includes non-profits), the member should not take action. Similarly, the member should avoid accepting anything of value from those developers or their representatives that may appear before the Commission.

When there is a disqualifying conflict of interest under the Ethics Code, the member must completely recuse himself or herself from the matter. Sec. 3.35(5)(f), MGO. This means taking no part in the discussion or voting on the matter, either on the floor or before or after the meeting.

Recusal under the Ethics Code applies similarly to members in their role as Plan Commission members or Alderpersons. Thus, unlike the potential for disqualification under the *Marris* rule discussed above, the same rules apply to Alderpersons as members of the Plan Commission or as members of the Common Council.

This is only the briefest summary of the many rules under the City's Ethics Code. If you or any member of the Plan Commission who has a question on application

of the Ethics Code to a particular set of facts, you should contact the Office of the City Attorney. In all cases, based either in ordinances or case law, fundamental due process concerns for an independent, impartial government should inform decisions on recusal.

CONCLUSION

Members of bodies that exercise quasi-judicial roles, such as Plan Commission members, are subject to common law rules requiring an impartial decision maker. Members should recuse themselves if they have developed a bias such that they are an advocate rather than impartial. The common rules are not as strict for Alderpersons on the Common Council, but an impermissibly high risk of bias may still be present. On legislative matters, Alderpersons and members of boards, committees and commissions enjoy the strongest presumption that their actions were proper.

Alderpersons and members of boards, committees and commissions are also subject to the rules in the City's Code of Ethics, which may require recusal under certain circumstances.

Michael P. May
City Attorney

cc: Plan Commission Members
Mayor Dave Cieslewicz
All Alderpersons
City Clerk

SYNOPSIS: Discusses and analyzes circumstances under which members of the Plan Commission, including Alderpersons, must recuse themselves under common law risk of bias and the City's Ethics Code.