



# City of Madison

City of Madison  
Madison, WI 53703  
www.cityofmadison.com

## Meeting Minutes - Approved AFFIRMATIVE ACTION COMMISSION

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Tuesday, March 9, 2010

5:00 PM

215 Martin Luther King, Jr. Blvd.  
Room LL-120, Madison Municipal Building

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### 1. CALL TO ORDER / ROLL CALL

The meeting was called to order at 5:06 p.m., Christian Odom presiding.

**Present:** 7 -

Toriana T. Pettaway; Joseph R. Clausius; Bert G. Zipperer; Christian L. Odom; James J. Chiolino; Bhavani "Shree" Sridharan and Lucia Nunez

**Absent:** 1 -

Sharyl J. Kato

**Excused:** 4 -

Michael M. Johnson; Theola V. Carter; Augustine S. Tatus and Donna V. Hurd

### 2. APPROVAL OF MINUTES

A motion was made by Ald. Clausius, seconded by Zipperer, to Approve the Minutes. The motion passed by voice vote/other.

### 3. PUBLIC COMMENT

None.

### 4. TRAINING FOR COMMISSIONERS ON PROJECTS RECEIVING CITY FINANCIAL ASSISTANCE BY ASSISTANT CITY ATTORNEY ANNE ZELLHOEFER

Norman Davis thanked Assistant City Attorney Anne Zellhoeffer for attending. He explained that it had been agreed to provide training for Commissioners on the work of the Division.

Zellhoeffer presented information on non-Public Works projects that the Affirmative Action Division will be monitoring in 2010. She distributed a handout (attached).

Zellhoeffer explained that the Division monitors projects for the Community Development Authority and bond and loan programs for the City of Madison, in addition to public works projects.

The CDA is an entity separate from the City of Madison. It is a body politic that

can sue and be sued, own property and enter into contracts. It is governed by a seven member board, appointed by the Mayor. It has two loan programs. It provides loan proceeds to private developers through its bonding authority. It can act as a housing developer or a community development developer in issuing bonds and assisting private developments.

Typically these are large scale projects. The most recent one was the issuance of bonds for the Wisconsin Alumni Research Foundation for the construction of the Wisconsin Institutes for Discovery Mortridge Research Institute on University Avenue. This represented a hugh undertaking for the Affirmative Action Division.

The CDA loaned WARF \$150 million to assist in the building of that project.

The CDA decided voluntarily years ago to have the Affirmative Action Division monitor its projects and that prevailing wage and City affirmative action goals are applicable. So, when CDA loaned funds to the Overture Foundation for the building of the Overture Center, the Overture Center had to file an affirmative action plan with the City and comply with prevailing wage standards.

There are two main City loan programs:

1. Capital Revolving Fund and
2. Tax Incremental Financing (TIF)

TIF is the most public of these programs. With TIF, the developer applies through City staff who review the application to determine through underwriting if there is a gap and if the developer needs the funds. If staff determines that funds are needed, it goes to the Board of Estimates and Common Council for approval. A loan agreement is then entered into and the Affirmative Action Division will monitor the project with the developer and the developer's contractor.

Capital Revolving Loan funds are limited to \$250,000 per loan. They are revolving so there is principal and interest being paid and they are amortized. They are short-term to assist projects that have a small gap. City funds do not go out the door until the project is fully completed. The benefit to the developer is that the City can offer a lower interest rate. Projects have included the Tobacco Warehouse Project on Bedford Court, an affordable housing project through Madison MARC, and the Great Dane on King Street. The use of this program has been limited in the last several years because there has not been much development going on. When the market was robust, the City did 1-3 per year.

Often the City does not have to borrow for the loans, because it is a revolving fund.

Zipperer asked how many employees are covered by the four programs. Davis was not able to provide an exact number, but stated that 100's of individuals are employed through these programs.

**5. TRAINING ON THE AAC APPEAL PROCESS PURSUANT TO SECTION 39.02 MADISON GENERAL ORDINANCES**

Assistant City Attorneys Roger Allen and Adriana Peguero provided training on conducting appeals. Allen stated that the best way to learn how to conduct an appeal is to participate in one. This training will set up some road signs to know what to look for.

Davis summarized the types of appeals the Commission may be called upon to decide:

1. Ineligibility as a targeted business enterprise
2. Ineligibility of an affirmative action plan
3. Non-compliance following an audit of a contractor
4. Appeals of findings following investigation of a complaint from an employee of a contractor

The process begins by the Affirmative Action Division sending correspondence containing specific information about why one of the above actions is being taken and offering them an opportunity to appeal.

The City does not issue press releases when this occurs. If this information becomes public, it does not respond to press inquiries. The City's position in these cases is that it is a pending legal matter and we have no comment. This is important in order for the Commission to decide these matters free of bias and prejudice by what you have read in the press or by what you personally know about the litigants. If you have a personal relationship with the staff involved or the contractor, you should disclose this. If this could influence you in your decision-making on the appeal, you should recuse yourself. It is important to remember that if one individual is shown to have been biased, the whole decision can be thrown out.

No one is expected to be a lawyer in these cases. Apply common sense. You are not bound by the rules of evidence or the hearsay rule. However, neither your factual findings nor your decision may rest on unsupported or uncorroborated hearsay. Make your decisions based on facts and evidence provided. There has to be a record made of the appeal. Typically this will be done by tape recording the hearing.

There will be two to three attorneys. The litigant may be represented by an attorney. The staff of the Affirmative Action Division will be represented by a member of the City Attorney's staff and the Commission will be represented by a member of the City Attorney's office as well. To avoid a conflict of interest, the two attorneys in the City Attorney's office share no communication about the appeal.

The appeal begins by calling the case and asking the parties to go on the record, including the attorneys representing any parties.

The burden of proof is on the Affirmative Action Division to prove the reasons it has taken its actions by a preponderance of the evidence (51% test--a little more proof than the other side).

Testimony will be under oath. Once sworn, the City will ask its questions. Then cross examination. Questioning can go back and forth so long as it is

not cumulative or redundant. There may be hearsay. Attorneys may object. While hearsay is admissible, attorneys will object to draw it to the Commission's attention that it is unsubstantiated. Hearsay cannot be used to support your decision unless it is supported by evidence or is corroborated by someone.

Testimony can become cumulative. For example, dissecting a question into 15 parts. You don't have to wait for an objection. You are in control of the hearing and can tell them they have made their point and to move on.

A chair should be selected to run the meeting. Members of the Committee can over rule the chair through a motion. Allen has not seen this done. The City's Police and Fire Commission usually takes a break and goes into closed session to confer with legal counsel, and then reconvenes to announce its decision, rather than discuss this type of issue in open session. It will be important to properly notice the meeting in order for this to occur. It was recommended that the language used by the PFC for closed sessions be used as a template.

There needs to be a log of evidence presented. Staff will maintain the log and assign numbers sequentially to each item introduced and indicate which party introduced it. Some evidence is more descriptive than it is physical. The witness can be asked to provide clarification to be sure it is in the record.

After the City puts all of its evidence on the record. The appellant may then call its witnesses. They are under no obligation to call any witnesses. However, if they could have called someone to testify and they do not do so, you can assume that witness would not have testified favorably for the party. This is different than in criminal proceedings.

But remember, that the burden of proof remains with the Affirmative Action Division.

Then comes deliberations. Deliberations may be held in open session, but this is not recommended. You are trying to shape your thoughts. This discussion might not be as open as it should be if it is held in front of the appellant.

Deguero distributed an example of how to go into closed session and the information that should be included on the agenda (attached). It will be important to read from the agenda when making the motion to go into closed session. After the motion is seconded, a roll call vote must be conducted. If after some discussion it is determined that the appeal panel has additional questions, it may reconvene in open session (if properly noticed--see above). It would be a good idea to be sure to know what questions need to be asked before coming out of closed session.

After deliberations, the Commission needs to come back into open session and state its decision and the factual findings that support it. The attorneys will help you formulate your findings during deliberations. Or the Commission may announce that a written decision will be issued within X number of days following the hearing. If the panel cannot reach a decision, then the Affirmative Action Division has not met its burden of proof and the City loses.

While there have been differences of opinion expressed about whether the

vote should take place in closed or open session, it is recommended that the vote occur in closed session.

A written decision will be prepared by staff for the chair's signature.

As to the role of alternates, alternates on the appeal panel may sit in on the closed session, but if a quorum of the panel is present, they should not participate in the deliberations or vote. When in doubt--ask counsel.

The appeal hearing is open to the public. If you have members of the public in attendance who are being disruptive or trying to influence the Commission, they can be asked to leave.

The appeal panel is an administrative body. The appeal process may be handled in an informal manner.

6. [14148](#)

DIRECTOR'S REPORT- Presented for information only. No action required

*Lucía Nuñez, DCR Director, will report on the following:*

*-Her activities since the last meeting*

*-Staff activities since the last meeting*

*-Activities of the Equal Opportunities Commission and Commission on Persons with Disabilities since the last meeting.*

Nuñez reported that last week, the Common Council Organizational Committee considered the proposal to allow Commissions staffed by the DCR to directly introduce ordinances and resolutions without a Common Council sponsor. The CCOC has recommended that the proposal be placed on file by the Common Council.

At the last Commission meeting, the Commission had questions relative to an ordinance amendment excluding relocation contracts from the City's affirmative action provisions. This item will be on the Commission's April meeting. City Attorney Michael May and City Engineer Rob Phillips will attend to answer questions. May will try to provide examples of when the ordinance would come into play prior to the meeting. There is no urgency for action on this item.

Staff will also be surveying Commissioners again for their availability for appeal panels.

Zipperer asked if appeals could be hear by the full Commission. The ordinances specify an appeal panel appointed by the Chair. Zipperer stated that he believes it empowers the Commission if appeals are handled by the full Commission rather than a small panel.

7. [14091](#)

DIVISION MANAGER'S REPORT

Norman Davis, Affirmative Action Division Manager, will report on activities of the Division since the last meeting, including:

-- Requests from Contractors for Appeals

No report.

8. [07972](#) COMMON COUNCIL UPDATE BY ALD. CLAUDIUS--Presented for information only. No action required.

Ald. Clausius reported that the CCOC report to the Common Council on the sponsorship amendment will come before the Common Council on March 16. Commissioners may certainly attend and speak at that time.

A special meeting to act on the Edgewater proposal was planned for March 23, but it looks like that will be rescheduled.

Zipperer reported that the vote on the CCOC was a tie vote. Alders Rummel, Bidar-Sielaff and Eagon voted in favor of the proposal. Alders Rummel and Bidar-Sielaff asked to have their names added as sponsors. Alders Schumacher, Compton and Clear voted against the proposal and the chair (Alder Bruer) voted against to break the tie. Alder Schmidt, the alternate, spoke against it.

Zipperer stated that the members expressed surprise at the number of items that come before it without a Common Council sponsor. They spent time nationalizing why that was good and this was bad.

9. **ADJOURNMENT**

A motion was made by Ald. Clausius, seconded by Ms. Pettaway, to Adjourn. The motion passed by voice vote/other.