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November 28, 2006

Ms. Karen Madden
Reporter
Wisconsin Rapids Daily Tribune
220 First Avenue South
Wisconsin Rapids, WI 54495

Mr. Steve Nowicki
Chairman
Town of Rome
1156 Alpine Drive
Nekoosa, WI 54457

Dear Ms. Madden and Mr. Nowicki:

Each of you has communicated with this office regarding the application of the open meetings law to the Town of Rome ("Town") Board of Supervisors' ("Board") practices for filling vacancies to appointive positions on the Town Police and Fire Commission, the Town Board of Appeal, the Town Planning Commission, the Town Water Utility Commission and the Town Library Board.

Town Ordinance § 2.05 (intro) provides, in relevant part:

Appointment: To appoint a member to a Commission or a Board the Town will advertise for the position in local newspaper and post a notice at the town meeting posting sites. Resumes must be submitted with qualifications and previous employment experience. Applicants will be interviewed and appointed by the Town Board.

Subsections 2.05(1), (2), (3), (4) and (6) of the Town ordinances contain very similar provisions regarding each of the five boards and commissions at issue. The subsections establish each body, and identify the statutory authorization for each body's creation. The subsections require the Board chairperson to annually appoint members to each board or commission for a fixed term, subject to the Board's confirmation. The subsections provide that all terms begin on May 1 of the year, and provide that members of the body shall be removable by the Board for

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cause upon written charges. The members of every body except the Library Board are entitled to reimbursement for their expenses and a per diem, as set by the Board.

Steve Nowicki states that the whole Board interviews the applicants for the positions in closed session, invoking section 19.85(1)(c) of the Wisconsin Statutes as justification. Mr. Nowicki states that the Board interviews applicants in closed session because the Board feels that more qualified applicants respond if they know they will not receive scrutiny from their employers. Mr. Nowicki states that employers have scrutinized applicant employees in the past, expressing concern that the nature of the service required on the Town's boards and commissions would create a distraction for their employees if they were appointed. After the interviews, the Board chairperson reviews the information gathered at the interviews, and announces his appointments at a subsequent open session meeting. At that meeting, the Board in open session confirms or rejects the chairperson's appointments. Mr. Nowicki states that the use of this appointment process has allowed the Board to fill vacancies with very qualified people.

Karen Madden questions whether the Board can use section 19.85(1)(c) to justify closed session interviews of the applicants for vacancies on the five boards and commissions. She indicates that she has obtained an informal legal opinion that the exemption is not available because the exemption is limited to "public employee over which the [Board] has jurisdiction or exercises responsibility," and not membership on an appointed board or commission. Mr. Nowicki states that the Board obtained the opinion from the town attorney prior to posting the meeting notice that the interviews could be conducted in closed session, pursuant to section 19.85(1)(c).

The Attorney General and the Department of Justice have not previously provided written guidance as to whether local governmental bodies may, pursuant to section 19.85(1)(c), conduct closed session interviews of applicants for appointment to membership on boards and committees like the five in question here. In 1982, the Department of Justice advised that the exemption in section 19.85(1)(c) "might apply" to allow a county board committee to meet in closed session to consider and vote on the committee's recommendations to the county board chair for filling county board and county board committee vacancies, if the committee's recommendation role could be said to be having jurisdiction or exercising responsibility over the appointment. Letter to Ann M. Caturia, September 20, 1982. The letter also advised that a body could convene in closed session pursuant to section 19.85(1)(c) to discuss a police chief's salary or to interview applicants for positions of employment.

In 74 Op. Att'y Gen. 70, 72 (1985), the Attorney General answered the question left open in 1982, and concluded that a school board, acting pursuant to section 17.26(1) to fill a vacancy for the unexpired term of an elected school board member, could not use section 19.85(1)(c) to interview applicants in closed session, because an appointment to fill a vacant elective office is

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not "considering employment" of a prospective employee. In 76 Op. Att'y Gen. 276, 276 (1987), the Attorney General concluded that a county board chair and the members of the board's administrative committee could not convene in closed session pursuant to section 19.85(1)(c) to discuss the appointment of county board supervisors to county board committees, because "the county board members are elected officials performing the duties of their office when serving on the county board committees" and therefore "cannot be public employes under section 19.85(1)(c)." Consistent with these two formal opinions, the Department of Justice has advised that a county board cannot conduct closed session interviews pursuant to section 19.85(1)(c) of individuals being considered to fill the unexpired remainder of the term of an elected county clerk who resigned her position. Letter to Cindy W. Haro, June 13, 2003. More recently, the Attorney General has advised in an informal opinion that a city council or one of its committees may not use section 19.85(1)(c) to consider in closed session the temporary appointment of a municipal judge, because a municipal judge is an elected position, and elected officials are not "public employees" over whom a governmental body has jurisdiction or exercises responsibility. Letter to Daniel T. O'Connell, December 21, 2004. For your reference, I enclose copies of the Attorney General opinions and Department of Justice correspondence identified in this letter.

Each of the four appointments addressed in the previous paragraph relate to the filling of vacancies in positions that are normally filled by election—school board, county board, county clerk and municipal judge. A local government official reviewing these prior precedents might conclude that the method of selecting members; *i.e.*, by election or by appointment, is the determining factor in whether a body may convene in closed session under section 19.85(1)(c) to consider applicants for vacancies in local bodies and offices. Indeed, that is the apparent conclusion reached by the Town's attorney, who approved the Town's method of selecting vacancies for Town boards and commissions. The Board's reliance on that good faith, open and unconcealed advice of the attorney whose duty is to provide advice to the Board shields the Board from liability if the closed session interviews for Town board and commission positions did not comply with the open meetings law. *State v. Davis*, 63 Wis. 2d 75, 82, 216 N.W.2d 31 (1974).

The conclusions of the Attorney General's and Department of Justice's prior guidance do not depend on whether the position is normally filled through appointment or election. The proper distinction is whether the vacancy is in a local public office or a position of employment in local government. If the vacancy is in a local elective or appointive public office, a body may not convene in closed session under section 19.85(1)(c) to consider applicants to fill a vacancy in the office. If the vacancy is in a position of local public employment, a body may invoke section 19.85(1)(c) to consider in closed session applicants for vacant positions.

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The leading Wisconsin case that articulates the most comprehensive set of criteria for a "public office" is *Martin v. Smith*, 239 Wis. 314, 332, 1 N.W.2d 163 (1941). Quoting from a Montana case, the court stated:

"[T]o constitute a position of public employment a public office of a civil nature, it must be created by the constitution or through legislative act; must possess a delegation of a portion of the sovereign power of government to be exercised for the benefit of the public; must have some permanency and continuity, and not be only temporary or occasional; and its powers and duties must be derived from legislative authority and be performed independently and without the control of a superior power, other than the law, except in case of inferior officers specifically placed under the control of a superior officer or body, and be entered upon by taking an oath and giving an official bond, and be held by virtue of a commission or other written authority."

A position need not satisfy all of these criteria for it to be a "public office." The principal consideration is the type of power that is wielded. *Burton v. State Appeal Board*, 38 Wis. 2d 294, 300, 156 N.W.2d 386 (1968). A public office must possess a delegation of the sovereign power of government to be exercised for the benefit of the public. *Martin*, 239 Wis. at 332; *Burton*, 38 Wis. 2d at 301. To be a public office, " . . . its powers and duties must be . . . performed independently and without the control of a superior power other than the law" *Burton*, 38 Wis. 2d at 301, quoting *State ex rel Barney v. Hawkins*, 79 Mont. 506, 257 P. 411 (1927).

The Attorney General has employed the *Martin* criteria to conclude that members of a county planning and zoning commission are public officers. In 81 Op. Att'y Gen. 90, 91 (1993), the Attorney General stated:

A planning and zoning commission is authorized to act in all matters pertaining to county planning and zoning. It makes policy for the county in those areas. Sec. 59.97(2)(bm), Stats. If the county has a county executive, the county executive appoints the commissioners for staggered three year terms. Sec. 59.97(2)(a)3., Stats. If there is no county executive, the commissioners are designated as such by the county board and may or may not be members of the county board. Sec. 59.97(2)(a), Stats. The commission "possess[es] a delegation . . . of the sovereign power of government to be exercised for the benefit of the public." *Martin*, 239 Wis. at 332, quoting *State ex rel. Barney v. Hawkins*, 79 Mont. 506, 257 Pac. 411, 53 A.L.R. 583 (1927). The members of a planning and zoning commission are, therefore, public officers.

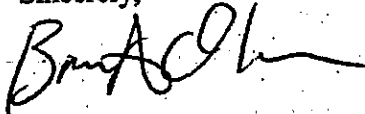
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Applying this analysis to the other four appointive governmental bodies at issue, it is clear that the members of each body are "public officers." Each body exercises a portion of the sovereign power delegated to it by one or more sections of the Wisconsin Statutes. Within the jurisdiction and standards set by the Legislature, each body acts with plenary authority. Each member serves for a fixed term, and may be removed by the Board only upon written charges. Each member of those bodies is, therefore, a "public officer" for purposes of applying the open meetings law to appointment decisions. And because section 19.85(1)(c) does not allow a governmental body to convene in closed session to consider applicants for public offices, the Board of Supervisors of the Town of Rome should interview applicants for future vacancies on Town boards and commissions in open session.

Although the Board may not have acted consistent with the open meetings law with respect to previous appointments to Town boards and commissions, that deficiency does not affect the validity of the actions of those boards and commissions. "[T]he acts of a *de facto* officer are valid as to the public and third parties and cannot be attacked collaterally." *Wahlberg v. State*, 73 Wis. 2d 448, 463-64, 243 N.W.2d 190 (1976). The *de facto* officer's acts "are binding and valid until the individual is ousted from his office by the judgment of a court in a direct proceeding to try his title to the office." *Id.* (footnote omitted).

Thank you for the assistance you have provided to this office in resolving the question that divides your opinions, and for giving this office the opportunity to clarify the limited scope of the exemption in section 19.85(1)(c).

Sincerely,



Bruce A. Olsen
Assistant Attorney General

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Enclosures

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