

# QUASI-JUDICIAL TRAINING

September 23, 2009  
Room 201, CCB

## PRESENTERS

MICHAEL P. MAY, CITY ATTORNEY LARA MAINELLA, ASSISTANT CITY ATTORNEY ROGER ALLEN, ASSISTANT CITY ATTORNEY STEVE BRIST, ASSISTANT CITY ATTORNEY

Michael P. May  
City Attorney

## QUASI-JUDICIAL TRAINING

September 23, 2009  
Room 201 CCB  
Madison, Wisconsin

Introduction, Definitions and Examples

Michael P. May  
City Attorney

### A. Introduction and Topics:

- 1 . Definitions and Examples
- 2 Procedures and Procedural Due Process
- 3 Impartiality
- 4 Deliberations
- 5 Questions

### B. Definitions:

- 1 . Black's Law Dictionary (4<sup>th</sup> Ed.): "A term applied to the action, discretion, etc., of public administrative officers, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature."
2. *Marris v. CityofCedarburg*, 176 Wis. 2d 14, at 24 fn. 6, 498 N.W. 2d 842 (1993), the Wisconsin Supreme Court 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. We need look only to the characteristics of the

proceedings 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." (emphasis added).

C. Factors that May Demonstrate Quasi-judicial Functions:

- 1 . Individualized determinations as opposed to generalized policies. Contrast the revocation of a liquor license with adoption of an ordinance limiting liquor licenses.
- 2 Application of a set of standards to a particular situation.
- 3 Explicit statement that some or all of the rules of fair play (notice, right to be heard, impartial decision-maker, right to present evidence, right of appeal) apply to the proceeding.
- 4 Existence of a recognized liberty or property right that may be impacted.

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D. Examples; Some Proceedings are More Quasi-judicial than others.

- 1 . The AI-RC suspending or revoking a liquor license. Compare the AI-RC denying an initial application for liquor or operator's license.
- 2 The Plan Commission granting or denying a conditional use permit. Compare the Zoning Board of Appeals considering a variance request, and the Plan Commission recommending a zoning text or map amendment.
- 3 The Police and Fire Commission considering the discipline of an individual officer. Contrast the PFC establishing rules for the conduct of its hearings.
- 4 The Equal Opportunities Commission considering an appeal on a finding of discrimination in employment. Contrast the EOC making a recommendation on amendment of the City's ordinances.

E. Quasi-judicial Functions and Immunity.

- 1 Immunity at common law for judicial and quasi-judicial function.
- 2 Codified at Wis. Stat. Sec. 893.80 for municipalities.

Attachment: City Attorney Opinion 07-003.





**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 quasijudicial 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." [d. 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 11 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

Matters 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 as 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. 6<sup>th</sup> 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.
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.
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

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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.

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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.

Quasi-Judicial Training for Committee/Commission Members  
September 23, 2009  
Lara Mainella Office of City Attorney

## HEARING PROCEDURE & DUE PROCESS

### 1. REQUIREMENTS FOR DUE PROCESS

**A.** Requirement comes from the Due Process Clause of the 14<sup>th</sup> Amendment to the US constitution:

"...nor shall any State deprive any person of life, liberty or property without due process of law..."

Most municipal quasi-judicial hearings (license revocation, appeals, etc.) are considered to involve a deprivation of property that requires basic due process.

**B.** Procedural Due Process in an Administrative Hearing includes:

- (1) Written Notice
- (2) Opportunity to be heard at meaningful time in meaningful manner
- (3) Right to a decision that describes reasons: facts and conclusions of law (4) Right to a decision that is not arbitrary or unreasonable.

(1) Written Notice. There are two kinds of notices needed for your hearing:

1. A Written Notice that informs the person of the "charges" or the reason for the hearing. (duty of city staff person commencing the case to prepare, not the Commission.)

- Good description of "charges" so the person knows reasons for action against them, including specific facts, so they can prepare a defense.
- Instructions on how and when to request a hearing, any deadline ● Statement that person has a right to present evidence, witnesses, confront the evidence against them, to hire an attorney, etc.
- Any other instructions about the hearing unique to the body, such as deadline to request a hearing, requesting a transcript, etc. (consult ord, state statute, or procedural rules adopted by the body.)

2. The Hearing Notice (Open Meeting Notice.) (Responsibility of the Commission. Secretary prepares, Chair approves.) Two options:

- Put on agenda of a regular meeting if not lengthy. identify "Hearing" item with good specificity. Best to put at end of agenda. Incl. "closed meeting" ● Schedule Special Meeting. Must use full agenda format. All Open Meetings rules apply. Include closed session / reconvene language. ●

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Hearing must be scheduled within any mandatory time-frame (ex: within 30 days of the request for a hearing)

- Hearing Notice must be mailed to person within any time-frame (ex: not less than 10 days prior to the hearing) Just posting the notice w/ the clerk and on legistar is not good enough.
- Consult the ordinance, any Rules of Procedure, and City Attorney if questions about any of these deadlines. ● Legistar Tips:
  - Include as much detail as possible in the Title of the legistar item
  - Scan a copy of the Written Notice as an attachment to Legistar #
  - Do NOT attach other items to the ID number (or ask first)

- (2) Right to be heard at "meaningful time in a meaningful manner."

U.S. Supreme Court cases: *Matthews v. Eldridge*, *Goldberg v. Kelly*

"Meaningful time" = soon enough to have a useful effect.

"Meaningful manner" = an exchange of information that includes an opportunity to "plead your case" to somebody w/ authority to make a decision. Includes right to hear the evidence against you, refute that evidence, present your case. See item II.

- (3) Right to receive a decision that adequately describes reasons for the decision, based solely upon information gathered at the hearing (i.e. in the "Record")
- "Findings of Fact and Conclusions of Law"
  - Must adequately describe how/why decision-maker reached the conclusion
  - Timely - decision must be rendered within any required time frame
- (4) Concept of "due process" also says the decision cannot be arbitrary, oppressive, unreasonable, and cannot just represent the body's "will."
- In other words, due process requires a fair, unbiased, reasoned decision based on facts and law. (See Roger's outline)

## 11.FLOW OF A QUASIJUDICIAL HEARING:

### A.Order of Events: (see sample rules of procedure for VOC.)

- There are two "parties" or "sides:" usually "the City" and other person.
- Party with the "burden of proof" typically speaks first and last. ● Both parties have a chance to present evidence, witnesses, facts and arguments on their behalf; as well as cross-examining the other party's witnesses and challenge or respond to the other party's evidence.
- Good practice to require each party to share exhibits w/ other side.

- B. Chairperson can and should control the flow of the hearing and order of events, via usual powers of the chair, plus your "Rules of Procedure."

\*\* Chairperson should take special care to explain the flow of the hearing, and inform the parties how things are going to work. When you "call the case" you should instruct the parties where to sit, introduce the members,

explain your role (see sample VOC procedures) & ask if any questions before starting.

- c. Although quasi-judicial, standard meetings requirements, Roberts Rules, parliamentary procedure still apply, Decisions should be made by motion & second, votes recorded, minutes taken, etc.
- D. Know the law that establishes your procedures: Consult City Attorney if needed.

Best Practice = Adopt Rules of Procedure that specify the hearing procedure.  
Rules should incorporate any statutory or ordinance requirements.  
Rules must be provided to all parties and comm. members before the hearing.

Sample Rules of Procedure: VOC, ALRC, ARB? BOHMDC?

- E. Fact-finding hearing -> Deliberation -> Vote-> Findings of Fact and Conclusions of Law. See Steve Brist's outline for how to make and announce decision. Some commissions are "Final Administrative Decisionmaker," some report to CC or other body.

## 111, Evidence / Burden of Proof/ Hearsay / Ruling on Objections

**A.**Burden of Proof at the Hearing. "how much" proof is required?

- Y' Sometimes the statute, ordinance or rules specifies the burden, sometime not.
- ✓ In absence of specified burden, safest to use "preponderance of the evidence:"

'Preponderance of the Evidence" is the lowest standard of proof in the law. It means 'more likely than not" or at least 51% of the proof:

51 % proof = preponderance of the evidence (small claims court)	"Clear & convincing' (traffic tix, municipal court)	"Beyond a reasonable doubt" (criminal cases)
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0% proof      50% proof      100% proof

If a Court reviews your decision: "Substantial Evidence" is the test that a court would use if the decision is appealed: 't'[S]ubstantial evidence' means credible, relevant and probative evidence upon which reasonable persons could rely to reach a decision." Princess House, Inc. v. DIHLR, 111 Wis. 2d 46, 54, 330 N.W.2d 169 (1983).

- Credible means it is believable.
- Relevant evidence is any information having a tendency to make the existence of any fact of consequence to the determination more or less likely. Wis. Stat. § 904.01. ■  
Evidence is "probative" if it tends to prove or disprove something.

B. Types of Evidence

1. Testimony from Witnesses (sworn or unsworn)

Look at your ord, statute or rules to determine if witnesses must be sworn in. There is no general requirement to swear in witnesses for quasi-judicial matters. Anyone can administer the oath or affirmation.

Wis. Stat. § 906.03, Oath or Affirmation: "Do you solemnly swear that the testimony you shall give in this matter shall be the truth, the whole truth and nothing but the truth?"

OR: "Do you solemnly, sincerely and truly declare and affirm that the testimony you shall give in this matter shall be the truth, the whole truth and nothing but the truth?"

2. Exhibits / Documents — papers, photos, charts, anything. Affidavits?

3. Site Visits? Common Knowledge? (See Steve's outline)

c. The Rules of Evidence — do they apply?

1. "Rules of Evidence" are for the courtroom, found in Wis. stats & federal law.

Rules govern admissability of evidence, in court. Unless a statute, ordinance or Rules of Procedure requires certain evidentiary rules for your hearing, the courtroom "Rules of Evidence" do not apply,

A state statute or city ordinance might specify evidentiary rules for your hearing.

Generally, evidence should be "probative" and reasonably related to the subject of the case. The Chairperson can exclude evidence that is overly repetitive or completely irrelevant or immaterial.

Best Practice: easier to "receive" or allow evidence that is questionable than to spend a lot of time ruling on objections or arguing with the parties.

2. What is Hearsay? You will hear objections to the use of "hearsay/" at your hearings. Hearsay IS admissable and can be relied upon, if has an "indicia of reliability," and especially if there is other non-hearsay evidence to corroborate or support it.

Wis. Stat. sec. 908.01(3): "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'

- Policy: Commission members don't have to be lawyers or judges, shouldn't have to deal with complicated arguments about hearsay or admissability of evidence. "[A]ll proceedings before administrative bodies, are generally simple and informal. The functions of administrative agencies and courts are so different that the rules governing judicial proceedings are not ordinarily applicable to administrative agencies, unless made so by statute." Gray Well Drilling co. v.



Wis. Board of Health, 263 Wis. 2d 417, 419, 58 N.W.2d 64 (1953). ● "Legal Residuum Rule" Wis. Supreme court case, Gehin v. Wis. Group Ins. Bd. (2005), the court reiterated that uncorroborated hearsay alone is not "substantial evidence" under ch. 227. Any city commission that follows this statute could be subject to the same rule Wis. Stat. §227.45(1).

- Police reports. Police reports are OK in a quasi-judicial hearing, as long as you don't have a hearsay within hearsay problem. State v. Gilles, 173 Wis. 2d 101 (Ct. App. 1992).
- Documents from the court system are generally OK: criminal complaints, Judgment of Conviction, CCAP reports (make sure somebody with knowledge interprets CCAP for you.)
- Not necessary to memorize hearsay rules. See "How to Rule on Objections" below.
- Best practice: avoid making critical finding on uncorroborated hearsay. ● Corroborated = supported by oral testimony or another piece of evidence that is not hearsay. Look for other types of evidence presented at the hearing that supports the fact for which the "hearsay" evidence was presented.

#### **E. How to Rule on Objections.**

- Note the objection — repeat it for the minutes. Ask to Clarify if needed. ○ Ask the other party if they oppose the objection — if not, you can grant it. ○ Ask the other party if they can "rephrase" their question.
- If the other side disagrees with the objection, ask for a reason. Acceptable to ask both sides to explain their position.
- Consult with Attorney that represents the Commission.
- If you can't rule on the spot, officially "Note" the objection in the minutes and seek legal advice during deliberations, and include the ruling on objection and reasoning in the final decision.

### **IV. CREATING A "RECORD" the "Record" in your case should include:**

**A. Recording of the Hearing** — audio, video, minutes? Or all of the above. Announce onto the tape the date, time, and the reason for the hearing, on both sides of the tape. Test the microphone. This is the most important record you can keep.

**B. Exhibit List.** Receive and label all Exhibits. Use a numbering system and note whether the exhibit came from the City or the other party. Secretary or Chair should maintain a list of all exhibits and keep the original exhibits together in a safe place.

**c. Witness List.** Secretary or Chair should keep a written list of the full name of each witness. Ask for spelling of first and last name. Note which party called the witness, and whether there was any cross-examination by the other party, whether the witness was sworn in.

- D. Rulings on any Objections. (see Ill. E., How to Rule on Objections.)
- E. Note any Agreements of the parties:
  - o Factual Stipulations. (the parties agree the incident took place at 210 Martin Luther King Jr. Blvd. On January 1, 2009 at 10:00 a.m.) Secretary should write down any factual stipulations verbatim. Better yet, the parties will provide you written stipulations.
  - o Legal Stipulations (the parties agree that an Operator's License requires.....) o Write down any legal stipulations or ask one of the parties to draft them for you and submit to each other and the chairperson within a couple days...
  - o Stipulations regarding penalties. (See Steve Brist's outline.) o Any agreements to extend or waive a deadline o Request for, or waiver of, right to a stenographic transcript o If either party (or the attorney for the commission) asks the commission to take note of some procedure or point, and the other side does not object, please do this. This is not to make more work for the secretary, it is to protect the record of the case so the decision of the commission is not overturned by a reviewing court.

F. Minutes of the Hearing, including interim and final vote(s) that forms the basis of the Decision. This is one of the most important parts of the Record, for the reasons explained earlier. The Record must include a decision meeting the basics of Due Process as well as the criteria for your ordinance, laws, and Rules of Procedure.

See the materials and presentation by Assistant City Attorney Steve Brist for details on how to structure and announce your decision.

## CONCLUSION: .

Your commission will provide adequate Due Process of Law to all participants in a quasi-judicial hearing if you follow your applicable ordinance, state statutes, as well as unique Rules of Procedure for conducting the hearing.

If your commission does not have Rules of Procedure, consider adopting them (in consultation with the City Attorney.)

If you're not sure of the required procedure for any situation, consult the City Attorney assigned to your Commission.

Thank you I

## IMPARTIALITY

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### Lay Person's Definitions

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"It is the province of knowledge to speak, and it is the privilege of wisdom to listen." Oliver Wendell Holmes

"Impartial. Unable to perceive any promise of personal advantage from espousing either side of a controversy."- Ambrose Bierce

Brisbane Definition - The quality of being impartial; freedom from bias or favoritism; disinterestedness; equitableness; fairness; as, impartiality of judgment, of treatment, etc.

Oxford Dictionary: IMPARTIAL • adjective treating all rivals or disputants equally.

### Wisconsin Legal Definition

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Impartiality - a fundamental element of due process and fair play that all litigants are entitled to. The absence of bias or prejudice in favor of or against any party or cause. *Marris v. City of Cedarburg*, 176Wis.2d 14 (1993).

Purpose of the rule is to ensure that the fact-finders act in a sound and rational process that ensures public confidence in the decision- making process.

### Procedures

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Know the burden of proof standard (i.e. preponderance of evidence)

Know which party has the burden of proof

Know the elements or facts they are required to prove

Be even handed in deciding motions or objections

Remain calm and unemotional; do not be baited by a party's behavior

Confine decision to the evidence or facts produced at the hearings

Avoid public statements on the controversy, public expressions of personal opinions or of support for a litigant or cause

Roger Allen  
City Attorney

Keep an open mind, let the evidence supply the outcome. Do not prejudge

IF YOU CANNOT DO ANY OF THE ABOVE - THEN RECUSE YOURSELF

DO NOT PARTICIPATE IN PROCEEDINGS IF YOU HAVE A PERSONAL INTEREST IN A DECISION OR ARE PERSONALLY ALIGNED WITH A LITIGANT

You may still rely upon and exercise common sense and deductive reasoning

The body's decision should address:

Burden of proof

Elements/facts to be proven

Your decision as to whether those elements/facts were proven  
Decision and reasoning

#### Presumption of Impartiality

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Decisions of City administrative bodies are entitled to a presumption of correctness and validity. *Kapischke v. County of Walworth*, 226 Wis.2d 320 (Ct. App. 1999). However, this doctrine does not apply to the question of whether the body considered all the factors that it is required to (In other words — your decision must, on its face, address each of the factors that your body is required to consider by law). *Keen v. Dane County Board of Supervisors*, 269 Wis.2d 488 (2003).

#### Challenges to Impartiality

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Challenger has burden to prove bias or prejudice

May rely upon statements or conduct during hearing — clear expressions of prejudice will invalidate a decision

One bad apple spoils the whole barrel

May rely upon statements or conduct outside of hearing and outside of the record

Findings of fact unsupported by evidence may be evidence of bias or prejudice

Decision based upon knowledge outside of the record (i.e. personal knowledge of the reputation of an applicant) may be evidence of bias

**DECISION WILL BE OVERTURNED WHERE THERE IS EVIDENCE OF BIAS/PREJUDICE OR AN IMPERMISSIBLY HIGH RISK OF BIAS/PREJUDICE**



## DELIBERATIONS

- 1 . Open meetings law permits closed sessions for deliberations in certain circumstances that may be applicable to City bodies, See Sec. 19.52, Wis. Stats.
  - a. These exemptions include:
    - i. Deliberations by a governmental body after it has held a judicial or quasi judicial hearing. This does not apply to the granting of an application for a permit.
    - ii. Discipline and Licensinq. Consideration of dismissal, demotion, licensing or discipline of any public employee or any person licensed or investigation of charges against such person, provided the person is given actual notice. The notice must contain a statement that the person may demand that the evidentiary hearing must be held in open session.
    - iii. Conferring with Counsel with respect to likely litiataion.
  - b. Motions and Roll calls must be recorded for closed sessions, including who made the motion, who seconded the motion and if a roll call is held, how each member voted. The minutes need not show discussions.
  - c. A closed session may only be held if proper notice that a closed session is contemplated, that notice of the subject matter of the closed session is given, and notice that the subject matter fits under one of the exemptions.
  - d. The body must convene in open session, an announcement must be made by the presiding officer of the nature of business to be held in the closed session, and a roll call vote must be taken.
  - e. The body cannot reconvene in open session within 12 hours after completing a closed session, unless the original notice of the meeting specified that the body would reconvene in open session. This requirement probably causes the most trouble of any section of the open meetings law.

But, note that while the law permits deliberation in closed session in certain circumstances, the body may choose to deliberate in open session. The rules of the Zoning Board of Appeals require it to deliberate in open session.

2. The Decision should be based on the Record and the Law or Rules that apply in the case.
  - a. The Record should support the decision. The traditional format is a

"Findings of Fact" and a "Decision". Bodies such as the Police and Fire Commission and the AI-RC will have their Counsel prepare a written decision containing such information for complicated cases. At a minimum, the body should state the reasons for the decision in its motion. This could be a general reference to the relevant factors heard at the hearing.

- b. The decision should be based on the facts and the law
- c. The decision should not be based on personalities or how many people speak on each side.
  - i. Jury instructions "The weight of the evidence does not depend on the number of witnesses on each side. t." Wis JI-Criminal 190.
- d. The body may make judgments about the credibility (believability) of witnesses.
  - i. Jury instructions "You may find that the testimony of one witness is entitled to greater weight than that of another witness or even of several other witnesses." Wis. JI-Criminal 190
  - ii. Factors from Jury instructions
    - 1 . Whether the witness has an interest or lack of interest in the result. ..
    - 2 The witness' conduct, appearance and demeanor. ..
    - 3 The clearness or lack of clearness of the witness' recollections
    - 4 The opportunity the witness had for observing and for knowing the matters the witness testified about.
    - 5 The reasonableness of the witness' testimony.
    6. The apparent intelligence of the witness
    7. Bias or prejudice, if any has been shown
    8. Possible motives for falsifying testimony
    9. All other facts and circumstances. ..which tend to either support or to discredit the testimony.

"There is no magic way for you to evaluate the testimony; you should use your common sense and experience, In everyday life, you determine for yourselves the reliability of things people say to you. You should do the same things here." Wis. JI-Criminal 300.



- e. Those who deliberate must be familiar with the record of proceedings. If a member was not present for the hearing, they should be able to make themselves familiar with the record.
  - f. Generally, hearsay may be considered, but all evidence admitted must be relevant---"reasonable probative value" and not immaterial, irrelevant or unduly repetitious. Sec. 227.45(1), Wis. Stats.
  - g. The body should not go outside the record except for taking notice of established technical or scientific fact, taking notice of ordinances or law, official court records, or other generally recognized fact. The body members may use their own "good sense".
    - i. Jury instructions---"you may take into account matters of your common knowledge and your observations and experience in the affairs of life." Wis. JI Criminal 195
  - h. Stipulated facts are considered to be true. A stipulation regarding settlement should be voted up or down. However, the body might specify that absent a certain change in the stipulation, it will not approve the stipulated agreement,
  - i. Members of the body should not do their "own" investigation. Ex parte communications with parties should not be considered and, if substantive rather than procedural, should be disclosed. See for example, Sec. 227.50, Wis. Stats.
  - j. While each case is probably unique, similar cases should be decided in the same way, with the similar penalties. i. e. PFC's disciplinary grid.
3. The Standard to be used in an administrative hearing is usually "preponderance", not beyond a reasonable doubt or some other standard.
- a. Preponderance---"more likely than not"—a civil standard.
  - b. Does your ordinance or do your rules specify a standard?
4. The body may choose to use a Hearing Examiner.
- a. The Police and Fire Commission has adopted such a rule. The State Supreme Court supported the use of a hearing examiner by that body in Conway v. Board 262 Wis.2d 1 (2003).
  - b. If a hearing examiner is used, the final decision makers should still be able to review the record and make an informed decision based on the record.
  - c. PFC rules provide that the proceedings be recorded and that the Hearing Examiner report an evaluation of witness credibility and demeanor and

recommendations regarding disposition of the charges. PFC Rules and Regulations, Published June 16, 2005. .

5. The body should be careful to follow any statutory time limits on their decision.
  - a. For example, ALRC—Sec. 38.10(1)(b)2, within 20 days of the completion of the hearing.