OFFICE OF CORPORATION COUNSEL

PAUL BARGREN
Corporation Counsel

MARK A. GRADY
COLLEEN A. FOLEY
Deputy Corporation Counsel

TIMOTHY R. KARASKIEWICZ
ROY L. WILLIAMS
LEE R. JONES
MOLLY J. ZILLIG
ALAN M. POLAN
JENNIFER K. RHODES
DEWEY B. MARTIN
JAMES M. CARROLL
PAUL D. KUGLITSCH
Principal Assistant
Corporation Counsel

Date: December 30, 2013

To: Alexis Gassenhuber, Committee Clerk

cc: Sup. Lipscomb
Sup. Borkowski
Sup. Johnson
Sup. Weishan
Sup. Broderick
Sup. Rainey
Chw. Dimitrijevic
Kelly Bablitch
Jessica Janz-McKnight
Joseph J. Czarnezki
Mark A. Grady
Colleen A. Foley
Legistar (via committee clerk)

From: Paul Bargren PB
Corporation Counsel

Re: Referral from December 5 JSGS Committee (abstentions)

Dear Madam Clerk,

As you communicated to me by email on December 12, 2013, the Committee on Judiciary, Safety and General Services, at its December 5, 2013 meeting, considered File No. 13-869 (amending MCO Ch. 1 related to abstentions) and referred the item to this Office for a legal opinion. My response follows.

Background

File No. 13-869 seeks to amend MCO 1.04(b) by making the following change regarding votes by supervisors:

> *Abstain from voting*. No member shall abstain from voting on a question when put, except by specific notice of that supervisor. Any member wishing to abstain from voting ~~may~~ shall make a brief verbal statement of the reason for abstaining.

With this change, any supervisor abstaining from a vote would need to a) provide notice and b) explain why. Now, notice is required, but providing a reason is optional.

Summary of opinion

Requiring a supervisor to provide a reason for an abstention would violate the supervisor's First Amendment free-speech rights and therefore, in my view, would not be enforceable. If a sanction was imposed against a supervisor who did not provide a reason, that supervisor could respond with a claim that his or her constitutional or civil rights were violated. Requiring a reason is also contrary to longstanding Board practice in related areas. As a result, in my view, the resolution should not be considered.

Analysis

Federal courts have addressed this issue.[1] The decision most directly on point is *Wrzeski v. City of Madison*, 558 F. Supp. 664 (1983). A similar rule adopted by the Madison Common Council was at issue. It stated:

> Every member present, when a question is put, shall vote, unless the presiding office of the council shall, for special reasons, excuse the member.

Under that and related provisions, a member who abstained without giving a reason could be censured and fined $100.

Judge Crabb applied the First Amendment, noting that "plaintiff's status as a legislator does not strip her of any right she would otherwise enjoy under the First Amendment to speak freely or not to speak at all." *Id.* at 667. "Legislators enjoy the same First Amendment protections as any other members of our society." *Id.*, citing *Bond v. Floyd*, 385 U.S. 116, 132-33 (1966). *See also Miller v. Town of Hull*, 878 F.2d 523, 532 (1st Cir. 1989) ("the act of voting on public issues by a member of a public agency or board comes within the freedom of speech guarantee of the first amendment"). Judge Crabb then noted:

> [I]t is well established that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."

Wrzeski, *id.* at 667, quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

Under the First Amendment, the right to keep silent expressly includes the right to abstain. *Coogan v. Smyers*, 134 F.3d 479, 489 (2d Cir. 1998) ("We do not mean to disparage the right of any person to abstain on an official vote. Indeed, the First Amendment protects such a right"). *See also Bundren v. Peters*, 732 F. Supp. 1486, 1499-1500 (E.D.Tenn.1989) (a school

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[1] On questions of federal law and federal rights, Wisconsin treats decisions of the US Supreme Court as binding and decisions of other federal courts as persuasive authority. *See, e.g., Alberte v. Anew Health Care Servs., Inc.*, 2000 WI 7, ¶ 7, 232 Wis. 2d 587; *Rao v. WMA Secs., Inc.*, 2008 WI 73, ¶¶ 47–50, 310 Wis. 2d 623.

district administrator illegally retaliated against a district employee who was a member of the county board but abstained from school finance questions to avoid a conflict of interest).[2]

Moreover, "[p]ermitting members to abstain is not functionally different from permitting them to vote no." *Wrzeski*, 558 F. Supp. at 668. A significant number of "no" votes are cast by supervisors in a typical Board cycle with no requirement whatsoever to explain. Because "an abstention is no less a legislative act than a 'yes' or 'no' vote," *Coogan*, 134 F.3d at 489, and is "the functional equivalent of a negative vote," *id.* at 486, the Board should treat a vote to abstain the same as a "no" vote, with no explanation required.[3]

Admittedly, it may be frustrating for a supervisor who takes a stand on a controversial issue to see a colleague refuse to vote at all and not explain why. But Judge Crabb made clear that imposing a penalty for an abstention is a job for the electorate – not for other supervisors:

> There can be no doubt that a representative who consistently dodges difficult or controversial issues by not voting on them does a disservice to his or her constituency. However, in our government system, the proper remedy for such behavior lies with the electorate.

Wrzeski, 558 F. Supp. at 668, citing *Powell v. McCormack*, 395 U.S. 486, 547 (1969) ("A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them' ").

Boards are allowed to establish procedural rules to "further the efficient functioning of a legislative body" as long as they are "closely drawn to serve that end" and do not restrict First Amendment rights. *Wrzeski*, 558 F. Supp. at 668. But there is a difference between providing a reason for an abstention and merely providing notice of intent to abstain as currently required under MCO 1.04(b). The notice requirement serves the procedural purpose of alerting other Board members that there will be fewer than 18 votes on the item. That may affect how other supervisors wish to approach the item. But the notice comes without explanation, so there is no First Amendment restriction involved. It is simply announcing what the vote will be a little while before it is cast.

The Board already observes a practice related to the First Amendment right to keep silent. When a supervisor poses a question on the floor, the responding supervisor has the option of not answering. This reflects *Robert's Rules of Order*, which the Board has adopted to govern its proceedings to the extent not inconsistent with specific rules or statutes. MCO 1.26. Under Roberts, whether to respond to a question or request for information is optional. *See Roberts* at 294-95, 392. Requiring explanation of an abstention would counter this longstanding practice.

In summary, for the reasons stated, in my view the amendment to MCO 1.04(b) proposed in File 13-869 is unconstitutional and unenforceable, and it should not be considered.

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[2] *But see Nevada Comm. on Ethics v. Carrigan*, __ U.S. __, 131 S. Ct. 2343, 2350 (2011) (upholding a legislative body's right to prevent members from voting on matters where they have conflicts of interest); *see also* MCO 9.05(2)(c), which bars a supervisor from voting on a matter where there is a conflict of interest.

[3] For that matter, how would the Board decide what constitutes a "brief verbal statement of the reason for abstaining"? Would it be enough to say, "because I want to"? Or could a supervisor still be sanctioned if colleagues deemed the "reason" insufficient?