

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

Date: July 30, 2014

**MEMORANDUM**

TO: The Members of the City of Madison Ethics Board

FROM: Steven Brist, Assistant City Attorney *SB*

RE: Request of Alder Mark Clear for an Advisory Opinion.

The Board has asked the Office of the City Attorney to provide the Board with information relating to the various decisions that the Board must make in considering Alder Clear's request for an advisory opinion. In addition to the information contained herein, Board members may determine that other factors or ordinance provisions should be considered in making a decision. The Board will need to separately consider what advice to give Alder Clear in regard to disclosure or recusal in regard to Accelerate Madison, Inc., and the Greater Madison Chamber of Commerce, respectively.

**Relevant Facts**

Alder Mark Clear seeks the Board's advice regarding disclosures or recusals related to Alder Clear's ownership of Clear Solutions, LLC, which consults for Accelerate Madison, Inc, ("Accelerate") a program of the Greater Madison Chamber of Commerce ("Chamber"). Alder Clear is the sole owner of Clear Solutions. Clear Solutions has a contract with Accelerate, a nonstock Wisconsin corporation, which is an association of digital technology companies. Clear serves as Executive Director of Accelerate. Clear Solutions receives income from Accelerate. According to the minutes, Clear Solutions receives 30-40% of its income from Accelerate. Alder Clear does not own an equity interest in Accelerate. He does serve as the Executive Director of Accelerate. The Executive Director of a nonprofit is equivalent to the Chief Executive Officer.

On May 5, 2014, Accelerate was acquired by the Chamber. From time to time the Chamber lobbies the City matters of public policy. Alder Clear seeks advice regarding when he should disclose his role with Accelerate and the Chamber and when he should recuse himself from voting on matters related to Accelerate or the Chamber.

**Relevant Definitions and Ordinance Sections of the Ethics Code**

**Relevant Definitions**

The following definitions are taken from the Ethics Code and may be relevant to your decision.

Sec. 3.35(2)(b) MGO, Associated, when used with reference to an organization, includes any organization in which an individual or a member of her or his immediate family is a director or officer or owns or controls, directly or indirectly, and severally or in the aggregate, at least two percent (2%) of the outstanding equity. Notwithstanding the foregoing, an elected official or employee who is appointed by the Mayor or approved by the Council to serve as an officer or

board member of a private non-profit organization, or a public committee or board, does so in his/her official capacity as a representative of the City of Madison and, as such, is not "associated" with the private or public organization.

Sec. 3.35(2)(c) MGO, Economic Interest or Financial Interest means a business or cause in which a person or her or his immediate family member has a concern, responsibility, share, right or title in the ownership of property in a commercial or financial undertaking which relates to the source, production, distribution or use of the person's or immediate family member's income, wealth or goods, including debts, or which affects or is apt to affect the welfare or the material resources of the person or immediate family member.

Sec. 3.35(2)(e) MGO, Organization means any public or private, profit or non-profit, religious, educational, charitable or political organization or entity but does not include governmental bodies.

Sec. 3.35(2)(f) MGO, Personal Interest means any interest greater than nominal, direct or indirect, arising from blood, marriage, adoption, guardianship or designated family or registered domestic partner relations or from close business, political or other associations.

### **Relevant Ordinance Sections**

The following are Sections of the Ethics Code, which may be relevant to your decision:

Sec. 3.35(5) MGO, Standards of Conduct.

Sec. 3.35(5)(a)1 MGO, 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.

Sec. 3.35(5)(a)3 MGO, 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.

4. Paragraph 3 does not prohibit an incumbent from taking any action concerning the lawful payment of salaries or employee benefits or reimbursement of actual and necessary expenses, or prohibit an incumbent from taking official action with respect to any proposal to create, modify, or repeal a City ordinance, resolution or matter benefiting the public.

Sec. 3.35(5)(f) MGO Disclosure and Disqualification.

1. An elected official who has or whose immediate family member has a financial or personal interest in any matter coming before the Common Council shall disclose on the records of the Common Council the nature and extent of such interest. This provision shall not apply if the elected official disqualifies herself or himself from participating in discussion of the matter and from voting on it. An elected official shall disqualify herself or himself from discussing and voting if the matter under consideration involves her or his immediate family member's financial or personal interests to the extent that such interests conflict or appear to conflict with her or his official duties or would impair or reasonably be expected to impair her or his independence of judgment or actions.

3. In the event a member of a City board, committee or commission is required to disqualify herself or himself from participating or voting on a matter which comes for official action before the board, committee or commission of which she or he is a member and a member of the board, committee or commission requests the disqualified member to leave the room that member shall physically absent herself or himself from that portion of the meeting involving discussion, deliberations or votes related to that matter, and the minutes of the meeting shall reflect her or his absence

**Questions to be Considered by the Ethics Board**

**The first group of questions applies to Alder Clear's relationship with Accelerate:**

1. Does the Ethics Board have jurisdiction?

If yes, proceed to the other questions and issue an advisory opinion. See Sec. 3.35 (11) MGO, "When an incumbent...has doubt as to the applicability of a provision of this code to a particular situation in which she or he is or may become involved or definitions of terms used in the code, she or he should apply to the Ethics Board for an advisory opinion and be guided by that opinion when given."

2. a. Is Accelerate an entity with which Alder Clear is "Associated"?

An associated organization is one in which an individual... is a director or officer or owns or controls, directly or indirectly, and severally or in the aggregate, at least two percent (2%) of the outstanding equity. Sec. 3.35(2)(b) MGO, cited above

b. Is Accelerate an entity in which Alder Clear has an "Economic or Financial Interest"?

This is defined as an entity "...in which a person... has a concern, responsibility, share, right or title in the ownership of property in a commercial or financial undertaking which relates to the source, production, distribution or use of the person's... income, wealth or goods...., or which affects or is apt to affect the welfare or the material resources of the person.."

Sec. 3.35(2)(c) MGO, cited above

c. Is Accelerate an entity in which Alder Clear has a "Personal Interest"?

Personal interest means "greater than nominal"... "direct or indirect"... "arising from close business... associations." Sec. 3.35(2)(f) MGO, cited above.

3. Is Alder Clear required to disclose if matters come before the Common Council relating to Accelerate?

An Alder who has a financial or personal interest in a matter before the Common Council shall disclose "the nature and extent of such interest." Sec. 3.35(5)(f)1. MGO, cited above.

4. Is Alder Clear required to recuse himself regarding matters relating to Accelerate?

An Alder must disqualify him or herself from discussing or voting on a matter that involves their financial or person interests "...appear to conflict with...official duties or would impair or reasonably be expected to impair...independence of judgment or actions." Sec. 3.35(5)(f)1. MGO, cited above.

**The second group of questions relate to Alder Clear's relationship with the Chamber**

5. a. Is the Chamber an entity with which Alder Clear is "Associated"?

An associated organization is one in which an individual... is a director or officer or owns or controls, directly or indirectly, and severally or in the aggregate, at least two percent (2%) of the outstanding equity. Sec. 3.35(2)(b) MGO, cited above.

- b. Is the Chamber an entity in which Alder Clear has an "Economic or Financial Interest"?

This is defined as an entity "...in which a person... has a concern, responsibility, share, right or title in the ownership of property in a commercial or financial undertaking which relates to the source, production, distribution or use of the person's... income, wealth or goods...., or which affects or is apt to affect the welfare or the material resources of the person.. Sec. 3.35(2)(c) MGO, cited above.

- c. Is the Chamber an entity in which Alder Clear has a "Personal Interest"?

Personal interest means "greater than nominal"... "direct or indirect"... "arising from close business...associations." Sec. 3.35(2)(f) MGO, cited above

6. Is Alder Clear required to disclose if matters come before the Common Council relating to the Chamber?

An Alder who has a financial or personal interest in a matter before the Common Council shall disclose "the nature and extent of such interest." Sec. 3.35(5)(f)1. MGO, cited above.

7. Is Alder Clear required to recuse himself regarding matters relating to the Chamber?

An Alder must disqualify him or herself from discussing or voting on a matter that involves their financial or person interests "...appear to conflict with...official duties or would impair or reasonably be expected to impair...independence of judgment or actions." Sec. 3.35(5)(f)1. MGO, cited above.

**Additional Information**

An Alder who recuses him or herself (disqualifies him or herself from discussing or voting) on a matter need not disclose the nature and the extent of a financial or personal interest. See Sec. 3.35(5)(f)1. MGO.

If an Alder who recuses him or herself must physically leave that portion of the meeting relating to discussion and votes on that matter, if requested by another member of the body. See Sec. 3.35(5)(f)3. MGO.

Also attached are two Opinions from the former Wisconsin Ethics Board, relating to disqualification or recusal of local officials, which may be relevant to the Board's deliberations.

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**1996 Wis Eth Bd 13**  
**LOCAL CODE - DISQUALIFICATION**

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A member of a local unit of government's legislative body should not simultaneously serve, in a private capacity, as an officer or director of a tourism organization and participate in discussions or votes to establish a room tax to support the organization financially.

A member of a local unit of government's legislative body who is a director of a tourism organization generally should not participate in a decision concerning room tax receipts if the decision could substantially affect the level of receipts earmarked for the organization. If decisions on these issues are presented to the legislative body in the form of an ordinance or ordinance amendment, then a member of that body who also serves on the board of the tourism organization should not act in a way that aids the organization of which he or she is a director.

OEB 96-13 (July 31, 1996)

Facts

- [1] This opinion is based upon these understandings:
- a. You are the attorney for a local unit of government.
  - b. Three of the six members of the local government's legislative body serve on the board of directors of a tourism organization ("organization A").
  - c. Organization A is a private, not for profit organization whose membership is primarily made up of business people in the tourism industry in the-area.
  - d. The local government currently imposes a room tax of which Organization A currently receives a significant majority percentage.
  - e. A new tourism organization ("Organization B") has asked the local government to earmark a portion of the room tax receipts for its use.

- f. The local unit of government's legislative body may also in the future consider a resolution that would direct all room tax receipts to Organization A for promotional activities.

### Questions

[2] The Ethics Board understands your questions to be:

1. May a member of the local unit of government's legislative body who is a director of Organization A participate in discussions or votes to establish a room tax when Organization A will receive a substantial portion of the room tax receipts for promotional efforts?
2. May a member of the local unit of government's legislative body who is a director of Organization A participate in discussions or votes to earmark a portion of the city's room tax receipts for Organization B?

### Discussion

[3] Section 19.59(1), *Wisconsin Statutes*, provides that no local public official may use public position or office to obtain financial gain, anything of substantial value, or a substantial benefit for an organization with which the official is associated or take any official action substantially affecting a matter in which an organization with which the official is associated has a substantial financial interest.<sup>1</sup>

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<sup>1</sup> Section 19.59(1), *Wisconsin Statutes*, provides:

**19.59 Codes of ethics for local government officials, employees and candidates. (1)(a)** No local public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated. A violation of this paragraph includes the acceptance of free or discounted admissions to a professional baseball game by a member of the district board of a local professional baseball park district created under subch. III of ch. 229. This paragraph does not prohibit a local public official from using the title or prestige of his or her office to obtain campaign contributions that are permitted and reported as required by ch. 11.

\* \* \*

(c) Except as otherwise provided in par. (d), no local public official may:

1. Take any official action substantially affecting a matter in which the official, a member of his or her immediate family, or an organization with which the official is associated has a substantial financial interest.
2. Use his or her office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for the official, one or more

*Room tax*

[4] A member of a local unit of government's legislative body is a local public official subject to §19.59.<sup>2</sup> Participating as a member of such body in discussions, deliberations, or votes on an issue before the board is a use of office. *See, e.g.*, 1992 Wis Eth Bd 22. Organization A is an "organization."<sup>3</sup> A member of a local unit of government's legislative body is associated with Organization A if the member, in his or her private capacity, is an officer or director of Organization A.<sup>4</sup> Room tax revenues have substantial value for Organization A; it is our understanding that, among other purposes, revenues will be used for the direct benefit of the organization in defraying the organization's costs and in promoting the business of the organization's members. Therefore, we advise that a member of a local unit of government's legislative body should not simultaneously serve, in a private capacity, as an officer or director of Organization A and participate in discussions or votes to establish a room tax commission to support Organization A financially.

*Organization B*

[5] Your second question is whether a member of a local unit of government's legislative body who is a director of Organization A may participate in discussions or votes on whether to give a portion of room tax receipts to Organization B. We advise that a member of a local unit of government's legislative body not simultaneously serve, in a private capacity, as an officer or director of Organization A and participate in a decision concerning room tax receipts if the decision could substantially affect the level of receipts earmarked for that organization. *Cf. Heffernen v. City of Green Bay*, 64 N.W.2d 216, 220 (1954) (there is a long-established public policy in this state "that a public officer in discharge of his duties as such

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members of the official's immediate family either separately or together, or an organization with which the official is associated.

<sup>2</sup> Under §19.42(7u), (7w), and (7x), *Wisconsin Statutes*, a local public official includes an individual that holds an elective office of a political subdivision of the state.

<sup>3</sup> Section 19.42(11), *Wisconsin Statutes*, provides:

19.42(11) "Organization" means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, trust or other legal entity other than an individual or body politic.

<sup>4</sup> Section 19.42(2), *Wisconsin Statutes*, provides:

19.42(2) "Associated", when used with reference to an organization includes any organization in which an individual or a member of his or her immediate family is a director, officer or trustee, or owns or controls, directly or indirectly, and severally or in the aggregate, at least 10% of the outstanding equity or of which an individual or a member of his or her immediate family is an authorized representative or agent.

shall be absolutely free from any influence other than that which grows out of the obligations that he owes to the public at large.”); *Edward E. Gillen Co. v. City of Milwaukee*, 183 N.W. 679 (1921).

#### *Ordinance amendment*

[6] You have also raised the issue whether section 19.59(1)(d), *Wisconsin Statutes*, would permit members of a local unit of government’s legislative body who are directors of Organization A to participate in room tax deliberations if the local government’s decisions on these issues are presented to the legislative body in the form of an ordinance or ordinance amendment. Section 19.59(1)(d) provides that the restrictions of §19.59(1)(c), *Wisconsin Statutes*, that prohibit an official from taking action in a matter in which an associated organization has a substantial financial interest or from using public office to produce or assist in the production of a substantial benefit for an associated organization, does not “prohibit a local public official from taking action with respect to any proposal to modify a county or municipal ordinance.” But this exception, by its specific terms, does not affect the narrower prohibition in §19.59(1)(a) that a local public official may not use his or her office or position to obtain anything of substantial value for the private benefit of an organization with which the official is associated. *See, e.g.*, 1995 Wis Eth Bd 1. Thus, a member of a local unit of government’s legislative body who serves, in a private capacity, on the board of Organization A should not act in a way that aids the organization of which he or she is a director. This means, for example, that such member should not vote against earmarking revenues for Organization B if that action helps preserve Organization A’s continuing receipt of room tax revenues.<sup>5</sup>

#### Advice

[7] The Ethics Board advises that a member of a local unit of government’s legislative body should not simultaneously serve, in a private capacity, as an officer or director of a tourism organization and participate in discussions or votes to establish a room tax to support the organization financially.

[8] Moreover, a member of a local unit of government’s legislative body who is a director of a tourism organization generally should not participate in a decision concerning room tax receipts if the decision could substantially affect the level of receipts earmarked for the organization. If decisions on these issues are presented to the legislative body in the form of an ordinance or ordinance amendment, then a member of that body who also serves on the

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<sup>5</sup> We note that you have indicated that the Ethics Code’s provisions may prevent the local unit of government’s legislative body from acting on matters because of the lack of a voting quorum.

board of the tourism organization should not act in a way that aids the organization of which he or she is a director.

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**2007 Wis Eth Bd 9**  
**LOCAL OFFICIALS -- DISQUALIFICATION**

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The Ethics Board advises:

- (1) If a matter before a town board, is reasonably likely to have more than a trivial, insignificant, or insubstantial financial effect on a supervisor, then the supervisor SHOULD ABSTAIN from discussion, deliberation, and votes on that matter.
- (2) If a matter before a town board will have no effect or only a trivial, insignificant, or insubstantial financial effect on a supervisor, then the supervisor SHOULD PARTICIPATE; and
- (3) If reasonable people cannot reasonably foresee the effect of a board of supervisors' action on a supervisor's financial interests or disagree about whether the effect will be positive or negative or will be substantial or insignificant then the supervisor's financial interest is too speculative to deny the supervisor's participation in related discussion, deliberation, and votes, and the supervisor SHOULD PARTICIPATE UNLESS, in the supervisor's judgment, to do so would undermine public confidence in the decision or in government.

Facts

¶1 We base this opinion upon these understandings:

- a. You are a town's attorney.
- b. A supervisor on the town board owns and resides on a parcel of land adjacent to a town-owned park.
- d. The board of supervisors may have, in future meetings, occasions to consider improvements or alterations to the park.

Question

¶2 The Ethics Board understands your question to be:

Does the supervisor's ownership of property proximate to the town park limit the supervisor's involvement in the board of supervisors' future discussions, deliberations, and votes concerning improvements to and alterations of the park?

Discussion

¶3 Reduced to its elements, section 19.59(1) (a), Wisconsin Statutes, provides:

No local public official  
May use his or her public position or office

To obtain financial gain or anything of substantial value  
For the private benefit of himself or herself or his or her immediate  
family, or for an organization with which he or she is associated.<sup>1</sup>

¶4 Reduced to its elements, section 19.59(1) (c) 1. and 2., *Wisconsin Statutes*, provides:

Except for taking official action concerning the lawful payment of salaries or employee benefits or reimbursement of actual and necessary expenses or taking official action with respect to a proposal to modify a municipal ordinance,

No local public official may:

Take any official action

Substantially affecting a matter

In which the official, a member of his or her immediate family, or an organization with which the official is associated or has a substantial financial interest.

AND

No local public official

May use his or her office or position

In a way that produces or assists in the production of a substantial benefit

For the official, one or more members of the official's immediate family either separately or together, or an organization with which the official is associated.<sup>2</sup>

¶5 The supervisor is a local public official.<sup>3</sup> This opinion addresses those instances in which the supervisor uses the office or position of supervisor or takes official action including the discussion, deliberation, or vote on matters before the town board of supervisors.

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<sup>1</sup> Section 19.59(1)(a) and (c), *Wisconsin Statutes*, provides:

**19.59 Codes of ethics for local government officials, employees and candidates. (1)(a)** No local public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated.

<sup>2</sup> Section 19.59(1)(a) and (c), *Wisconsin Statutes*, provides:

**19.59 Codes of ethics for local government officials, employees and candidates. (1) (c)** Except as otherwise provided in par. (d), no local public official may:

1. Take any official action substantially affecting a matter in which the official, a member of his or her immediate family, or an organization with which the official is associated has a substantial financial interest.
2. Use his or her office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for the official, one or more members of the official's immediate family either separately or together, or an organization with which the official is associated.

<sup>3</sup> See 1997 Wis Eth Bd 6, ¶6; 1999 Wis Eth Bd 01, ¶4.

¶6 Whether the foregoing statute prevents a supervisor's discussion, deliberation, and vote on a matter before the town board depends upon whether the supervisor has a personal substantial financial interest in a matter. "Substantial" contrasts with "nominal value" and may be synonymous with "merchantable value"<sup>4</sup> Substantial value is something more than token or inconsequential value.<sup>5</sup> The Ethics Board has never found it necessary to establish the least value that may be quantified as substantial.<sup>6</sup>

¶7 The issue is one of fact. Public policy supports a government official's exercise of official duties when the financial effect of an official decision on the official's personal interests is uncertain and conjectural.<sup>7</sup> In 1998, the question was whether a member of a city council could properly vote on whether to extend public utilities to an area in which the member owned a house. The Board said:

It is not clear that extension of service to the affected area or retention of the status quo will result in a private benefit of substantial value. You have indicated that the municipality is likely to require a substantial payment from the owner of each property to which water and sewer service is extended. On the other hand, these households may avoid the cost of maintaining wells and septic systems. Property values may be affected. The private benefits and costs are several and, in part, offsetting. In contrast, the public benefits from the provision of public water and sewer service may include added groundwater protection and improved public health. *If a public official's participation or action on government policy is neither forbidden nor antagonistic to public policy, then public policy favors a public official's exercise of his or her official duties.*<sup>8</sup>

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4 A wholesale quantity of brochures had substantial value; 1997 Wis Eth Bd 13 ¶4. 7 Op. Eth. Bd. 2 (1983); 5 Op. Eth. Bd. 99 (1982), 73 (1981).

5 2005 Wis Eth Bd 5 ¶7; 1998 Wis Eth Bd 2 ¶8; 1995 Wis Eth Bd 5 ¶6; 7 Op. Eth. Bd. 22 (1983)

6 7 Op. Eth. Bd. 2 (1983); 5 Op. Eth. Bd. 99 (1982), 58 (1981).

7 See 2002 Wis Eth Bd 05.

8 See, e.g., 1995 Wis Eth Bd 3, ¶12; 8 Op. Eth. Bd. 33 (1985). We also note the expression of the legislature's intent set out in §19.45(1), *Wisconsin Statutes*. Although that portion of the Ethics Code is addressed to state officials, we believe it has relevance to local officials as well. In that section, the legislature has stated:

**19.45 (1)** The legislature hereby reaffirms that a state public official holds his or her position as a public trust, and any effort to realize substantial personal gain through official conduct is a violation of that trust. This subchapter does not prevent any state public official from accepting other employment or following any pursuit which in no way interferes with the full and faithful discharge of his or her duties to this state. The legislature further recognizes that in a representative democracy, the representatives are drawn from society and, therefore, cannot and should not be without all personal and economic interest in the decisions and policies of government; that citizens who serve as state public officials retain their rights as citizens to interests of a personal or economic nature; that standards of ethical conduct for state public officials need to distinguish between those minor and inconsequential conflicts that are unavoidable in a free society, and those conflicts which are substantial and material; and that state public officials may need to engage in employment, professional or business activities, other than official duties, in order to support themselves or their families and to maintain a continuity of professional or

1998 Wis Eth Bd 1, ¶10 (emphasis added).

Advice

¶8 The Ethics Board advises:

- (1) If a matter before the town board, is reasonably likely to have more than a trivial, insignificant, or insubstantial financial effect on the supervisor, then the supervisor SHOULD ABSTAIN from discussion, deliberation, and votes on that matter.
- (2) If a matter before the town board will have no effect or only a trivial, insignificant, or insubstantial financial effect on the supervisor, then the supervisor SHOULD PARTICIPATE; and
- (3) If reasonable people cannot reasonably foresee the effect of the board of supervisors' action on the supervisor's financial interests or disagree about whether the effect will be positive or negative or will be substantial or insignificant then the supervisor's financial interest is too speculative to deny the supervisor participation in related discussion, deliberation, and votes, and the supervisor SHOULD PARTICIPATE UNLESS, in the supervisor's judgment, to do so would undermine public confidence in the decision or in government.

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business activity, or may need to maintain investments, which activities or investments do not conflict with the specific provisions of this subchapter.

Section 19.45(1), *Wisconsin Statutes*.