

## Advisory Opinion 10-01

### **Question Presented**

Do either (i) owners of property in Seattle's lowrise multifamily zones, or (ii) owners of Seattle rental properties constitute a substantial segment of Seattle's population, allowing Covered Individuals to participate in matters in which they have a financial interest?

### **Short Answer**

A substantial segment of the City's population – approximately one-third – owns property in Seattle's lowrise multifamily zones, so owners of such property may participate in matters that will affect property values in those zones. Landlords, however, are not a substantial segment of the City's population – approximately five percent of the City's population owns Seattle rental property – and therefore Covered Individuals who own Seattle rental property may not participate in matters affecting persons with an interest in rental property.

### **Facts**

A Covered Individual and his spouse own their primary residence as well as a second home in the City that they rent out. He and his spouse also own a 50 percent interest in an LLC that owns another rental property on his block. All three properties are in an area of the City zoned Lowrise 3.

#### *Lowrise Zoning*

Lowrise zones are intended to accommodate lower-scaled multifamily development, including single-family homes, townhouses, and apartments.

The City Council is presently at work on a comprehensive overhaul of the lowrise zones. According to an April 22, 2010 memorandum from Councilmember Sally Clark, the legislation as drafted will, among other things: (i) consolidate the five lowrise zones into three, (ii) tailor development standards for five housing types across the three zones, (iii) increase height limits for most housing types in most of the zones, (iv) use floor area ratio and density limits to control building size, (v) establish general design standards for all multifamily structures in lowrise zones, (vi) eliminate minimum parking requirement for multifamily uses in urban villages, (vii) make changes to the rules governing unit lot subdivisions.

According to the Department of Planning and Development (DPD), there are presently 85,567 housing units in Seattle's lowrise multifamily zones, which at an average family size of 2.1 means that approximately 180,000 residents live in lowrise multifamily zones.<sup>1</sup> The most

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<sup>1</sup> While there is not a perfect fit between the number of residents *living* in lowrise multifamily zones, and the number of Seattleites who *own property* in lowrise multifamily zones, the difference is likely marginal, and certainly insufficient to disturb the Commission's analysis.

recent U.S. Census estimate of Seattle's population is approximately 617,000, which means that approximately 29 percent of Seattle residents live in lowrise multifamily zones.

The Covered Individual would like to participate in the overhaul of the lowrise zones.

### *Rental Housing*

On June 1, 2010, the City Council passed Ordinance 123311, which requires that, as of June 2011, residential rental property owners obtain a license, and provides for periodic inspections of rental units. The City Council will set the fee for a residential rental business license by ordinance at a later date. The following types of rentals are excluded from the program: (i) rental units that a government unit, agency or authority owns, operates or manages, or that are specifically exempted from municipal regulation by State or federal law or administrative regulation; (ii) certain rental units that receive funding or subsidies from the federal, state or a local government; (iii) accessory dwelling units; and (iv) other types of housing units such as motels, nursing homes, and mobile homes.

DPD estimated that roughly 20,000 rental property owners would be subject to the licensing and inspection program, but acknowledges that this is a rough estimate. The Rental Housing Association, extrapolating from national data, estimates that there are approximately 30,000 owners of Seattle rental property. The most recent U.S. Census estimate of Seattle's population is approximately 617,000, which means that approximately 3.2 percent to 4.8 percent of Seattle residents own rental property.

The Covered Individual would like to participate in the development and implementation of the Residential Rental Business License and Inspection Program.

### **Relevant Ethics Code Sections**

Subsection a of SMC 4.16.070.1 provides as follows:

[A Covered Individual may not p]articipate in a matter in which any of the following has a financial interest...: (i) the Covered Individual; (ii) an immediate family member of the Covered Individual; (iii) an individual residing with the Covered Individual; (iv) a person the Covered Individual serves as an officer, director, trustee, partner or employee; (v) a person with which the Covered Individual is seeking or has an arrangement concerning future employment.

Subsection d creates the following exception to this prohibition: "Sections 4.06.070.1.a... shall not apply if the prohibited financial interest is shared with a substantial segment of the City's population."

## Analysis

The Covered Individual has a financial interest in both matters. The zoning changes will impact the fair market value of his properties, and the rental housing inspection program has a license fee that the Covered Individual will have to pay. The existence of the rental housing inspection program will likely also impact the fair market value of the two rental properties in which the Covered Individual owns an interest.

The question for the Commission then is whether the Covered Individual's financial interest is "shared with a substantial segment of the City's population," thus enabling the Covered Individual to participate in these matters. This provision was added to the Code last year, and this is the first time the Commission has issued an advisory opinion on its application.

The exception clearly applies to matters such as setting the City's sales and property tax rates, which plainly affect "a substantial segment of the City's population." It would be absurd to disqualify Covered Individuals who own property in the City from setting property tax rates, and the fact that a strict reading of the Ethics Code prior to last year's amendments animated the Commission's recommendation that the City Council create this kind of exception.

This case poses the more difficult question, and one that the Commission expressly contemplated addressing through the advisory opinion process; namely, when does a Covered Individual's financial interest, though widely shared, nevertheless fall short of qualifying for the exception.

We do not write on a blank slate, but have other sources of law on which to draw. The Federal Trade Commission Act empowers the Federal Trade Commission (FTC) to act on a finding that a "substantial number" of consumers have been deceived by an advertisement. In 1973, the Sixth Circuit Court of Appeals affirmed an FTC order, writing "We find it hard to overturn the deception findings of the Commission if the ad thus misled 15% (or 10%) of the buying public." In contrast, in 1985, the FTC ruled that proof that two to four percent of consumers had been misled by an ad was "patently insubstantial" proof of a violation. *In re Bristol Myers* 85 FTC 688, 744-45. In addition, Massachusetts' Ethics Code, which contains a similar exception, has been interpreted by that State's Ethics Commission to permit individuals to participate in matters in which they have a financial interest whenever the official or employee's financial interest is shared with more than 10 percent of the locality's population. EC-COI-92-34.

It would be premature for the Commission to adopt a bright line test at this time. We are persuaded, though, that the exception applies to the Covered Individual's participation in matters affecting his financial interest in the City's consideration of lowrise zoning changes, but that it does not apply to his financial interest in the City's consideration of a rental housing inspection program. Thirty percent of the City's population is a "substantial segment," while less than five percent is not sufficient.

Two points which are implicit in the Commission's opinion merit being made explicit. First, the Commission has not deemed relevant the *degree* of the Covered Individual's financial interest in these matters. The Covered Individual has an interest in three properties in the lowrise zone. Other residents will have an interest in more properties, while others will have an interest in fewer properties. The Commission reads the Ethics Code to apply to shared interests, and not to require that the Covered Individual's interest be precisely the same as the interests of other residents.<sup>2</sup> Second, the Commission notes that determining the size of the City's population with a financial interest in a matter will likely, as it did in this case, involve some good faith estimating. If experience shows that the Commission's determination is in error – if, for example, the number of individuals who ultimately register as residential landlords turns out to exceed the Commission's estimate – we will reconsider our determination.

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<sup>2</sup> To take another example, in setting property tax rates, the fact that one covered individual's property was assessed at \$200,000 while another's property was assessed at \$2,000,000 would not be relevant to the determination that both may participate in the City's decisions regarding property tax rates. The relevant fact is that both will pay property taxes. The fact that one will pay ten times more does not work to require that either or both individuals disqualify themselves from the process.