MEMO

TO: Village of Harrison

FROM: ACM

DATE: March 17, 2025

RE: Closed Session

At the February 25, 2025 Village Board Meeting, there was some discussion regarding a recent Court of Appeals decision, and its impact on acceptable topics that may be discussed in closed session. The Village Manager requested an opinion summarizing the decision and its likely impact on future Village Board meetings.

Specifically, the case raised by Trustee Lancaster was *State ex rel. Oitzinger v. City of Marinette & Marinette Common Council* (the opinion is subject to further editing, accordingly, there is no formal citation yet) 2025WI517875 (hereinafter "*Oitzinger*"). The *Oitzinger* case addressed a particular exception to the Open Meetings Law allowing a governmental entity to go into closed session for the purpose of "deliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session." Wis. Stat. §19.85(1)(e).

Incidentally, along with Wis. Stat 19.85(1)(g) (which allows a board to convene in closed session for the purpose of conferring with legal counsel to receive advice on matters that are in or are likely to be in litigation), §19.85(1)(e) is one of the two most commonly-invoked exceptions to the Open Meetings Law used by the Village Board.

In *Oitzinger*, the Court of Appeals found that the City of Marinette violated the Open Meetings Law (by invoking Wis. Stat. §19.85(1)(e) as an excuse for the common council to meet in closed session to discuss a proposed agreement with Tyco, but then engaged in discussions far beyond what was required for "competitive or bargaining reasons"). The Court of Appeals noted that the proposed agreement with Tyco had already been negotiated by the time that it was presented to the council in closed session so there was little need for closed door deliberations or negotiations. The Court acknowledged that the council could have discussed terms of a possible counteroffer in closed session, but there was no need to have the entire meeting in closed session.

The *Oitzinger* Court recognized that boards often want to discuss sensitive topics in closed session, and boards can sometimes find an exception under Wis. Stat. §19.85(1) that arguably allows portions of said meeting to be held in closed session. But *Oitzinger* cited an earlier case (*State ex rel. Citizens for Responsible Development v. City of Milton*, 2007 WI App 114, 300 Wis. 2d 649, 731 N.W.2d 640 (hereinafter "*Milton*")) to reiterate an important principal: <u>even if some parts of some meetings on a particular topic may be eligible for closed session, not all parts of all meetings concerning the same topic are eligible for closed session</u>. Indeed, under Wis. Stat. §19.85(1)(e), only the portions of a meeting where "competitive or bargaining reasons <u>require</u> a closed session" are eligible for closed session discussion. "Require" means situations where there is "no other reasonable alternative."

In most cases going forward, discussion of an agenda item should begin in open session, shift to closed session as necessary for competitive and bargaining reasons, and resume in open session when discussion of the competitive and bargaining issues have been exhausted.

The Village has historically complied with the requirement to begin all closed sessions in open session. Agendas typically state a permissible statutory exception to the Open Meetings

Law and a summary of the items to be discussed in closed session. The agenda verbiage is read aloud in open session, and the Board decides to go into closed session via role-call vote. *Oitzinger* suggests that a better practice would be to have a more-detailed discussion of the subject matter in open session first. This general discussion could occur before a motion to convene is closed session is made, or it could occur after a motion and second are made.

For example, in a negotiation with a developer over TIF incentive payments, the best practice might be to begin discussion of a proposed development in open session (this means, unfortunately, that Village staff may limited in its ability to honor a developer's request for confidentiality). When the discussion shifts to the permissible range of incentives that the manager is authorized to negotiate, perhaps the Board could go into closed session to discuss such ranges (e.g. "At this point in the discussion, I think we need to go into closed session so the Board can candidly discuss terms of a counterproposal to the developer's agreement"). But when the Board is ready to return to the merits of the development and developer's agreement, the Board would need to adjourn the closed session and return to open session to continue the conversation.

In some cases, a closed session may be agendized as a precautionary matter, but the Board may remain in open session if a valid reason to go into closed session is not articulated. For example, a closed session may be agendized to discuss a permissible range of development incentives, but if the board decides in open session that it is uninterested in entering into a developer's agreement in the first place, there would be no need to go into closed session to discussion the negotiation points.

In our opinion, the *Oitzinger* case addresses a very unique set of circumstances that are unlikely to be repeated in the Village. Adherence to *Oitzinger* won't necessarily change how the

Village Board invokes an exception to the Open Meetings Law, but it will require the Board to discuss non-essential topics in open session first and stay on topic while in closed session, limiting closed session discussion only to natters where "competitive or bargaining reasons require a closed session." And when in closed session, if the conversation begins to drift back to the merits of a proposal, the Board should return to open session to continue the discussion.

It is worth noting that there will always be room for interpretation and *Oitzinger* does not identify the exact point in a discussion where closed session becomes impermissible (it only says that Marinette went too far). Village staff and Board members may question the Village Attorney before and during meetings anytime an opinion is sought.

Andrew C. Micheletti
HERRLING CLARK LAW FIRM, LTD.
800 N. Lynndale Drive
Appleton, WI 54914
Phone: 920.739.7366
Fax: 920.739.6352