



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN  
ATTORNEY GENERAL

Raymond P. Taffora  
Deputy Attorney General

17 W. Main Street  
P.O. Box 7857  
Madison, WI 53707-7857  
www.doj.state.wi.us

Paul L. Barnett  
Assistant Attorney General  
barnetpl@doj.state.wi.us  
608/266-5366  
FAX 608/267-2778

January 4, 2007

Mr. and Mrs. Jeff Roberts  
12113 Tannery Road  
Mishicot, WI 54228

Mr. Dean Anhalt  
P.O. Box 272  
Mishicot, WI 54228

Mr. George Patek  
2706 Benzinger Road  
Mishicot, WI 54228

Mr. and Mrs. David Korinek  
11511 Lakeshore Road  
Two Rivers, WI 54241

Mr. Dean J. Pekarek  
13033 Saxonburg Road  
Mishicot, WI 54228

Mr. William Hlinak  
3709 East County Hwy BB  
Two Rivers, WI 54241

Re: *Investigation in Manitowoc County Regarding Wind Ordinance  
Matters*

Dear Folks:

The Department of Justice received a referral from the Manitowoc County District Attorney, Mark R. Rohrer, concerning allegations of conflict of interest on the part of members of certain town boards.<sup>1</sup> The referral also included alleged violations of the Open Meetings Law. We requested the Division of Criminal Investigation to assign a special agent to conduct an investigation into these allegations. That investigation is now completed. We have reviewed the results of the investigation. This letter sets forth our findings and analysis.

*Facts*

A. Introduction

By statute, the Legislature has adopted as state policy a program to encourage the development of renewable energy resources. See section 1.12(3)(b) of the Wisconsin

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<sup>1</sup> The referral subjects included Norbert L. Stangel of the Two Creeks Town Board. During our investigation, we were asked not to interview Mr. Stangel as he was in the hospital gravely ill. We are informed that he did not sign a contract with any wind energy company.

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statutes. At the state level, the Legislature has directed the Department of Administration to promote the use of wind energy systems. Section 16.959 of the Wisconsin statutes. At the local level, the Legislature has curtailed the authority of county and municipal governments to regulate wind energy systems. Section 66.0401 of the Wisconsin statutes.

In recent years, Wisconsin communities have witnessed an increase in proposals to establish so-called "wind farms." Two of the firms active in this effort are Navitas Energy, Inc. of Minneapolis, Minnesota, and Emerging Energies of Hubertus, Wisconsin. In 2004, these firms solicited Manitowoc County residents to construct wind turbines. Also during 2004, the Manitowoc County Board of Supervisors considered and eventually adopted a zoning ordinance regulating the placement and construction of these turbines.

The confluence of these events led to the allegations presented to us for investigation.

B. Contracts for Wind Turbines

Navitas Energy conducted information sessions open to the general public during Spring 2004, including on April 6, 2004. Kenneth Duvenek and Lee Engelbrecht, both members of the Two Creeks Town Board, made appointments to meet with a Navitas representative. Mr. Duvenek met with Jared Anderson of Navitas at the Duvenek home. Mr. Anderson explained that Navitas would lease one to two acres per wind turbine and pay approximately \$4500 annually for each turbine placed on the property.

Mr. Duvenek did not sign anything at this time but on April 22, 2004, he executed an "Option to Lease, Lease and Wind Easement Agreement." Mr. Duvenek understood that he was not guaranteed that any turbines would be placed on his property. Shortly thereafter, Mr. Duvenek received a check from Navitas dated April 29, 2004, for \$1000. According to the documents signed by Mr. Duvenek, this payment covered the first twenty-four months of the consideration for a five-year exclusive option to Navitas to lease Mr. Duvenek's property. The agreement provides for additional payments of \$500 annually beginning the month following the two-year anniversary of the agreement. After receiving his first payment, Mr. Duvenek had no further contact with Navitas until November 19, 2004, when he received a letter advising that Navitas determined that it

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would not place any turbines on his property at that time. The letter also stated that Navitas could re-examine placement on his property in the future. Also, under the agreement, Navitas could exercise its option to place turbines on the property through May 2009.

Mr. Engelbrecht and his wife own land in both the Town of Mishicot and the Town of Two Creeks. They met with a Navitas representative within two weeks of the April 6, 2004, information session. The representative informed the Engelbrechts that they would receive \$1000 for simply "showing interest" by signing the option agreement and could receive \$4500 annually per turbine placed on the property. The Engelbrechts signed the option agreement on May 5, 2004. Mr. Engelbrecht recalled receiving the \$1000 payment even before signing.

A review of the agreement signed by the Engelbrechts reveals that it is the same as signed by Mr. Duvencik. In addition to the lease option and option payment provisions, the agreement also provides that if Navitas exercises its option, the lease shall be for twenty years initially with the option to extend for two additional five-year terms. The owner may select from two rent payment plans, one which is fixed and the other which is adjusted annually for inflation.

In June or July 2004, Mr. Engelbrecht signed a twenty-year easement in which he agreed to have two turbines placed on the Town of Mishicot property. A project map we reviewed confirms that two turbines (identified as A45 and A47) are planned for placement on property in the Town of Mishicot.

After signing the first easement, Mr. Engelbrecht reported receiving a second easement from Navitas. This second easement was almost identical to the first easement except it did not specify the amount of the annual lease payments. Navitas informed the Engelbrechts that it wanted to record this second easement with the register of deeds. Mr. Engelbrecht advised that he has not signed this second easement.

Mr. Engelbrecht said that subsequent contacts with Navitas have consisted of them contacting him to sign the second easement and him contacting them to find out the status of the project. He has had no other contacts with Navitas.

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Sometime in or about March 2004, Richard Heyroth, a member of the Mishicot Town Board, was contacted by a representative of Emerging Energies and asked if he would be willing to have a test tower placed on the property. He discussed the request with his sons, the other members of Schoner Hugel Farms LLC, the family farm business, and they agreed. However, Mr. Heyroth told his sons that they could not be compensated because he was a member of the Mishicot Town Board. Mr. Heyroth denies signing any contract with either Emerging Energies or Navitas and only produced an unsigned Emerging Energies contract. He also denies receiving any compensation from Emerging Energies.

Mr. Heyroth did attend a Navitas information session and later met a representative at his home. The representative asked Mr. Heyroth to sign up but he declined, telling the representative that he could not because he was a member of the Mishicot Town Board. Mr. Heyroth reported that the representative accepted the explanation and did not try to pressure him to sign up.

#### C. Manitowoc County Wind Ordinance

In 2004, Manitowoc County created chapter 24 to its zoning ordinance by adopting a wind ordinance to govern the location and construction of wind turbines in the county. The draft ordinance was discussed at several meetings of the county's Planning and Park Commission, including a regular meeting on August 23, 2004, and special sessions on August 31 and September 14, 2004. Changes were proposed to the draft ordinance, including in its setback requirements, and the Commission eventually voted at its September 14, 2004, meeting to recommend that the Manitowoc County Board adopt the ordinance as revised. The County Board did so at its September 21, 2004, meeting.

Members of the public attended the Commission meetings. So did members of various town boards. The minutes to these meetings distinguish between citizen attendees and town board representatives. For instance, the minutes to the September 14, 2004, Commission meeting state that "[t]he towns of . . . Mishicot [and] Two Creeks . . . were in attendance[.]" The minutes to the Commission's August 31, 2004, meeting are likewise. However, the minutes themselves do not specifically identify which individuals in attendance were "citizens" and which represented the named townships.

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Messrs. Heyroth, Duvnek and Engelbrecht attended these meetings. Mr. Heyroth spoke at the August 23, 2004, meeting. He was observed conferring with a representative of Navitas. According to Mr. and Mrs. Korinek, who attended this meeting, Mr. Heyroth said that he spoke on behalf of Schoner Hugel Farms LLC. Mr. Heyroth confirmed this to us and advised that he expressed concerns about not being able to plant crops around the base of a wind tower and the need for an access road to the tower.

Mr. Duvnek spoke at the August 31, 2004, Commission meeting. According to the Korineks, Mr. Duvnek suggested that the proposed wind ordinance be revised to reduce the setback limitations for placing turbines near a nature conservancy, park, hunting area or forest. He also reportedly said that he had signed up for two turbines and was at risk of losing one because of the restrictions. When someone objected to these comments, the Korineks say that Mr. Duvnek responded that no one could tell him what he can and cannot do on his property.

Mr. Duvnek acknowledged attending this meeting as town chairman. He explained that he spoke against the original proposed setback of one mile because it would disqualify almost all Two Creeks residents. Mr. Demske told us that Mr. Duvnek did not propose reducing the setback in order to personally obtain a turbine. The Commission eventually decided to recommend a setback of  $\frac{1}{4}$  mile. Mr. Duvnek claimed that his property does not qualify for a turbine even under the revised setback requirement. According to a map of Two Creeks prepared by Navitas and obtained from the Planning and Park Commission, however, there is a narrow strip of Mr. Duvnek's property that could meet the reduced setback requirement.

Mr. Engelbrecht reported that he attended the Commission meetings on August 31 and September 14, 2004, but did not say anything. Neither the Korineks, who attended both meetings as well, or anyone else claims otherwise.

Section 59.69(5)(c) of the Wisconsin statutes requires that a county zoning ordinance is not effective in any town until approved by the town board. After the County Board adopted the wind ordinance, copies were forwarded to the townships. The town boards for the Towns of Two Creeks and Mishicot voted to adopt the ordinance at meetings that occurred on October 18 and November 16, 2004, respectively. Town board members Heyroth, Duvnek and Engelbrecht all participated in and voted on the matter.

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D. Introductions of Representatives of Wind Energy Firms

Mr. Heyroth reportedly accompanied a wind energy firm representative and made introductions to some neighbors. Mr. Korinek furnished two names, George Patek and Dean Pekarek. Mr. Patek informed us that Mr. Heyroth brought a representative of Emerging Energies to the Patek home. Mr. Patek did not want to discuss the matter in front of Mr. Heyroth and therefore asked the representative to return at a later time. They met a couple of weeks later and Mr. Patek decided that he was not interested in the program. Mr. Patek said that he thought Mr. Heyroth's introduction came as a neighbor and not as a Mishicot Town Board member.

Mr. Pekarek denied that Mr. Heyroth ever brought anyone to solicit him to sign up for a wind turbine.

E. Compliance with Open Meetings Law

We interviewed the Manitowoc County clerk, Char Peterson, to obtain information on the practice and procedure used to provide public notice for meetings of county governmental bodies. Ms. Peterson advised that each Thursday morning she contacts all county departments via electronic mail and asks whether they plan to have any meetings the following week. By noon each department replies. If a meeting is planned, the department also forwards an agenda. A staff person in the clerk's office prepares a cover sheet that lists the meetings to be held the following week. This list includes the date, time and location of the meeting, the name of the governmental entity involved and whether the meeting is open, closed, regular or special. This information is obtained from the agendas. If no agenda is provided, then the meeting is not listed on the cover sheet.

Once completed, the cover sheet and the corresponding agendas are posted in the Manitowoc County Courthouse rotunda and the county clerk's office. They remain posted for a week or until the last meeting of the week occurs, whichever is later. A copy of these documents is also provided on Fridays to the *Herald Times Reporter*, which prints only the cover sheet listing the various meetings but not the agendas.

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We obtained copies of the cover sheets and agendas for the August 31 and September 14, 2004, meetings of the Planning and Park Commission. The agenda for the August 31, 2004, special meeting is dated August 24, 2004, and is signed by Michael J. Demske, the Director for the Planning and Park Commission. The agenda lists discussion of the wind energy ordinance as the only item of new business. The corresponding cover sheet includes all the basic information for this meeting other than the agenda and is signed by the clerk herself.

The *Herald Times Reporter* published the cover sheet that listed the August 31, 2004, special meeting of the Commission on that same day.

Mr. Demske also prepared the agenda for the September 14, 2004, special meeting on September 8, 2004. The agenda identifies the wind energy ordinance as an item of business. The clerk's cover sheet provides the same basic information. However, though the agenda identified this meeting as "special," the clerk's cover sheet lists it as a "regular" meeting. The cover sheet is correct in all other respects as to this meeting. When asked, Ms. Peterson explained that the error must have been an oversight by a staff person in her office.

The Korineks allege that a secret meeting between the Commission, the town boards and Navitas took place some time between the August 31 and September 14, 2004, meetings. They claim that, at the August 31 meeting, Mr. Demske agreed to "arrange the details" for this secret meeting. Mr. Demske denies that any secret meetings took place. The Korineks state that Dan Koehler walked in on this secret meeting.

We interviewed Mr. Koehler. He reported that he only knows about one meeting involving Navitas and the Towns of Mishicot and Two Creeks. He was the only citizen who attended. He denied that this was a secret meeting and said that it was properly posted.

*Analysis*

A. Conflict of Interest

The allegations presented here raise several distinct conflict of interest issues. The first issue concerns the propriety of town board members Heyroth, Duvnek and Engelbrecht voting on the wind ordinance when they had or may have had a financial interest in the matter. The second issue concerns Mr. Heyroth's actions at the August 23, 2004, Planning and Park Commission meeting at which he spoke regarding the ordinance and conferred with a representative of one of the wind energy companies. The third issue concerns Mr. Heyroth's introducing his neighbors to a company representative. The last conflict issue considers the actions of Mr. Duvnek at the August 31, 2004, Planning and Park Commission meeting regarding the proposed setback in the wind ordinance.

Each of these issues will be discussed separately.

*1. Voting on the Wind Ordinance*

Section 19.59(1)(c) provides that 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.

This statute does not define what subsection 1. means by "official action." It cannot be doubted that making, seconding, debating or voting on a motion presented to a town board constitutes official action by a board member. *Compare Christian v. Town of*



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*Emmett*, 163 Wis. 2d 277, 281, 471 N.W.2d 252 (Ct. App. 1991) (equating “official action” with a resolution or ordinance). It has been suggested that the votes of the various town boards on whether to accept Manitowoc County’s wind ordinance are meaningless because they are not binding on the county. This suggestion does not appear to square with state law, which provides that a town may vote to decide whether the county’s zoning ordinance should apply in the township. Section 59.69(5)(c) of the Wisconsin statutes. Even if a town board’s vote was advisory only or merely expresses the sense of the town board or the town itself, however, the vote still constitutes official action by the town board’s members and therefore is subject to the conflict statute.

Our investigation revealed various degrees of actual or potential financial interest in the establishment of wind farms in Manitowoc County among the three town board members at the time they each voted on the wind ordinance at a town board meeting. Mr. Duvnek had the most direct financial interest, having signed a contract in April 2004, already receiving the first \$1,000 payment for the option agreement and, at the time of his vote (October 18, 2004), still being under consideration for placement of one or more turbines.<sup>2</sup>

Mr. Engelbrecht’s financial interest is similar to Mr. Duvnek’s. There is one difference, however. Whereas Mr. Duvnek’s contract concerns property he owns in the Town of Two Creeks, on whose town board he is a member, Mr. Engelbrecht’s contract concerns property in both Two Creeks and in Mishicot and it was the property in Mishicot on which Navitas agreed to construct two turbines. Thus, it could be said that, from his perspective as a member of the Two Creeks Town Board, Mr. Engelbrecht’s financial interest is somewhat less direct than Mr. Duvnek’s because a vote as a Two Creeks Town Board member would not affect whether turbines could be placed on the Mishicot property. On the other hand, as with Mr. Duvnek, Mr. Engelbrecht’s contract gives Navitas a five-year option to both properties. Therefore, when he voted on the ordinance, Mr. Engelbrecht still had the potential to realize significant revenues if Navitas exercised its option on the Two Creeks property.

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<sup>2</sup>Mr. Duvnek subsequently was informed on November 19, 2004, that Navitas had decided not to place any turbines on his property at that time. Of course, he had no way of knowing this prior to receiving the communication. Moreover, the option agreement is for five years. Thus, Navitas could exercise its option to proceed with placing turbines on his property at any time until May 2009.

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Mr. Heyroth's financial interest is the least direct of the three board members. This is not because the property involved is owned by a corporation, however, since the conflict statute applies to any organization in which the official has a substantial financial interest. Our investigation has not uncovered any evidence indicating that Mr. Heyroth actually signed a contract or that he or the family farm corporation has received any payments, even for placing a test turbine on the property. Arguably, at the time he voted, Mr. Heyroth still had a financial interest in the adoption of the wind ordinance since the ordinance would permit Emerging Energies (or Navitas, which also solicited Mr. Heyroth) to proceed with further efforts to convince Mr. Heyroth to place turbines on the property. But we think that this financial interest is no different than the interest that any resident in the Town of Mishicot might have had if they were willing to consider having wind turbines placed on their property.

Thus, we conclude that, whereas Mr. Duvnek and Mr. Engelbrecht had a substantial direct financial interest in the adoption of the wind ordinance at the time they voted, Mr. Heyroth did not.

Notwithstanding their substantial financial interest, however, the conflict of interest statute erects a significant obstacle to concluding that Mr. Duvnek and Mr. Engelbrecht violated the statute. Another provision of section 19.59(1) states as follows:

**(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.**

What this means is that the prohibition under subsection (c) does not apply where the official action concerns modifying a local ordinance. Here, the wind ordinance on which the town board members voted arguably qualifies as a "proposal to modify a county . . . ordinance." Subsection (d) creates an exception to what is prohibited under subsection (c).

By creating this exception, the Legislature arguably authorized Mr. Duvnek and Mr. Engelbrecht (and Mr. Heyroth as well, even if we had concluded that he had a substantial financial interest at stake) to participate in the town board votes on the

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Manitowoc County wind ordinance. For this reason, we conclude that a prosecution of these town board members under section 19.59(1)(c) would be difficult to sustain.

However, section 19.59(1)(a) similarly prohibits any local public official from using his office to “obtain financial gain or anything of substantial value” for his, his family’s or an associated organization’s private benefit. By its terms, however, the exception under section 19.59(1)(d) does not apply to the conduct prohibited by section 19.59(1)(a). Therefore, a prosecution of town board members may be possible under this provision for voting on whether the town should adopt the county’s wind ordinance as its own when they stood to benefit financially by the vote.

Nonetheless, we decline to initiate any such prosecution. We instead conclude that the public interest is sufficiently well-served by alerting and educating these and other local government officials to the risk of violating the conflict statute when they entertain or accept offers to enter into a contract potentially involving many thousands of dollars while related matters are or can reasonably be expected to come before them in their official capacities. We anticipate that, by informing them of this risk, these officials will proceed with greater care in the future when confronted with similar circumstances. In our judgment, this warning suffices to prevent local public officials from unwittingly violating the conflict of interest statute. We will certainly take this notice into account in the event we are called upon to investigate similar actions by these officials in the future.

To increase the awareness of local government officials elsewhere to this issue, we have sent correspondence to the Wisconsin Towns Association and the League of Wisconsin Municipalities asking them to spread the word among local government officials throughout Wisconsin about the legal risks in entertaining these offers when relevant matters pertaining to wind energy projects are or could foreseeably come before them in their official capacities.

2. *Mr. Heyroth’s Actions at the August 23, 2004, Planning and Park Commission Meeting.*

Mr. Heyroth spoke at this meeting in support of the wind ordinance, raised several specific concerns and appeared to confer with a representative of one of the wind energy firms. The conflict of interest issue is whether this conduct constitutes a use of Mr.

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Heyroth's office to produce a substantial financial benefit for himself, his immediate family or his farming corporation. Based on the available facts, we conclude that no violation occurred.

There is no dispute that Mr. Heyroth spoke on behalf of his farming corporation. He must have made that clear at the meeting itself because the Korineks, who were in attendance, knew this. Making this clear at the time Mr. Heyroth made his remarks removed any possible ambiguity about whether he spoke as a private citizen or as a town board member. Although they must proceed with care and caution, elected officials do not lose their status as citizens entitled to speak to important matters pending before other governmental bodies.

Even if he had spoken in his capacity as a town board member, however, Mr. Heyroth did not violate the conflict of interest statute because, as we discussed earlier, there is no evidence that he obtained any substantial benefit for doing so.

Also, we fail to see how conferring with a wind firm representative violates the law. Mr. Heyroth told us that he wanted to be sure he used the correct terminology in his remarks. Even if this left others with the impression that he was advancing the firm's interests, our investigation has failed to uncover any evidence that such a relationship in fact existed. Again, there is no evidence that Mr. Heyroth used his board position for personal gain.

### 3. *Introduction by Mr. Heyroth*

Mr. Heyroth apparently introduced one neighbor to a wind energy company representative. That neighbor made an appointment to meet with the representative at a later time. The neighbor denied that Mr. Heyroth pressured him to sign up. The neighbor did not consider the introduction to be in Mr. Heyroth's capacity as a town board member but as a fellow neighbor.

We find nothing unlawful or improper about Mr. Heyroth's actions. Even if he had made the introductions as a town board member, that alone would not be improper and, indeed, some citizens (at least those who, like Mr. Heyroth, generally support wind power) might consider this to be a public service by an elected representative no different

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than if another town board member had introduced a wind turbine opponent to local residents to discuss reasons for opposing the initiative. A violation of the law would occur if Mr. Heyroth was compensated or received some other benefit in exchange for using his position to make these introductions but there is no evidence supporting such a violation.

4. *Actions of Mr. Duvenek at August 31, 2004, Planning and Park Commission Meeting.*

It is undisputed that Mr. Duvenek spoke against the proposed wind ordinance setback at the August 31, 2004, meeting of the Planning and Park Commission. The Korineks say that Mr. Duvenek's comments included a statement to the effect that he would lose one of two turbines if the setback was not reduced whereas Mr. Duvenek advises that he advocated for a reduced setback so that more Two Creeks residents could qualify for turbines. Thus, whether a possible violation of the conflict statute occurred may depend on Mr. Duvenek's motives for advocating the position he did.

It is not necessary, however, for us to resolve this dispute over his motives. We have already determined that a prosecution is not necessary in order to further the public interest. We do think it is worth noting, particularly for the benefit of local officials, that perception may be as damaging as fact, and that this should also influence these officials in taking steps to avoid even the appearance of impropriety.

5. *Responsibility of Wind Energy Firms*

Our investigation disclosed that two wind energy firms solicited contracts from local property owners, including members of two town boards. In our opinion, these solicitations may have violated section 19.59(1)(b) of the Wisconsin statutes, which provides as follows:

(b) No person may offer or give to a local public official, directly or indirectly, and no local public official may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the local public official's vote, official actions or

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judgment, or could reasonably be considered as a reward for any official action or inaction on the part of the local public official. This paragraph does not prohibit a local public official from engaging in outside employment.

We believe that offers to pay local public officials \$1,000 to sign the contract and potentially thousands of dollars more over a term of up to twenty years could “reasonably be expected” to influence the votes, actions or judgment of such officials on matters in which the firms were interested. And, in our opinion, this is so regardless of whether the actual or potential contract payments were the same as offered to every other property owner.

After due consideration, however, we concluded that the public interest in educating and alerting these and other firms pursuing such projects in Wisconsin to the possible pitfalls of making these solicitations and entering into these contracts outweigh the interest in prosecuting these alleged violations. Accordingly, we undertook to communicate our interpretation of the conflict of interest statute to energy companies and local officials.

In particular, our research identified numerous firms who were actively or considering pursuing wind energy projects in Wisconsin, including Navitas and Emerging Energies. We issued letters to top officials or their representatives in these firms informing them of our interpretation and application of the conflict of interest statutes to the solicitation of local government officials and urged them to review and modify their business practices to comply with the law.

We will treat these proactive warnings as an important factor in making future decisions if we receive any additional referrals similar to those involved here.

#### B. Open Meetings Issues

Four distinct open meetings issues were presented to us in this referral. We have also identified a fifth issue. In order of discussion, these issues are (1) whether sufficient notice was given of the August 31, 2004, special meeting of the Planning and Park Commission; (2) whether any meetings of a governmental body took place in secret and without any public notice; (3) whether the September 14, 2004, special meeting of the

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Planning and Park Commission was improperly noticed as a regular meeting; (4) whether the minutes of these meetings suffice under the law; and (5) whether a violation occurred when a quorum of the Two Creeks Town Board attended a meeting of the Planning and Park Commission.

1. *Notice of the August 31, 2004, Planning and Park Commission*

The allegation here is that the notice of this meeting appeared in the *Herald Times Reporter* on the day of the meeting and therefore did not meet the twenty-four hour requirement of the Open Meetings Law. See section 19.84(3) of the Wisconsin statutes. There are two ways in which the public notice requirement may be met. One way is by paid publication in a news medium likely to give notice in the area the governmental body serves. The other way is by posting.

If the Planning and Park Committee gave public notice by paid publication, then we would agree that a violation occurred and not only because of the twenty-four hour requirement. In addition, the Open Meetings Law requires that the public notice include the subject matter of the meeting and the notice published in the *Herald Times Reporter* did not include this information. However, our investigation establishes that the Planning and Park Committee (as well as every other Manitowoc County governmental body) gives public notice by posting, which is an equally acceptable method of providing public notice. Here, the evidence shows that the public notice, including the subject matter of the meeting (as reflected in the posted agenda), was posted five days prior to the meeting. No violation occurred.

We do make one observation. Although the Open Meetings Law does not mandate a minimum number of locations where a meeting notice must be posted, as a general rule, the Attorney General recommends posting notices at three different locations within the governmental body's jurisdiction. 66 Op. Att'y Gen. 93, 95. Thus, for county governmental bodies we recommend posting at three distinct locations within the county. The courthouse rotunda and in the clerk's office also located in the courthouse are not two different locations within the contemplation of the Attorney General's recommendation. We therefore urge the county clerk to identify two additional locations within Manitowoc County for posting of such notices.

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2. *Secret Meetings*

The Korineks allege that a secret meeting was planned during the August 31, 2004, Planning and Park Commission meeting. They told us that Mr. Koehler walked in on the meeting. However, Mr. Koehler specifically denied that and, indeed, told us that the meeting he attended was properly posted. We also think it highly unlikely that an official would announce at a public meeting that he would be planning a secret meeting in violation of the law. In any event, we have uncovered no evidence of any secret meeting.

3. *Notice of the September 14, 2004, Planning and Park Commission Meeting*

The Planning and Park Commission meeting of September 14, 2004, was a special meeting. However, in the cover sheet prepared by the county clerk's office listing all county meetings that week, this meeting was identified as a regular meeting. The county clerk explained that this resulted from oversight.

Section 19.84(2) of the Wisconsin statutes sets forth the requirements that govern the contents of public notice of a meeting. This provision states that "[e]very public notice of a meeting of a governmental body shall set forth the time, date, place and subject matter of the meeting, including that intended for consideration of any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof." Nothing in this statute requires that the notice describe the meeting as "regular" or "special." Providing this information does perform a public service, however, and we encourage it.

For purposes of whether there was compliance with the notice statute we look only to the posted agenda. That agenda correctly described this meeting as a special meeting. The county clerk's cover sheet, which lists all meetings of county governmental bodies for the coming week, is in addition to the required agenda notice. It was unfortunate that the cover sheet mistakenly listed this particular meeting as a regular meeting rather than a special meeting. We doubt, however, that any member of the public was misled by this



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erroneous designation, particularly since posted the agenda adequately described the subject matter to be discussed at the meeting.

#### 4. *Sufficiency of Planning and Park Meeting Minutes*

The Open Meetings Law does not require detailed minutes of a governmental body's meetings. The only requirement is a record of motions and roll call votes of each meeting. Section 19.88(3) of the Wisconsin statutes. A roll call vote is a vote requested by any member of the body to be recorded in a manner that the vote of each member can be ascertained. Section 19.88(2) of the Wisconsin statutes.

We have reviewed the minutes of the Planning and Park Commission meetings for August 31 and September 14, 2004. We conclude that these minutes adequately reflect the motions made and votes taken for purposes of the Open Meetings Law.

We note, however, that the specific identities of the Commission members in attendance are not noted in these minutes. By contrast, the minutes for the Commission's regular meetings do list each commissioner present and absent. We urge the Commission to do the same for special meetings as well. As illustrated by the minutes to the September 14, 2004, meeting, when fewer than all the commissioners are present, it is simply not possible for anyone not present at the meeting to know which commissioners voted, even when the vote is unanimous. Although not expressly required by law (unless a roll call vote is requested), we think that, by identifying those members in attendance, the Commission will help fulfill the legislative policy "that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." Section 19.81(1) of the Wisconsin statutes.

#### 5. *Meeting Within A Meeting*

The final Open Meetings Law issue for discussion came to our attention during this investigation. When a quorum of members of one governmental body attends a meeting of another governmental body, if their attendance is not by chance or social and their purpose is to gather information or otherwise engage in governmental business

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regarding a subject over which the first body has decision-making responsibility, two simultaneous meetings actually take place and separate notice must be provided for each. This was the result in a decision of the Wisconsin Supreme Court in *State ex rel. Badke v. Greendale Village Bd.*, 173 Wis. 2d 553, 494 N.W.2d (1993). In *Badke*, a quorum of the village board attended meetings of the plan commission, including its consideration of a proposed housing project regarding which the village board had final decision-making authority. The village board members listened to presentations by the developer and others and heard discussion by plan commission members. The supreme court held that this kind of information gathering or “[l]istening and exposing itself to facts, arguments and statements constitutes a crucial part of a governmental body’s decisionmaking.” *Id.* at 572. Even though the village board members did not interact during these plan commission meetings, their presence allowed them to gather information that influenced a decision they were later authorized to make. In the supreme court’s view, because a quorum of the village board was involved, the public was entitled to be made aware of this information also. That awareness should have come via a separate public notice of a village board meeting taking place during the meeting of the plan commission. *Id.* at 573-74; *see also id.* at 577-78.

Here, there is evidence that a quorum of the Two Creeks Town Board attended the August 31, 2004, Planning and Park Commission meeting regarding the county’s wind ordinance. Perhaps quorums of other town boards also attended this or other Commission meetings, although we cannot say because there is no written record of attendees. Based on *Badke*, it is clear that a meeting of the Two Creeks Town Board occurred because a quorum attended the Commission meeting to gather information on the wind ordinance, a matter on which they subsequently voted. It did not matter that Mr. Engelbrecht said nothing during this meeting since information gathering is a recognized part of a governmental body’s process for making decisions.

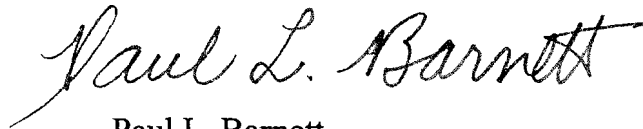
We point out this violation because it is one easily overlooked by well-meaning officials. We have no information to suggest that the violation was knowing, which is required to prosecute under the Open Meetings Law. Section 19.96 of the Wisconsin statutes. Actions taken by the governmental body at a meeting held in violation of the Open Meetings Law are voidable, *see* section 19.97(3) of the Wisconsin statutes, but to our knowledge no town board took any action at the Planning and Park Commission meeting. The votes by town boards to approve the county’s wind ordinance occurred later and are not voidable because of an earlier violation.

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We trust that, by pointing out this type of violation, we will encourage local officials to be more attentive to situations that might trigger the requirements of the Open Meetings Law.

Thank you for the opportunity to address these important issues.

Sincerely,

A handwritten signature in black ink that reads "Paul L. Barnett". The signature is written in a cursive style with a large, prominent initial "P".

Paul L. Barnett  
Assistant Attorney General

PLB:kw

c: William R. Powell, Esq.  
Attorney, Town of Two Creeks  
Mr. Michael J. Demske  
Director, Planning and Park Commission  
Mark R. Rohrer, Esq.  
District Attorney  
Ms. Char Peterson  
County Clerk  
Mr. Kenneth Duvenek  
Mr. Lee Engelbrecht  
Mr. Richard Heyroth  
Special Agent Deb K. Strauss