

MEMO

7 TPC
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To: TB
From: Jen; ZA
CC: TPC
Date: 9-23-08
Re: Fauerbach Opinion – Ryder CSM

I asked Mike Fauerbach's opinion on this because I did not know if the Town Board could proceed with their vote on the CSM if there was a conflict of interest in the TPC's recommendation. It was a process question, nothing else. Mr. Fauerbach gives guideline on how to proceed.

**FAUERBACH & MARTELL, S.C.**

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Michael F. Fauerbach*
Joseph E. Martell
Kelly J. McKnight

September 22, 2008

Ms. Jennifer Croonborg
LaPointe Town Hall
PO Box 270
LaPointe, Wisconsin 54850

FAX to 747-6654 & first class

**Re: Possible conflict of interest
Town Plan Commission CSM decision - Michael Childer and Lois Carlson**

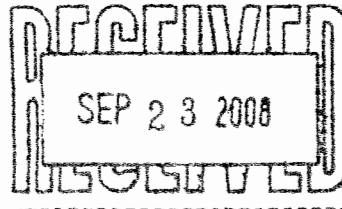
Dear Jennifer:

I am writing to respond to your inquiry about whether or not there was a conflict of interest in the above entitled case. I will first go through the facts, reference the applicable statute and discuss my conclusion in that order.

FACTS

This matter involves a request for the approval for a CSM recently approved by the Town Plan Commission. The parcels in question total 21 acres and are owned by James Ryder. The land is configured presently in three lots with lot lines perpendicular to the road. The purpose of the CSM is to reconfigure the lots so that they have lot lines horizontal to the road and so that the lots in their reconfigured state take care of some encroachment issues related to a house and pole barn on the property.

The Town Plan Commission voted five aye /one opposed / one abstain to approve the reconfigured lots and Mr. Childer and Ms. Lois Carlson voted in favor of the motion. Mr. Childer is a realtor that is associated in the realty agency selling the property and the CSM is needed to sell the property. Lois Carlson is the wife of the owner of Island Shore Realty that is also involved in the sale of the property.



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APPLICABLE STATUTE

Sec. 19.59 (c) and (d), Wis. Stats., provide as follows:

(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.

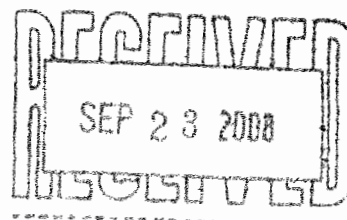
(d) Paragraph (c) does not prohibit a local public official from taking any action concerning the lawful payment of salaries or employee benefits or reimbursement of actual and necessary expenses, or prohibit a local public official from taking official action with respect to any proposal to modify a county or municipal ordinance.

DISCUSSION

In my opinion, Mr. Childer and Ms. Carlson should not have voted on this CSM issue. I believe that it violates Sec. 19.59(c)(1) and probably (2). It violates the first part of the statute because it was an official action which substantially affected the matter in which the official or a member of his/her immediate family, or the organization with which the official is associated, has a substantial financial interest.

I hasten to add that I do not think there is a problem with having people that are involved in real estate transactions on the Town Plan Commission. I do not think it is necessarily a good idea that the Town Plan Commission be all real estate people but to have one or two on the commission probably provides for some valuable insights. However, when a CSM or other decision comes before the Town Plan Commission that directly affects their agency or their spouse's agency they simply have to abstain under this statute.

However, there is a separate question about what the Town Board ought to do in light of this conflict of interest situation. As I understand it, if these two people had not voted the vote would have been three in favor, one opposed and one abstaining. In situations like this that have gone through litigation where someone on a municipal board voted with a conflict of interest I have seen judges



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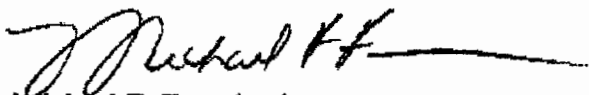
simply ignore that vote of the person with the conflict as though it had not occurred. If you do that in this case there would still be an adequate number of people to approve the CSM. The vote would have been three in favor, one opposed, one abstain. The town can decide what they think they should do because of the ethical lapse but I am not sure you should do anything differently than if the two people in question had abstained.

I also want to make clear that I am offering no opinion about whether or not the lot subdivision caused by this proposed CSM is legal. You did not ask for my opinion on that so I will not give it to you because I have not had time to analyze documents from that perspective and I understand that the Town Board meeting is tonight. I first saw this stuff late yesterday afternoon. I do want to point out, however, that there is a very legitimate question about whether these lots were, in fact, grandfathered as non-conforming lots with inadequate area. Mr. Metzinger at the office of land description thinks they are not grandfathered. Moreover, even if the lots were grandfathered as non-conforming I do not think that would necessarily give the Town Plan Commission the authority to approve this CSM. The proposed CSM could have been approved with a variance, but I think there is a legitimate legal question about whether or not you can use a CSM to create new non-conforming lots just because the old lots were non-conforming. If you or the Town Board want an opinion on that issue I would be happy to provide it; I would just need more time.

I hope this is responsive to your concerns.

Sincerely,

FAUERBACH & MARTELL, S.C.



Michael F. Fauerbach
MFF/da

