

CITY OF MADISON  
ETHICS BOARD

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JANET ETNIER,

Complainant,

v.

Ethics Board Matter #46879

SARA ESKRICH,

Subject of Complaint.

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**ALDER SARA ESKRICH'S MOTION TO DISMISS  
AND, IN THE ALTERNATIVE, ANSWER TO THE COMPLAINT**

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**MOTION TO DISMISS**

The complaint before the Ethics Board alleges that Sara Eskrich, a City Alder, violated two provisions of Madison's Ethics Code -- MGO §§ 3.35(5)(a)1 and 3.35(5)(a)3.b.<sup>1</sup> -- by having "significant and extended involvement" in the Parks Department's Request for Proposals (RFP) for Olbrich Park and, more generally, "the concept of a Biergarten in a Madison Park." *See* Complaint of Janet Etnier (hereafter "Complaint") at 1. Ms. Eskrich, the complaint alleges, "abuse[d] her position as Alder to benefit the success of her dear friend Mike Bare, and her

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<sup>1</sup> Section 3.35(5)(a)1, MGO prohibits an incumbent from "us[ing] or attempt[ing] 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." Complaint, at page 2 of attachment. Section 3.35(5)(a)3.b., MGO, provides that, with certain exceptions (not applicable), "no incumbent may . . . [u]se 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." *Id*

husband Erik Kesting, which also provides Alder Eskrich with direct personal financial benefit." *Id.* at 2.

These allegations are entirely baseless. Ms. Eskrich's behavior has been aboveboard, appropriate, and in full compliance with the City of Madison's Ethics Code. When her husband, Mr. Kesting, decided to go into business with Mike Bare and Travis Mueller, in connection with BKM Group, LLC ("BKM"), and to submit a proposal in response to the Olbrich Park RFP, Ms. Eskrich understood she had a conflict and sought legal advice. Consistent with the City's ethics rules, and the advice she received, she appropriately recused herself.

Summary dismissal is required here because the complaint alleges no *facts* that would warrant a hearing. The complaint offers no evidence to show, for instance, (1) that Ms. Eskrich exerted any influence or sought to exert influence relating to the Olbrich Park RFP or beer garden issue (she did not); or (2) that Mr. Kesting became involved in a business relationship with Messrs. Bare and Mueller, or relating to a beer garden, before the Olbrich Park RFP (he did not). The complaint presents nothing but conclusory allegations, speculation, and personal opinion. Ms. Eskrich, therefore, respectfully requests that it be summarily dismissed. *See, e.g., Helland v. Kurtis A. Froedtert Mem'l Lutheran Hosp.*, 229 Wis.2d 751, 756, 601 N.W.2d 318, 321 (Ct. App. 1999) ("It is not enough to rely on unsubstantiated conclusory remarks, speculation, or testimony which is not based on personal knowledge."), citing *Maynard v. Port Publications, Inc.*, 98 Wis.2d 555, 561-63, 297 N.W.2d 500, 504-05 (1980).

More specifically:

- BKM -- the partnership involving Messrs. Bare, Mueller, and Kesting -- bid for and was later selected through the RFP to open a Biergarten in Olbrich Park. The complaint relies on assumption, insinuation, and speculation when arguing that this result must have been brought

about by Alder Eskrich's behind-the-scenes maneuvering. The complaint provides no evidence of that. There is no evidence of that and it is simply not true.

- Citing no evidence, the complaint alleges that Ms. Eskrich participated in discussions between the Parks Department and Mr. Bare about the idea of a beer garden. This allegation is false. Ms. Eskrich did not attend any meeting between the Parks Department and Mr. Bare. She attended one meeting relating to the general concept of a beer garden, but this meeting involved a park in her district (Olin-Turville), not Olbrich Park, and Mr. Bare was not present.

- The complaint alleges that Ms. Eskrich "would have received insider knowledge about the details and aspects of the project that would succeed in gaining approval from the Parks Department[,]" and that "it is likely she was able to use details to ensure the successful acceptance of BKM Groups proposal." Complaint, at 2. Once more, the charge is wholly speculative as the language -- "would have," "it is likely" -- shows. The complaint fails to even explain how Ms. Eskrich could obtain "insider knowledge" in a meeting that related to an entirely different beer garden concept. It fails to allege what "insider knowledge" Ms. Eskrich "would have received," or how it was "likely" she used this unspecified knowledge to benefit BKM. All of the allegations here are speculative and unsupported.

- The complaint alleges that, in May 2016, the Parks Department issued its Request for Proposal for Placemaking at Olbrich Park (and Marshall Park). The complaint then insinuates that Ms. Eskrich somehow engineered this RFP, or had some unspecified role in this RFP (or the Sample RFP selected by the Parks Department). Once again it offers no evidence, there is no such evidence, and the allegation is not true.

- Ms. Eskrich recused herself once her husband, Mr. Kesting, became involved with the BKM Group and its response to the Parks Department's RFP. The complaint offers no evidence

to contradict this, only allegations as to what "likely" occurred, "must have" occurred, etc. The complaint fails to allege *facts*, in other words, that if proven could establish an ethics violation. Without this evidence, or even logical explanation in most cases, the complaint presents nothing to hold a hearing about. This was Assistant City Attorney Steven Brist's conclusion when he looked into the matter in December 2016 and nothing has changed. But most importantly here, the complaint fails to identify *evidence* capable of supporting a contrary conclusion.

Ms. Eskrich is not required to prove her innocence. It is neither appropriate nor fair to require that she defend herself at a hearing when the complaint offers nothing but conclusory allegations, speculation, and opinion for support. That would turn rules of fairness and due process on their head. Accordingly, because there are no material facts in dispute to justify a hearing, Ms. Eskrich respectfully requests that the Board dismiss the complaint.

#### ANSWER

The complaint is based on assumptions and opinions that are unsupported and wrong, on connect-the-dot speculation, and on a timeline that is demonstrably inaccurate and incomplete. There is no evidence to show that Alder Eskrich used improper influence to benefit herself or Mr. Kesting in relation to the Olbrich Park Biergarten--*i.e.*, the complaint fails to state a claim on its face. Each allegation is answered in turn.

**Allegation: Ms. Eskrich "had significant and extended involvement connected to a Parks Department Request for Proposal (RFP), and the concept of a Biergarten in a Madison Park."**

This allegation improperly confuses two issues: (1) a claim that Ms. Eskrich had "significant and extended involvement" with the general concept of a beer garden in Madison; and (2) a claim that Ms. Eskrich had "significant and extended involvement" with the Parks Department's Olbrich RFP. Claim #2 is simply false. There is no evidence to support it. But even

Claim #1 shows nothing. Ms. Eskrich participated in one meeting organized by Parks staff at the request of Friends of Olin-Turville. The meeting related to a Biergarten proposal for that park, which is in her district. These things, moreover, are clear: (1) her involvement could hardly be called "significant and extended"; (2) this meeting was unrelated to the Olbrich RFP or even the concept of a Biergarten at Olbrich; (3) as the evidence will confirm, Ms. Eskrich had no further involvement with beer gardens, and no involvement with the Olbrich RFP; and (4) there is no evidence that Ms. Eskrich exercised her influence in any way to advance BKM's proposal. Nothing about her attending this meeting was remotely improper.

**Allegation: Ms. Eskrich "used her position as Alder in November 2015, by sending an e-mail on behalf of Mike Bare (her husband's business partner in BKM Group, LLC) to introduce Mike Bare to Parks Superintendent Erik Knepp to discuss a Biergarten in a Madison Park. Alder Eskrich used her position to ensure a positive outcome for Mike (meeting or phone call). She received immediate response from Eric Knepp, Parks Superintendent.**

These allegations assume -- once again in error, with no evidence, and contrary to the evidence -- that Mr. Kesting was Mr. Bare's business partner in November 2015. In fact this occurred much later. The complaint alleges that Ms. Eskrich worked to ensure a "positive outcome" for the BKM proposal but the evidence utterly fails to support that claim either.

The sequence of events was this:

- The concept of a Biergarten in one of Madison's parks was being considered by the Madison Parks Department long before November 2015. These discussions were general, not specific to Olbrich Park; indeed, one early concept involved the idea of a Biergarten that would rotate to different locations. Friends of Olin-Turville, a neighborhood group, was one of the local entities interested in the concept.

- Mr. Bare had a conversation with Mr. Kesting and Ms. Eskrich in November 2015 about the possibility of a Biergarten in Madison. Mr. Bare was enthusiastic about the concept due to the success of Biergartens in city parks in Milwaukee.

- Mr. Bare had no Biergarten-related business in November 2015. Mr. Bare and Mr. Kesting were friends only, not business partners, in November 2015.

- When Ms. Eskrich introduced Mr. Bare to Eric Knepp, Madison's Parks Superintendent, it was an introduction of the type that Alders routinely make between the public and city officials. She did not know the Parks Department would eventually issue an RFP for Olbrich Park. She did not know Mr. Bare would bid on this RFP. She did not know that her husband, Mr. Kesting, would join Mr. Bare in a business venture.

- Ms. Eskrich was not involved in communications between Mr. Bare and the Parks Department after making this introduction.

**Allegation:** *"Following this introduction, Alder Eskrich involved herself in the continuing discussions between the Parks Department and Mike Bare about a Biergarten in the Park. According to the records received, she participated in the process and discussion in person, and by e-mail." Complaint, at 2. "Because Alder Eskrich was involved in this discussion from the beginning, she would have received insider knowledge about the details and aspects of the project that would succeed in gaining approval from the Parks Department."*<sup>2</sup>

Here again, the complaint cites no evidence to support of these allegations. In fact, Ms. Eskrich was not involved in discussions between Mr. Bare and the Parks Department about a

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<sup>2</sup> Here, the complaint also speculates that the alleged "insider knowledge" "was likely not shared with other businesses potentially interested in opening a Biergarten in a Park. However, it is likely she was able to use details to ensure the successful acceptance of BKM Group's proposal." This speculation is also without merit. Ms. Eskrich had no "insider knowledge" because she had no discussions with the Parks Department relating to the concept of a Biergarten in Olbrich Park or relating to the RFP. Nor is there even any evidence that she worked to advance the BKM proposal. Ms. Eskrich's involvement in general discussions about a Madison Biergarten was tangential at best, but even so, had ceased by the time the RFP was issued and Mr. Kesting became involved with BKM. There's also no evidence there were "other businesses potentially interested in opening a Biergarten in a Park," this is more speculation. If there were such businesses, however, there was nothing at all preventing them from making a proposal similar to BKM's proposal.

Biergarten at Olbrich Park or elsewhere. Ms. Eskrich had no "insider knowledge" concerning the Olbrich Park RFP, nor was she privy to the Parks Department's thinking with respect to this RFP. She had no involvement in discussions relating to the Olbrich RFP. She had no involvement in developing or drafting this RFP.

By its own language, the complaint itself concedes that these charges are built on speculation rather than evidence. After asserting that Ms. Eskrich "would have received insider knowledge" about the Olbrich Park RFP, the complaint posits that this knowledge "was likely not shared with other businesses," and "it is likely she was able to use details to ensure the successful acceptance of BKM Groups proposal." Complaint, at 2.

The complaint further asserts that Ms. Eskrich and her husband must have discussed the Olbrich Park RFP because "[i]t is unimaginable that a married couple would not have detailed discussions about opening a business." Accordingly, "[i]t is very reasonable to assume that Alder Eskrich and her husband discussed the project in detail before, during, and after the RFP, and that these discussions also included partners Mike Bare and Travis Mueller." Here again, this is sheer speculation, and the allegations are without merit:

1. The complaint offers no evidence that Ms. Eskrich was involved in the Parks Department's discussions with Mr. Bare.
2. The complaint offers no evidence that Alder Eskrich had any involvement with the RFP for Olbrich Park.
3. The complaint offers no evidence that Ms. Eskrich had "insider information" or shared such information with her husband or Mr. Bare. The only thing she did was send them a publicly available letter from Friends of Olin-Turville, the neighborhood group, with publicly

available attachments. When she did this, moreover, it was before the RFP issued, before Mr. Kesting joined forces with Mr. Bare and Mr. Mueller, and before the formation of BKM.

4. Once Mr. Kesting considered joining Mr. Bare in a business venture relating to the Olbrich Park RFP, Ms. Eskrich recused herself from any involvement with beer gardens in Madison generally and with the Olbrich Park RFP specifically. The complaint offers no evidence to show or suggest otherwise.

**Allegation:** *"In May 2016, the Parks Department issued a Request for Proposal for Placemaking at Olbrich Park (and Marshall Park). Following the December 8, 2016 Board of Parks Commissioners meeting, Parks Superintendent, Eric Knepp stated that the Parks Department had called Mike Bare once the RFP was posted, so that he could respond with a proposal. It appears that BKM Group LLC is the only possible alcohol vendor that was involved in any part of the discussion about a Biergarten, before during and after the release of the RFP, despite numerous well-qualified vendors in the immediate community that might have been interested." Complaint, at 2. "Because of her involvement in developing a beer garden in a City of Madison Park with the Parks staff, [Ms. Eskrich] clearly had an inside advantage to improve the response to the RFP to receive a favorable response by the Parks Department."*

These allegations are also unsupported and fail to state a claim. The Parks Department issued its RFP relating to Olbrich Park on May 25, 2016. If Mr. Knepp called Mr. Bare to alert him that the RFP had been posted, Ms. Eskrich had no involvement with that, nor does the complaint allege any such involvement. What's improper about that is also unexplained. The complaint goes on to allege that it "appears" that BKM was "the only possible alcohol vendor" involved in discussions about a Biergarten in Olbrich Park, but this, once again, is wholesale speculation. If true, moreover, it proves nothing. The complaint goes on to allege that Ms. Eskrich had an "inside advantage," but again, the charge can't stick. She had no involvement in developing the Olbrich Park RFP, nor any discussions with City Parks staff regarding this RFP. Discussions about a beer garden in Madison had occurred well before November 2015; indeed, very likely before Ms. Eskrich was even elected to the Common Council. She was involved in a



single, general discussion of a beer garden concept relating to a different park. The claim that this meeting somehow gave her an advantage, and insider knowledge, is unexplained and unsupported. Even more fundamentally, there is no evidence at all that Ms. Eskrich exerted any influence, publicly or privately, on behalf of BKM's proposal.

**Allegation: *The lack of experience of the partners in BKM demonstrates Ms. Eskrich's hidden influence.***

This allegation is unsupported opinion. There is no evidence to show that Ms. Eskrich was pulling strings behind the scenes. Nor is the suggestion that BKM could succeed only due to her "hidden influence" even remotely credible. The project went through multiple levels of review after Ms. Eskrich recused herself from all involvement and after her husband's involvement with BKM was well known. These reviews included: (1) approval by the Parks Commission (approved February 8, 2017 after a public hearing); (2) approval by the Board of Estimates (approved February 13, 2017, after public hearing);<sup>3</sup> (3) approval by the Alcohol Licensing Review Committee (approved February 15, 2017, after public hearings November 16 and December 21, 2016); and (4) approval by the Common Council (approved March 8, 2017, after public hearing).<sup>4</sup>

**Allegation: *The sample RFP stated that projects including alcohol would not be considered. This "was perhaps even done intentionally" to eliminate competition in response to the RFP.***

This allegation is more unsupported speculation. Ms. Eskrich had no involvement in the development or drafting of the Parks Department's RFP. She had no involvement with the Sample RFP. During the RFP process, moreover, the Parks Department clarified that the Sample

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<sup>3</sup> Ms. Eskrich is also a member of the Board of Estimates. She recused herself from this vote, and left the meeting prior to the discussion of the project.

<sup>4</sup> The meeting was March 7, but the vote occurred on March 8--i.e., well after midnight, and after what was reported to be a 3+ hour hearing. Here again, Ms. Eskrich recused herself from the vote and left the meeting prior to this discussion.

was an example, and that final terms would be negotiated with the winning bidder. This information was publicly posted for everyone to see.

**Allegation:** *Ms. Eskrich "delayed filing Conflict of Interest paperwork until the end of July 2016. Yet her husband's business had responded to an RFP to do business with the City of Madison (Parks) in June 2016."*

Here the complaint suggests another sinister conclusion with no evidentiary basis. The complaint fails to allege any action taken by Ms. Eskrich in the June or July 2016 time period to assist her husband or his new business partners. Ms. Eskrich took no such action and, therefore, there was no advantage to "delay" her filing. There also was no "delay" in the filing of her amended Statement of Interest. She spoke with City Attorney Mike May in early July 2016, advising him that her husband had formed an LLC and had responded to a city RFP. She was advised to amend her Statement of Interest and to recuse herself from any vote or involvement with the matter. She did exactly that.

Ms. Eskrich amended her Statement of Interest more than six weeks before the Parks Department notified BKM that its proposal was being selected. She also made this disclosure many, many months before BKM gained approval--July 2016 (disclosure) versus February and March 2017 (formal approvals).

**Allegation:** *"Even after BKM group received the RFP for opening a Biergarten at Olbrich Park, Alder Eskrich continued to maintain communication with Mike Bare regarding the project using her City of Madison email account."*

This charge is unsupported. Ms. Eskrich did not communicate with Mr. Bare regarding the "project" (*i.e.*, the Olbrich Park Biergarten) using her city email. We are aware of no basis for this charge, and the complaint provides none. We can only surmise that it is referencing "AllAlders@cityofmadison.com" emails that Mr. Bare sent during the Common Council

approval process, but this, of course, is a general email distribution list. Ms. Eskrich, as an Alder, is on this list. The fact she received this email is in no way improper. It is a matter of public record and she did not respond to it. She did not respond to Mr. Bare from her City of Madison account, as the complaint asserts, nor did she do anything else that was improper.

**Allegation:** *In late 2016, Alder Eskrich, using her City of Madison e-mail, reached out to a group "Merlin Mentors" to help her husband obtain support and mentoring for his business--the Biergarten at Olbrich Park.*

This allegation twists the events, but even so, fails to support an ethics charge. Ms. Eskrich did not "reach out" to Merlin Mentors using her City of Madison email. She met Susie Younkle at an event and her husband's business venture came up. Ms. Younkle later emailed Ms. Eskrich, at Ms. Eskrich's City e-mail address, on the topic. Ms. Eskrich responded to Ms. Younkle, stating "I'm ccing Erik so you can connect." That was it. There is nothing in this sequence of events that could possibly support an ethics charge.

**Allegation:** *"The public documents mostly include e-mails and a meeting agenda. No handwritten notes, or documents were provided by any parties. It is assumed that these notes exist, but did not constitute open records."*

Here the complaint admits that it rests on an "assumption"--i.e., on sheer speculation. The reason notes were not produced, we assume, is because Ms. Eskrich had no meetings with City staff, or with elected or appointed City officials, relating to the Olbrich Park RFP or the idea of a Biergarten in Olbrich Park. As with so much of the complaint, it asserts a "fact" here -- the lack of handwritten notes -- and then concludes that this is proof of something sinister, with no evidentiary support.

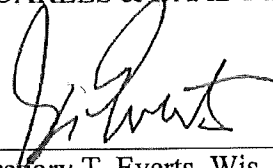
## CONCLUSION

Ms. Eskrich respectfully requests that the complaint be dismissed by the Board for failure to state a claim; that is, for failing to identify *facts* that, if proven, would support the charges

made. Without this, there is no reason or basis for a hearing; there are no allegations of fact that Ms. Eskrich even needs to, or should need to, rebut. Ms. Eskrich should not be required to affirmatively prove her innocence where, as here, the claim that she violated the City's Ethics Code is based on speculation and assumption, and nothing more.

Respectfully submitted this 21st day of April, 2017.

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