

**Christine Brennan**  
1004 Church Street  
Waupun, WI 53963

**Roseanne Kowal**  
110 East Cotton Street  
Fond du Lac, WI 54935

Complainants,

**FINDINGS OF FACTS AND  
CONCLUSIONS OF LAW**

**Councilmember Ben Giles**  
161 East Second Street, 4E  
Fond du Lac, WI 54935

Respondent.

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**FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

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The above matters were brought before the board due to complaints filed with the City Clerk's office on September 14, 2020 (Brennan) and October 12, 2020 (Kowal). After the board provided notice to Councilmember Giles concerning these matters, the board engaged in an investigation consisting of interviews conducted with eight witnesses, as well as a review of a plethora of documents and electronic communications. On November 12, 2020, the board made a determination of probable cause that Councilman Giles violated provisions of the City of Fond du Lac Ethics Code. At a hearing on December 19, 2020, all parties waived the time limits to conduct a hearing concerning the alleged Ethics Code violations. That hearing was conducted in open session on February 5, 2021. Based upon the evidence presented, the Board of Ethics makes the following findings of fact and conclusions of law:

When the Ethics Board determined it would initiate an investigation concerning allegations made against Councilman Giles, it focused on two specific activities and informed Mr. Giles that these would be the matters focused upon during its investigation:

- 1) Circumstances of CM Giles' appointment as the executive director of the Fond du Lac County Historical Society, including the salary he is to receive in that position, the funding for that salary, and the alleged connection between the increased donations to the Fond du Lac County Historical Society and support for the Lakeside Park Alternative Master Plan.

- 2) The nature of CM Giles' conversations with parties promoting the Lakeside Park Alternative Master Plan and the extent to which those conversations were revealed to fellow members of the City Council.

### **Appointment as executive director of the Fond du Lac County Historical Society**

This issue was the focus of the complaint filed against CM Giles by Christine Brennan on September 14, 2020. In her complaint, Ms. Brennan cited “an exceptionally large jump in [Historical Society] donations from 2017 to 2018.” She noted that Mr. Giles was hired as executive director by the Historical Society and that the president of the society’s board, Teresa Keenan, requested that donors shift of their capital improvement funding donations to operating funds, which funded Mr. Giles’ executive director salary, at the time Mr. Giles was hired. Ms. Brennan requested a look into the full list of donors in 2018, indicating that the circumstances “give reason to pause--a man who approached private entities about development in a public park...ends up being rewarded with a job funded by some of the very same people who will benefit from the proposed development.”

Indeed, the circumstances do give reason to pause and justified a review by the Ethics Board. However, our investigation did not establish that there was any kind of unethical link between the hiring of Mr. Giles as the Historical Society’s executive director, the increased donations to the Historical Society beginning in 2018 (two years before Mr. Giles was hired), the voluntary shifting of donations from the society’s capital improvement fund to its operating funds, and Mr. Giles advocacy on behalf of proponents of the Lakeside Park Alternative Master Plan (AMP).

The Historical Society did indeed have a significant uptick in its received contributions in 2018. In the recent years preceding, those contributions typically amounted to somewhat more than \$50,000 per year. In 2018, those contributions surged to over \$885,000. The following year, they exceeded \$1.1 million. All of these increases, however, occurred before Mr. Giles was associated with the society. Testimony and evidence received by the board indicates that fundraising efforts led by people associated both formally and informally with the board, were responsible for these significant increases. Since we have seen no evidence that this increase in contributions was in any way connected to Mr. Giles’ hiring as executive director, we cannot attribute these to any unethical behavior on his part, or on the part of anyone else.

Similarly, the circumstances of Mr. Giles’ hiring can indeed initially give reason to pause. But the evidence accumulated by and presented to the board indicates no unethical behavior by Mr. Giles in connection to this offer. The rapidness which Ms. Keenan displayed in hiring Mr. Giles seems likely as connected to serendipity as to any more concerning behavior. It does appear that Ms. Keenan in particular seemed highly motivated to offer the executive director’s job to Mr. Giles from the moment that she became aware of his availability on the evening of July 28, 2020. By the next day, she was emailing Rich Doyle and Lisa Lefebber (two other members of the Historical Society’s board of directors) to promote the idea. She reached

out to Mr. Giles by August 1 and met with him within days. Confirming his interest in the job, she quickly set out to line up financing with the society's two major contributors, the National Exchange Bank Foundation and J.F. Ahern Company. She persuaded both organizations to transfer 10% of their previously pledged contributions to the society from the capital improvement funds to the operating funds, explicitly stating that the funds would be used to pay the salary of an executive director. There is, however, no evidence in the record that either organization was aware of the identity of the anticipated new executive director. And there is no evidence that Mr. Giles was made aware of contributions by these organizations--both strong supporters of the AMP--prior to the time that he was offered the position of executive director. Additionally, Mr. Giles' strong support for the AMP was clear from the beginning of the movement to implement such a plan. He testified accordingly, and the public record of his position is clear. There was no *quid pro quo* between his hiring as Historical Society executive director and his support for the AMP because his support was already clear before the employment offer was made.

One can reasonably criticize the process in which Mr. Giles was offered employment by the Historical Society. It is clear that Ms. Keenan, who as president of the society's board, desired to hire Mr. Giles. She moved with extraordinary speed, after a vacancy in the position for several months, once she discovered Mr. Giles' availability. She and the society board never advertised the position, never recruited or interviewed any other candidates and never entertained the possibility of looking elsewhere for a director. This certainly reasonably creates suspicions about his selection. But those concerns cannot be visited upon Mr. Giles. There is no evidence that he was made aware of the contributors who shifted contributions to the operating funds to allow for payment of his salary, at least until the voicemail he received from Ms. Hoffman. As indicated, there is no direct evidence that those responsible for those contributions were made aware that it was Mr. Giles who was contemplated as the hire as executive director. Whatever motivations may have guided Ms. Keenan to focus on Mr. Giles to the exclusion of any other potential candidate for the position, they do not allow us to conclude that Mr. Giles engaged in unethical behavior to obtain the executive director's job. Additionally, the salary he receives, though considerably higher than any past salary he has earned, does not appear to be inconsistent with the position and appears to be the salary contemplated by the society board before the position was offered to Mr. Giles.

The board, however, is mindful that Mr. Giles and the community are now aware that contributors who financed his initial salary are prominent supporters of the AMP. Ms. Hoffmann's recommendation that Mr. Giles recuse himself from participation and votes on AMP issues was entirely appropriate. The fact that those who paid at least his initial annual salary as executive director, a salary some 30% higher than he had ever received, are vocal and prominent supporters of the AMP, creates circumstances that would "tend to impair independence of judgment or action in the performance of his official duties", as contemplated by Section 52-7(B) of the Fond du Lac Ethics Code. Accordingly, he should continue to recuse himself from debates and votes on the AMP so long as employed as Fond du Lac County Historical Society executive director, unless otherwise advised by the city attorney or through other legal advice

obtained through appropriate channels. Failure to do so could potentially amount to employment tending to impair independent judgment or action regarding that issue--or at least create such an appearance. To his credit, he has done so, with exceptions on September 23, 2020 that, while concerning to the board, appear to be minor. The board fully expects Mr. Giles to not participate in any action or vote that is connected to decisions concerning the AMP, including procedural decisions to allow consideration or votes on the substantive matter, unless he obtains legal directives through appropriate channels to the contrary.

This leads to the issue of Mr. Giles' actions to obtain legal advice from outside counsel. Councilman Giles testified that City Attorney Deborah Hoffman had called and left a voicemail indicating that his employment with the County Historical Society constituted a conflict of interest and required that he either decline the position with the Historical Society or resign from the City Council. He testified that subsequently Ms. Hoffman spoke with him and indicated that she no longer felt that he needed to give up one of the positions. He also testified that he hired and consulted outside counsel and received a contrary conclusion to those drawn by City Attorney Hoffman. However, during his testimony, Mr. Giles was not able to name the attorney with whom he had consulted, although later on during the hearing (when arguably not under oath) he was able to provide that identity after consulting his cell phone. Ms. Hoffman indicated that due to her obligation of confidentiality to her client, which would include Mr. Giles in his capacity as a councilman, she could not disclose her recollection of their discussions. Thus, the board is left with only Mr. Giles hearsay testimony about both the statements made to him by Ms. Hoffman and by his outside counsel.

While there were no objections made by either counsel when various hearsay statements were provided in testimony, which legally rendered those statements admissible, the board chooses not to give them any weight. When witnesses testify at a legal proceeding, they do so 1) under oath, 2) subject to cross examination, and 3) while their demeanor and credibility can be accessed by the fact-finder. Hearsay statements--simply put, statements made by someone not testifying--don't offer these important safeguards necessary to assess their accuracy. When a witness testifies that another witness said something, there is substantial risk that 1) the testifying witness may not accurately remember the statement, 2) the witness may not have fully understood the statement, or 3) the witness may be untruthful about the statement. Particularly when the hearsay statements are self-serving for the witness, their reliability comes into question. The situation here is compounded because Ms. Hoffman, as an attorney, is duty-bound to not reveal her confidential communications with a client. Mr. Giles made no offer to waive the confidentiality of those conversations, even though he testified to his version of them. This board has no authority to direct Ms. Hoffman to testify to those conversations absent a waiver of confidentiality by Mr. Giles. Accordingly, we give no weight to Mr. Giles testimony concerning confidential communications with either counsel. These hearsay statements provide the classic example of why hearsay is generally not admissible in court proceedings: it is unreliable.

A significant responsibility of the City Attorney is to provide legal advice and opinions to the council, both as a whole and to individual members in their capacity as council members. In

furtherance of that responsibility, Ms. Hoffmann advised both Mr. Giles and the City Council that Mr. Giles employment with the Historical Society would constitute a conflict of interest in connection with his participation on the council concerning the Lakeside Park Master Plan. Mr. Giles testified that initially, Ms. Hoffmann left him a voicemail telling him he needed to decline the position with the Historical Society or resign from the council. As noted above, this hearsay testimony had no verification and we therefore will not consider it in making our decision. What is clear from the record, however, is Ms. Hoffmann's written conflict of interest opinion to Mr. Giles and City Manager Joe Moore, dated August 26, 2020 and admitted at the board hearing as plaintiff's exhibit #7. That memorandum opined that Mr. Giles' Historical Society employment and his participation on matters concerning the Lakeside Park Master Plan created a conflict of interest.

Mr. Giles testimony demonstrated he disagreed with that conclusion. He indicated that he spoke with two attorneys, at least one of whom, according to his testimony, felt that Ms. Hoffmann's conclusion was incorrect. As indicated above, we give no weight to that hearsay testimony for the reasons we previously noted. But if Mr. Giles disagreed with Ms. Hoffmann's conclusion, he had alternative steps to take.

Section 52-9(B) of the City Code of Ethics clearly states that an elected official "may apply to the Ethics Board for an advisory opinion". Mr. Giles could have taken this step; he did not. Additionally, the City of Fond du Lac is a member of the League of Wisconsin Municipalities, an organization consisting of nearly 600 cities and villages. The League provides legal advice, making an attorney available by phone to "answer inquiries from member municipal officials and employees who are inquiring about matters within their official responsibilities". Moreover, Mr. Giles, Ms. Hoffmann or the council could request a formal legal opinion from the League (and Mr. Giles could request that Ms. Hoffmann make such a request). [www.lwm-info.org/101/Legal-Services](http://www.lwm-info.org/101/Legal-Services). There is no evidence that Mr. Giles sought to take this step either.

Section 52-4(B) of the City Ethics Code provides:

Elected and appointed officials should not exceed their authority, breach the law or ask others to do so, and they should work in full cooperation with other public officials and employees unless prohibited from so doing by law or by officially recognized confidentiality of their work.

We find that Mr. Giles has violated Section 52-4(B) of the Ethics Code. His actions in response to being advised that he should not participate in council debates and votes concerning the Lakeside Park Master Plan was to seek out private counsel, rather than utilize the normal process to review the opinion of the city attorney. In doing so, he effectively attempted to create a back channel to obtain an opinion favorable to his desired outcome. This not only creates the possibility of keeping fellow council members and city officials in the dark as to how he seeks to

proceed on this legal determination, it puts the city at risk of liability for missteps he may take in pursuing his desired outcome. The city carries and pays for liability insurance for coverage in the event that it, or a member or employee, engages in conduct that can generate legal action against it. If it, or any member or employee, does not follow required channels for resolving a legal issue, the city may not be covered by its insurer for actions taken.

Moreover, it would be irresponsible for Mr. Giles to rely on the apparent advice that he received from outside counsel because there is no indication that this outside counsel would have received complete information concerning the issues that Mr. Giles raised. The reason the city employs a city attorney's office is so that city members and employees can receive sound advice from attorney's familiar with municipal law and other legal matters facing municipalities. Part of the city attorney office's ability to provide sound recommendations is their staff's ability to access necessary information concerning the matters they are advising upon. Their staff can access relevant materials from the city records (including materials not available to the general public) and can consult with other members of city government. Private counsel frequently won't have access to those materials. As significantly, reliance on the advice of counsel who hears only one version of the story may be of limited value. For an individual in a private capacity, this may be satisfactory; for a municipal office holder, it is a risky strategy that creates the possibility of unreliable advice when the private attorney may not be fully apprised of all relevant information.

Governing, particularly in a legislative setting, is a team sport. Members have to follow the rules and work with one another. And when someone isn't sure about the rules, they need to ask. Mr. Giles, if unsatisfied with Ms. Hoffmann's opinion, needed to ask her, the city manager or the council what his next step should be. This failure to work with other public officials and employees puts the city at risk for liability. The city council consists of elected citizens who serve two year terms. They come from different backgrounds and experience. Some are steeped in knowledge about municipal government; others are not. But the city employs staff who do have necessary experience in their fields, including a day-to-day manager and a city attorney's office. It is important to work with them, rather than going off on one's own, if they have questions about their obligations, including--and especially--their ethical and legal obligations. His actions in this regard were beyond his authority and displayed a failure to work in full cooperation with other public officials and employees.

Councilman Giles asserted that he was unaware of certain ethical rules, including those contained in the City of Fond du Lac Ethics Code. His complaints are not unreasonable. Testimony from City Attorney Deborah Hoffmann confirms the dearth of training regarding ethics obligations provided to new city employees, and particularly, to new members of the Fond du Lac City Council. She indicated that her portion of training for new employees, or at least for new council members, consists of a half hour in which she explains ethical rules, open meeting requirements and open records obligations, devoting equal time to each. Mr. Giles recalled a particular emphasis on "walking quorums", an aspect of open meetings rules. This training is woefully inadequate, particularly for members of the body which holds ultimate legislative and

executive power for the city. Legal and ethical obligations are of paramount importance to transmit to members of the sole body in city government which possesses such authority. The city needs to increase the amount of time devoted to, and the importance of, its city's government's leaders understanding of their legal and ethical obligations. We do not fault Ms. Hoffmann for this lack of emphasis, but the city needs to provide more training to ensuring those who serve on the city council are adequately versed in their ethical obligations.

We do note, however, that Ms. Hoffmann does direct new council members to the internet website that accesses the city code, which is likewise available to the general public. Even were that not the case, council members have an obligation to the citizens they serve to familiarize themselves with the rules that those granted authority are required to observe. To allow an ignorance-of-the-law or of ethical requirements defense would only serve to encourage and reward indifference to these obligations. Public service, particularly in elected office, is not foisted upon anyone; it is a choice for any individual seeking such positions and the power those positions confer. Those whom are entrusted by the public with such authority must ensure that their actions meet the requirements of law. We emphatically reject any notion that Councilman's Giles ignorance of ethical rules provides any shelter from his ethical obligations to the citizens of this community. He was already in his second term of office when these issues arose. And, as indicated above, if he has questions about those rules, he needs to consult the appropriate parties.

#### **Conversations with promoters of Lakeside Park Alternative Master Plan/ disclosure of conversations to fellow members of the City Council**

The record from our investigation and from testimony at the public hearing on February 5, 2020, demonstrated that Councilman Giles met with "members" of the informal Fond du Lac area business leaders' group promoting the Lakeside Park Alternative Master Plan. These meetings, on most Mondays, occurred some 30 to 40 times in 2019 and 2020. He indicated that the city manager and the public works director also attended these meetings. Mr. Giles also testified to private conversations with business promoters and potential backers of the AMP. He further testified that he wasn't directed by the city council to engage in these meetings and didn't consistently report back to the council concerning these meetings and input provided to him and given by him at these meetings. This is the primary basis for the complaint filed against Mr. Giles by Roxanne Kowal.

Section 52-5(B) of the City Ethics Code provides:

Obligations to citizens. No elected or appointed official shall grant any special consideration, treatment or advantage to any citizen beyond that which is available to every other citizen.

By his own admission, Mr. Giles was never involved with nor did he have any significant contact with citizens who oppose the AMP. Mr. Giles has offered himself as an advocate of the AMP and testified to being approached by Larry Richardson in 2019 about a "grander

expansion” of Lakeside Park development. He strongly supported and voted in favor of shelving the Lakeside Park pavilion project, culminating in a February 12, 2020 resolution terminating the pavilion project in favor of the AMP. His position as a vocal proponent of the AMP was hidden from no one and was part of his campaign for the City Council.

The question is whether this activity, essentially meeting with one side only of a controversy and pushing that side’s agenda, while largely avoiding contact with opponents of that agenda, constitutes special consideration, treatment or advantage.

The term “consideration” carries a specific meaning in law. It is the inducement to entering a contract. A party receives X in return for providing Y. In the most typical version of a contract, a party is paid a fee in return for providing a service. There is no evidence in the record that Mr. Giles received something that could be regarded as legal “consideration”, e.g., payment or special favors, in return for his participation with and advocacy for promoters of the AMP.

However, given that the term “consideration” is coupled with “treatment” and “advantage” in Section 52-5(B), we cannot conclude that the term “consideration” is limited to the legal definition of the term. We would apply the term more broadly to include special regard, since that is consistent with the terms “treatment” and “advantage”.

In the broadest sense, Mr. Giles is clearly giving special regard--in essence, what consideration, treatment and advantage all amount to--to supporters of the AMP in comparison to its opponents. Yet to interpret the Ethics Code so broadly would seem to preclude the give-and-take between political office holders and those who support their political agenda, and conversely, to those whose agenda the office holder supports. There is no evidence of a *quid pro quo* between Mr. Giles and supporters of the AMP. Both counsel at the February 5 hearing made that assertion and there is no evidence that draws us to a contrary conclusion. Mr. Giles supports the AMP and gives more attention to its supporters than to its opponents.

Two of us on the board are troubled by this situation. The third member reasonably asks the question “Is this just the way it works?” Clearly, Mr. Giles advocates for one side of a controversy in this community and gives little attention to the other side. Yet to conclude that merely giving attention, even greater access to him, to supporters of one side of an issue, constitutes an ethical violation, without clearer directive from the language of the Ethics Code, is a step that we do not believe we can take. We do not believe that the language of the Ethics Code gives sufficient notice to those bound to its directives that this conduct, standing alone, amounts to an ethical violation. It occurs to us that this is the kind of issue that the voters should address: are they comfortable with Mr. Giles vigorous and vocal support for the AMP? Do they think that the attention he gives to the supporters of that plan is appropriate? Does he essentially ignore those who oppose the plan? It is up to the citizens of Fond du Lac to decide whether Mr. Giles approach to this issue, including focusing his contacts to supporters of one side of the



issue, earns their votes. We do not find that this behavior constitutes a clear violation of Section 52-5(B) of the Ethics Code.

### **Conclusion**

We unanimously find that Councilmember Ben Giles has engaged in conduct that violates Section 52-4(B) of the City of Fond du Lac Ethics Code regarding dedicated service. We also unanimously conclude that the evidence does not support a finding that Councilmember Giles violated Sections 52-5 (Fair and Equal Treatment) or 52-7 (Conflict of Interest). We leave the question of censure or other disciplinary action to the City Council and, ultimately, to the voters of this city.

Dated this 11th day of February, 2021.

/s/ Paul Czisny, Chair

/s/ Jeff Butz

/s/ Bojan Ljubenko