

# Memo

To: Commissioners

From: Wayne Barnett

Date: July 16, 2013

Re: Bench Memo Concerning Councilmember Bagshaw's Opinion Request

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## **I. Introduction**

The City is considering creating a local improvement district (LID) to fund possible public improvements in the downtown central waterfront area. Councilmember Sally Bagshaw has for many years owned and lived in a condominium located within the likely boundaries of a potential LID.

Councilmember Bagshaw asked the Commission to issue an advisory opinion regarding the extent to which her ownership of the condominium might impact her ability under the Ethics Code to continue to be active in waterfront redevelopment issues in general and LID issues in particular.

The Commission in turn asked the Executive Director to provide a memo summarizing the issues under the Ethics Code. This memo summarizes: 1) the relevant facts; 2) the applicable provisions of the Ethics Code; 3) a suggested analytical framework the Commission might use to answer Councilmember Bagshaw's questions; 4) an SEEC opinion applying those SMC provisions; and 5) several court cases applying other conflict of interest laws.

## **II. Summary of Facts**

### **A. Local Improvement Districts**

A LID is a tool to fund public improvements. Improvements funded through a LID must be public improvements on public property. As a result, there will typically be some general public benefit from any LID improvement. Although the benefit of the improvement must be public to support special assessments, the improvements must also be local as opposed to purely general. In order to be assessed to pay for part or all of the improvements, properties within the local improvement district must be "specially benefitted" by those local improvements. "The amount of the special benefits attaching to the property, by reason of the local improvements, is the difference between the fair market value of the property immediately after the special

benefits have attached, and the fair market value of the property before the benefits have attached.” *In re Schmitz*, 44 Wn.2d 429, 434, 268 P.2d 436 (1954).

Formation of an LID is a legislative action. RCW 35.43.040; *Abbenhaus v. City of Yakima*, 89 Wn.2d 855 (1978); *see also State ex rel. Frese v. City of Normandy Park*, 64 Wn.2d 411 (1964); *Forsgreen v. City of Spokane*, 28 Wn. App. 919, *review denied*, 95 Wn.2d 1029 (1981). The City Council, by resolution initiates creation of an LID. Once notice has been provided, a hearing conducted and all statutory requirements adhered to, the City Council then may create a LID and order the improvements through passage of an ordinance. RCW 35.43.140, 35.43.070. The ordinance establishing the LID will contain a variety of elements, including a description of the improvements and the district boundaries, among others. RCW 35.43.080

After the statutorily required notice is provided, the City will conduct a hearing on the final assessment roll. RCW 35.44.070, RCW 35.44.100. When considering the final assessment roll, the Council and selected hearing officer sits as a board of equalization and acts in a quasi-judicial capacity. RCW 35.44.080. As a result, the hearing examiner and City Council members will be subject to the appearance of fairness doctrine. The City Council makes the final decision, even when a hearing examiner conducts the final assessment hearing. RCW 35.44.070. Once the LID is established and the assessments are fixed, future Council actions about the project will not affect these assessments.

## **B. The Proposed Seattle Central Waterfront Local Improvement District**

The City of Seattle has not yet formally described the “improvements” for a waterfront LID or established its geographic boundaries. That will not occur until the City Council establishes a LID by legislative action.

## **C. Councilmember Bagshaw’s Circumstances<sup>1</sup>**

Councilmember Sally Bagshaw has been active in a large variety of downtown and waterfront issues both before and after she was elected to the City Council. She has lived in a condo located at First and Spring since 2000. She and her husband have owned a condo there since 2001. The current assessed value of the 1000 square foot condominium is \$422,000. She anticipates the condo will be within the geographic boundaries of a potential LID. There will be about 10,000 parcels within the LID and that the total assessed value of those properties is in the range of \$20 billion.

## **D. Councilmember Bagshaw’s Questions**

She asks to what extent she can continue to participate in a variety of matters related to downtown redevelopment and the proposed LID, including matters such as:

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<sup>1</sup> Most of this information is taken from Councilmember Bagshaw’s May 31, 2013 letter to the Commission, attached as Appendix A.

1. the formation of the LID and the selection of the public improvements to be funded in whole or in part through the LID;
2. establishing the total dollar amount of the LID, its geographic boundaries, and the assessment methodology;
3. establishment of the relative weight assessments within the LID;
4. LID related matters after the LID is in place;
5. the design of the improvements to be funded in whole or in part by the LID;
6. Council’s ongoing oversight role once implementation begins; and,
7. other improvements located along the waterfront not funded by a LID.

She also asks what limits if any the Ethics Code places on her activities as a private citizen, and how she might avoid public confusion about those activities.

### **III. The Seattle Ethics Code**

“A covered individual may not participate in a matter in which [the covered individual] has a financial interest.” Seattle Municipal Code § 4.16.070.1.a. However, Section 4.06.070.1.d provides that Section 1.a “shall not apply if the prohibited financial interest is shared with a substantial segment of the City’s population.”

### **IV. Suggested Analytical Framework**

In analyzing conflict of interest issues, we have found it helpful to ask a series of questions.

#### **A. Issues**

1. Is the person a “covered individual”?
2. Does the person’s action or proposed action constitute “participation” in a City “matter”? "Participate" means to consider, investigate, advise, recommend, approve, disapprove, decide, or take other similar action. "Matter" means an application, submission, request for a ruling or other determination, permit, contract, claim, proceeding, case, decision, rulemaking, legislation, or other similar action. Matter includes the preparation, consideration, discussion, or enactment of administrative rules or legislation. Matter does not include advice or recommendations regarding broad policies and goals.<sup>2</sup>
3. Does the individual have a financial interest in the matter? “Financial interest” is not a defined term in either the Code or Commission rules.

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<sup>2</sup> SMC 4.16.030

4. If so, is the financial interest shared by a “substantial segment of the City’s population” (also not a defined phrase).

## **B. Discussion**

1. **Covered individual.** That is not an issue here. As an elected City official, Councilmember Bagshaw is a covered individual.

2. **Participation in a City matter.** Legislative actions such as forming a LID are City matters. City Council post-LID actions and actions related to downtown non-LID projects are also City matters unless they are merely “recommendations regarding broad policies and goals.” Participating in Council discussions, consideration, and votes regarding the LID, related post-LID matters, and other non-LID projects would therefore constitute participation in City matters.

However, Councilmember Bagshaw’s last question regarding her potential activities as a private citizen may not, depending on the circumstances, involve participation in a City matter.

3. **Financial interest.** The Code does not define financial interest. Possible financial interests could include: 1) an impact on the fair market value of Councilmember Bagshaw’s property; or 2) an impact on the amount of a LID assessment that would be applied to Councilmember Bagshaw’s property.

4. **Exception for financial interests shared by a “substantial segment of the City’s population.”** Even if the covered individual has a financial interest that would otherwise disqualify him or her from participating in a matter, the prohibition would not apply if the interest is shared with a substantial segment of the City’s population. A “substantial segment of the City’s population” is also not a defined term.

## **V. Commission Advisory Opinion 10-01**

Commission Advisory Opinion 10-01 discusses both what constitutes a financial interest and when a financial interest does not require disqualification because it is shared by a substantial segment of the City’s population.<sup>3</sup>

### **A. Financial Interest**

The Commission considered two separate legislative proposals in that opinion. The first matter was a proposed overhaul of the City’s zoning code that applies to low-rise multifamily zones. The second matter was a proposed residential rental property licensing ordinance that would create a license fee for owners of covered residential rental property.

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<sup>3</sup> Advisory Opinion 10-01 is attached as Appendix B.

The Commission decided that the covered individual had a financial interest in both matters. The covered individual had a financial interest in the proposed multi-family zoning ordinance because it would impact the fair market value of property he owned. The Commission also decided he had a financial interest in rental housing inspection program because it included a licensing fee he would have to pay because he owned rental property subject to the fee. The Commission also stated that the rental inspection program will likely also impact the fair market value of the two rental properties in which the Covered Individual owns an interest.

The Commission has never considered whether a LID assessment constitutes a financial interest. It is up to the Commission to determine whether Councilmember Bagshaw has a “financial interest” in the various categories of possible actions she describes in her questions.

### **B. Substantial Segment**

Staff could locate only one SEEC advisory opinion interpreting or applying that language. In that same Advisory Opinion 10-01 the Commission also considered the applicability of the exception to the two separate matters.

The Commission concluded that the covered individual’s financial interest in the zoning legislation was shared with a substantial segment of the City’s population because approximately 29% of the City’s population lived in low-rise multi-family zones.

The Commission concluded that the covered individual’s financial interest in the residential rental business license fee was not shared with a substantial segment of the City’s population because only about 3.2% to 4.8% of Seattle residents own rental property.

It is up to the Commission to determine whether any identified financial interest in the various matters presented by Councilmember Bagshaw’s questions fall within the SMC exception language.

## **VI. Commission Advisory Opinion 96-03**

Instructive in analyzing non-LID waterfront projects is Advisory Opinion 96-03. In that Opinion this Commission reviewed whether some of the nine members of the Pioneer Square Preservation Board could participate in review of any of the three sites selected by the Public Facilities District for the location of a new baseball stadium, which later became Safeco Field. Five members owned property near one of the sites. The Commission concluded that members who owned property near one of the sites could not comment on the decision to locate at that particular site.<sup>4</sup>

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<sup>4</sup> Advisory Opinion 96-03 is attached as Appendix C.

## VII. Case Law

Many jurisdictions' ethics laws contain some type of exception for widely held financial interests. Courts have also implied such an exemption in several cases. We could, however, not locate any case law in Washington or elsewhere that applied language similar to the SMC's exemption for financial interests shared with a "substantial segment of the (jurisdiction's) population".

### A. Case Summaries

In order to inform the Commission's discussion, we have included summaries of several court cases.<sup>5</sup>

#### 1. Washington Case Law Regarding Conflicts of Interest

Generally, courts will not interfere with the functions of a legislative body in passing a law; however, once the law or ordinance has passed, courts have the power to inquire into the validity of such a law when its enforcement threatens citizens' personal and/or property rights. *Smith v. Centralia*, 55 Wn. 573, 576, 104 P. 797, 798 (1909). In this case, Centralia City Council passed an ordinance purporting to vacate a part of a city street. The petition did not indicate that the street was not used by the public, it did not indicate a public necessity for the vacation of the street, nor did it provide for compensation to property owners whose property would be taken or damaged. *Id.* at 574, 104 P. at 797. One of the petitioners for the vacation was a city council member who owned property on the street that would be enlarged by the action. *Id.* The city council voted in favor of the ordinance's passage in a 4-3 vote, with the councilman's vote playing a decisive role. *Id.* Property owners on the street challenged the action, on the basis that their property would be damaged by the vacation. *Id.*

Centralia's Code of Ethics provides that a city employee has a conflict of interest if the employee "Has a financial or personal interest in any legislation coming before the city council and participates in discussion with or gives an official opinion to the city council unless the employee discloses on the record of the council the nature and extent of such interest." 2.48.040(G).

The Supreme Court of Washington held that the manner and proceedings in which the ordinance was exercised did not comply with municipal law, thus invalidating the ordinance. *Smith*, 55 Wn. at 577, 104 P. at 799. Furthermore, the property owners who challenged the action suffered "an injury which is not common to the public," allowing the court to invalidate the legislative action. *Id.* at 576, 104 P. at 798. The court reasoned that the rights of property owners on the street differ from the rights of those who use the street for passage. *Id.* at 575, 104

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<sup>5</sup> Thanks to Seattle City Attorney Office intern Megan Moser for her work researching and summarizing the case law.

P. at 798. Lastly, the court held that the ordinance was also invalid due to the participation of the councilman who owned property on the street and who stood to receive a benefit from the vacation. *Id.* at 577, 104 P. at 799. The court found this to be a conflict of interest, and the councilman’s deciding vote was *void. Id.*

## **2. Case Law from Other Jurisdictions Regarding Conflicts of Interest**

### **a. Case Law Where Interest Would Not Disqualify Participation**

A majority of courts have held that property ownership within a proposed local improvement district does not disqualify a city council member from participating in the formation of the LID or in assessing property levies. *Simmons v. City of Moscow*, 111 Idaho 14, 18, 720 P.2d 197, 201 (1986). Courts support this rule when (1) the same benefits and assessments are accrued to all property owners in such a district, and (2) there is no showing of fraud or bias on behalf of the councilmember.

#### **i. When the Same Benefits are Accrued to All Property Owners in the District**

Courts support the general rule that property ownership does not disqualify a city council member from participating in the formation of a LID and determining property assessments, when it can be supported by the fact that the same benefits will be accrued to all property owners in the area. *Id.* In *Simmons*, several city council members owned property in the downtown business district of Moscow. This location was the same area where the city council had passed a resolution to create a local improvement district, and property assessments were to be made in proportion to the benefit derived by the improvements. *Id.* at 16, 720 P.2d at 199. Moscow’s Public Service Handbook adopted the Idaho Ethics in Government Act, declaring that “A public official shall not take any official action or make a formal decision or formal recommendation concerning any matter where he has a conflict of interest.” Idaho Code Ann. § 59-704 (West 2013). A conflict of interest, according to the Idaho Code, is defined as:

any official action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit of the person or a member of the person’s household or a business with which the person or a member of the person’s household is associated.

§ 59-703(4).

Section (4)(d) creates an exception to a disqualifying interest when the pecuniary benefit arises out of “any action by a public official upon any revenue measure, any appropriation measure or any measure imposing a tax, when similarly situated members of the general public are affected by the outcome of the action in a substantially similar manner and degree.”

Based on the exception in Section (4)(d), the Supreme Court of Idaho held that council members cannot be disqualified based on their property ownership, because the members would be beneficiaries and pay assessments, along with the other similarly situated property owners in the district. *Simmons*, 111 Idaho at 18, 720 P.2d at 201. The court used three principals to support this holding: (1) to the extent that any assessments are levied, the councilmember must pay for the assessments, along with the other property owners; (2) the council member is not the sole beneficiary of the improvements; and (3) disqualification of public officials who own property in such an area could inhibit a necessary quorum or majority to perform legislative functions.<sup>6</sup> *Id.*

In *Story v. City of Macon*, an ordinance was passed by Macon City Council for paving improvements on a particular street in the city. 205 Ga. 590, 591, 54 S.E.2d 396, 397 (1949). A city councilmember owned property on the street that was to be the subject of the new paving ordinance. *Id.* at 594, 54 S.E.2d at 399. The Georgia Code states that “it is improper and illegal for a member of a city council to vote upon any question, brought before the council, in which he is personally interested.” Ga. Code Ann. § 69-204. The term ‘personal interest’ of the Georgia Code likely includes pecuniary interests, based on the discussion of the case.

The facts of *Story* indicate that the paving improvements would increase property values in the area by 10-20%, constituting a personal and financial interest on behalf of the councilmember. *Story*, 205 Ga. at 594, 54 S.E.2d at 399. Petitioners sued to enjoin the repavement of the street, claiming the councilmember’s vote was invalid due to his interest in the property. *Id.* The court concluded that the action of the city council was made in a legislative capacity. *Id.* Furthermore, the court held that the benefits accrued to the councilmember would be the same benefits accrued to all property owners in the area, concluding that the interest did not disqualify him from voting on the improvement. *Id.*

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<sup>6</sup> “In the event of a challenge to a member or members of a decision-making body which would cause a lack of a quorum or would result in a failure to obtain a majority vote as required by law, any such challenged member(s) shall be permitted to fully participate in the proceeding and vote as though the challenge had not occurred, if the member or members publicly disclose the basis for disqualification prior to rendering a decision. Such participation shall not subject the decision to a challenge by reason of violation of the appearance of fairness doctrine.” RCW 42.36.090

Under RCW 42.36.090, the doctrine of necessity allows an individual to continue participating as a member of a legislative body when there is a conflict of interest, so long as the individual has declared the conflict prior to participating. Therefore, the individual’s disqualification yields to necessity to obtain an established quorum. *Jackstadt v. Washington State Patrol*, 96 Wn.App. 501, 516, 976 P.2d 190, 198 (1999).

The doctrine of necessity is applicable where the majority of a city council is prejudiced. *Kennett v. Levine*, 50 Wn.2d 212, 220, 310 P.2d 249 (1957).

Additionally, courts have held that when city employees receive no additional benefits than those of other property owners, the conflict of interest is mitigated and does not prevent the employee from participating in the matter. *Bullock v. City of Ashland*, 241 Or.App. 378, 383, 250 P.3d 947, 950 (2011). In this case, the Ashland City Council ordered the formation of a LID for sidewalk and traffic improvements on a particular street. *Id.* at 380, 250 P.3d at 949. The LID included the surrounding neighborhood and the homes north of the street. *Id.* The public works director, who was assigned the task of putting together the LID, owned property in the proposed area and was found to have a conflicting interest as defined in the Oregon Revised Statutes. *Id.* at 381, 250 P.3d at 949. The relevant provision declares that “An elected public official...shall when met with an actual conflict of interest, announce public the nature of the actual conflict and...refrain from participating as a public official in any discussion or debate on the issue out of which the actual conflict arises or from voting on the issue.” Or. Rev. Stat. § 244.120(2)(b).

Property assessments were to be made in the improvement district in proportion to the benefits derived from the improvements. *Bullock*, 241 Or.App. at 381, 250 P.3d at 949. The city of Ashland argued that the conflict had been mitigated by the fact that the director was part of “the class that all equally received the benefit,” and she did not benefit financially from her ownership as a result of her position within the city. *Id.* at 383, 250 P.3d at 950. Although the Oregon statute does not provide an exception for a disqualifying interest that is shared with a significant portion of the city’s population or with the general public, the court appears to have imputed such an exception. The circuit court of Jackson County agreed with the city, based on a further determination that the director did not receive any benefits or considerations beyond those available to other citizens in the area. *Id.* at 384, 250 P.3d at 951.

## **ii. When there is an Absence of Fraud or Bias on the Part of the Public Official**

Generally, when legislative action is involved, rather than quasi-judicial action, the motives of city council members will not be subject to judicial scrutiny. *City of Miami Beach v. Schauer*, 104 So.2d 129, 132 (Fla. Dist. Ct. App. 1958). In this case, the city council of Miami Beach passed an ordinance that amended the city’s comprehensive zoning ordinance. *Id.* at 130. One of the affirmative votes for the amendment was made by a councilman who had an ownership interest in a property that was to be increased in value by at least \$500,000 as a result of the ordinance. *Id.*<sup>7</sup> The district court of appeal determined that the issue relied upon whether

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<sup>7</sup> No relevant local code of ethics for Miami Beach or Florida for the time period was located. However, a current Florida statute states that “A *state* public officer may not vote on any matter that the officer knows would inure to his or her special private gain or loss.” Fla. Stat. Ann. § 112.3143(2)(a). Additionally, the statute addresses factors that may be of interest in determining an economic benefit: “Special private gain or loss means an economic benefit or harm that would inure to the officer...unless the measure affects a class that includes the officer...,in which case at least the following factors must be considered when determining whether a special private gain or loss exists: 1) The size of the class affected by the vote; 2) The nature of the interests involved; 3) The degree to which the

the councilman partook in fraudulent action or acted with bias, and whether passage of the ordinance was made in a legislative or quasi-judicial capacity. *Id.* at 131. Because the court found that the city council was acting in a legislative capacity, and there was an absence of fraud on the part of the councilman, his vote was not ruled invalid and the action was upheld. *Id.* at 133.

Similarly, the Court of Appeals of Ohio held that owning real estate within an improvement area where properties are to be assessed, alone, does not disqualify a public official, where no bad faith or fraud has been alleged. *Burton v. City of Middletown*, 4 Ohio App.3d 114,117, 446 N.E.2d 793, 798 (1982). In this case, improvements were to be made for the installation of curbs, gutters, and storm sewers on a particular street, and the affected properties were to be assessed accordingly. *Id.* at 114, 446 N.E.2d at 795. The chairman of the city commission owned property that would become subject to assessments for the installation of the street improvements. *Id.* at 117, 446 N.E.2d at 798. The court upheld the dismissal of the conflict of interest claim, based on the fact that there was no evidence of bad faith or fraud on behalf of the commissioner. *Id.*<sup>8</sup> Owning the property, itself, was not a sufficient interest to disqualify the chairman, and he was allowed to participate in the city project. *Id.*

Typically, courts will hold that a municipal officer should be disqualified from proceedings in which the person has an immediate or direct personal or pecuniary interest. *Christman v. Zoning Hearing Bd. of the Twp. of Windsor*, 854 A.2d 629, 633 (Pa. Commw. Ct. 2004). However, when the municipal officer is acting in a quasi-judicial capacity, there must be evidence of “bias, prejudice, capricious disbelief, or prejudgment” before requiring the officer to disqualify himself. *Id.* The Pennsylvania Public Official and Employee Ethics Act states that, “no public official or public employee shall engage in conduct that constitutes a conflict of interest. A conflict of interest is defined as use by a public official or public employee of the authority of his office or employment for...the private pecuniary benefit of himself.” § 1103(a) (1998). Such a conflict of interest, however, does not include “an action having a de minimis economic impact or which affects to the same degree a class consisting of the general public or a subclass...which includes the public official.” *Id.*

The *Christman* case involved an amendment to the township’s zoning ordinances that created a new agricultural preservation zoning district. 854 A.2d at 632. Landowners in the new zone appealed the ordinance amendment to the Zoning Hearing Board. *Id.* Two members of the ZHB owned property within the new agricultural zone and were requested by the landowners to recuse themselves from the matter because their ownership would affect the zoning ordinance. *Id.* at 633. The two members stated they could act on the matter in an unbiased manner and declined to recuse themselves. *Id.* at 632. The court found the zoning board’s action to be quasi-

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interests of all members of the class are affected by the vote; and 4) The degree to which the officer...receives a greater benefit or harm when compared to other members of the class.” Fla. Stat. Ann. § 112.3143(1)(d).

<sup>8</sup> No relevant ethics code for the city of Middletown or a general code for public officials in Ohio was located.

judicial, but could not conclude that any of the board's members had acted with bias or prejudice on the matter, and thus, invalidation of the ordinance was unwarranted. *Id.* at 634.

### **b. Case Law Where Interest Would Disqualify Participation**

Generally, a city councilmember is disqualified from voting on an issue in which the person has a direct or indirect interest. *Schumacher v. The City of Bozeman*, 174 Mont. 519, 529, 571 P.2d 1135, 1141 (1977). However, not every interest of a public official will be considered to disqualify him. *Id.* Courts have held that the decision as to whether a particular interest is sufficient to disqualify a public official is a factual one and is dependent upon the circumstances of the particular case. *Aldom v. Borough of Roseland*, 42 N.J.Super. 495, 503, 127 A.2d 190, 194 (1956). Such interests that are considered for disqualification include (1) a personal interest that differs from the public or (2) a financial interest that will have a foreseeable material effect on the public official's income.

#### **i. When An Interest Differs From the General Public**

Courts have held that a personal or private interest that may disqualify a public official is generally identified as one which is "different from that which the public officer holds in common with members of the public." *Id.* at 507, 127 A.2d at 196.

In *Schumacher v. The City of Bozeman*, the city commission passed a resolution that created a special improvement district to establish an off-street parking facility in Bozeman's downtown area and adopted a formula to assess the improvements. 174 Mont. at 522, 571 P.2d at 1137. The city commissioner owned business property within the boundaries of the district. *Id.* at 528, 571 P.2d at 1140. Before the creation of the improvement district, the commissioner applied for a building permit to remodel his property, but was denied because he did not provide the required number of parking stalls. *Id.* After the resolution to form the district was passed, the commissioner brought an appeal to the Board of Adjustment, and a variance was approved for fewer parking stalls at his business property. *Id.* The commissioner had a conflict of interest under the Bozeman Code of Ordinances, which states that:

No official or employee shall have a financial or personal interest, tangibly or intangibly, in any transaction with the city as to which such official or employee has the power to take or influence official action unless full public disclosure is made. An official or employee having such a financial or personal interest shall not engage in deliberations concerning the matter, shall disqualify himself/herself from acting on the matter, and shall not communicate about such matter with any person who will participate in the action to be taken on such matter.

§ 2.03.520.B (2012).

The Bozeman Code defines a ‘financial interest’ as one which will result “in a monetary or other material benefit that has a value of more than fifteen dollars,” while a personal interest is one that would affect the official’s action in a manner other than a financial interest. § 2.03.470.A.10.

The Supreme Court of Montana held that disqualification is warranted when a public official is placed in a situation of temptation to serve his own purposes based on his personal interest in the matter. *Schumacher*, 174 Mont. at 529, 571 P.2d at 1141. The councilman’s interest in the appeal before the Board of Adjustment, which was related to his property and the project, sufficed as an interest different from that of the “ordinary citizen.” *Id.* at 530, 571 P.2d at 1141.

In *McNamara v. Borough of Saddle River*, a zoning ordinance was adopted that provided for the regulation of private and parochial schools located in residential zones. 60 N.J.Super. 367, 370, 158 A.2d 722, 723 (1960). A councilman owned property that was in the vicinity of a proposed school, which was subject to an amendment of a zoning ordinance. *Id.* at 371, 158 A.2d at 724. Prior to the ordinance’s passing, the councilman participated in litigation against the location of the proposed school because of the threat to property value of the land in the area and the harm to the owners’ enjoyment of the land. *Id.* at 373, 158 A.2d at 725. The New Jersey Code of Ethics for Local Government Officers provides that “No local government officer or employee shall act in his official capacity in any matter where he...has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.” N.J. Stat. Ann. § 40A:9-22.5.

The Superior Court found that the city council’s exercise of its zoning power was a quasi-judicial action, which can be invalidated when an interested public official has participated through personal involvement. *Id.* at 376, 158 A.2d at 726. The court held that a disqualifying interest is “not such an interest as he has in common with all other citizens or owners of property.” *Id.* at 378, 158 A.2d at 728. Because of his involvement in prior litigation against the proposal, the court held that the councilman was motivated by a personal interest not shared with the general public when he voted to adopt the restrictive ordinance. *Id.* at 379, 158 A.2d at 728.

Courts have also held that acting in a dual capacity as a public official and as an employee of a company who has a particular interest in a zoning matter suffices as a disqualifying interest that differs from that of the public: “no man can serve two masters whose interests conflict.” *Aldom*, 42 N.J.Super. at 502, 127 A.2d at 194. The city enacted a zoning ordinance that established five use districts, including additions to an industrial zone. *Id.* at 498, 127 A.2d at 192. Prior to the changes, a company in the city requested a rezoning from the city council of some of its acreage to be industrial use, but was declined three times. *Id.* One of the city council members was also an employee of the company, and petitioners argued it was unethical for the councilmember to vote on the rezoning ordinance because of the interest the company had in the outcome. *Id.* at 500, 127 A.2d at 192.

The court held that the councilman's vote to adopt the ordinance was invalid based on a New Jersey statute (that has since been amended), stating that "No member of a planning board is permitted to act on any matter in which he has, either directly or indirectly, any personal or financial interest." N.J. Stat. Ann. § 40:55. Additionally, the court found that the disqualifying interest does not have to be a direct pecuniary one, but one that places the councilman in a substantial conflict with their proper duties, such as loyalty to one entity. *Aldom*, 42 N.J. Super. at 507, 127 A.2d at 196. Because of the official's duty of loyalty to the company that employed him, his thinking was "pervaded," and he was disqualified from acting on the zoning ordinance. *Id.*

## ii. When There Is a Foreseeable Material Effect on Income

The California Court of Appeal, Second District, held that the test for a financial conflict of interest is whether it is "reasonably foreseeable that the adoption of a plan would have a material financial effect" on the public official's property and business. *Downey Cares v. Downey Cmty. Dev. Comm'n*, 196 Cal.App.3d 983, 991, 242 Cal.Rptr. 272, 276 (1987).

In this case, the City of Downey adopted a redevelopment plan that encompassed several hundred acres of property, passed by a three-to-two vote. *Id.* at 987, 242 Cal.Rptr. at 274. One city councilmember, whose affirmative vote was necessary for passage, owned five properties and a real estate business in the project area. *Id.* at 988, 242 Cal.Rptr. at 274. The court found that the property ownership created a conflict of interest for the councilmember, as defined by the Political Reform Act of California. *Id.* at 991, 242 Cal.Rptr. at 277. "No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." Political Reform Act: Fair Political Practices Commission § 87100 (Cal. 2013). An official has such a financial interest in the decision "if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally." § 87103.

In its ruling, the court drew reasonable inferences that the redevelopment plan would foreseeably increase property values and realtor income, directly affecting the councilmember in a manner distinguishable from the general public. *Downey Cares*, 196 Cal.App.3d at 992, 242 Cal.Rptr. at 277.

An Alaska Supreme Court case involved a zoning amendment to the Central Business District of the City of Homer, Alaska that would allow for the sale and service of motor vehicles in the area. *Griswold v. City of Homer*, 925 P.2d 1015, 1017 (1996). A councilmember resided on and operated a business on one of the 13 properties in the district that would be affected by the ordinance. *Id.* at 1018. The facts state that the ordinance did not directly affect a large part of the city or an entire class of citizens. *Id.* at 1025. Homer's City Code provides that a city official must disclose any financial interest and "prohibits the official from participating in the

debate or vote unless the board or commission determines that a financial interest is not substantial.” Homer City Code § 1.12.070. Furthermore, the code defines a ‘substantial financial interest’ as an interest that will result in an “immediate financial gain” or one that will result in “financial gain which will occur in the reasonably foreseeable future.” § 1.12.010(a).

The Supreme Court of Alaska determined that the focus of such a conflict resides in the relationship between the official’s financial interest and the possible result of the official’s action, no matter the intent. *Griswold*, 925 P.2d at 1026. Notably, because the ordinance did not affect a large part of the city or an entire class of its citizens, the court found the councilman’s interest to be “peculiarly personal” and benefiting only a tiny class. *Id.* The circumstances in this case also showed a bias, where the property value would be either increased or decreased by the city council’s decision. *Id.* at 1027. Thus, the court held that the councilmember had a substantial financial interest within the meaning of the city’s code because the ordinance had the potential to increase the property value and permissible uses of his property. *Id.* at 1026.

### **3. Washington Case Law Regarding the Appearance of Fairness Doctrine**

Some of the summarized cases discuss the distinction between legislative and quasi-judicial matters. In Washington, the appearance of fairness doctrine applies only to quasi-judicial matters.<sup>9</sup> The Seattle Ethics Ordinance does not make any distinction between legislative and quasi-judicial matters. State law invests the courts with jurisdiction to apply and enforce the appearance of fairness doctrine. The Commission therefore has not had occasion to interpret the doctrine. We have included cases that discuss the doctrine simply to assist the Commission.

Washington courts have held that, based on RCW 42.36.010, the application of the appearance of fairness doctrine to local land use decisions applies only to quasi-judicial actions of local legislative bodies. *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 246, 821 P.2d 1204, 1209 (1992). The appearance of fairness doctrine was judicially established to ensure fair hearings by legislative bodies, requiring that the public hearing itself be procedurally fair and conducted by impartial decision makers. *Id.* at 245, 821 P.2d at 1208.

This case involved the adoption of a zoning ordinance within Leavenworth’s Tourist Commercial District to allow for a RV Park Planned Development District. *Id.* at 240, 821 P.2d at 1205. The city determined that the zoning ordinance would not create a significant environmental act under SEPA, and the challengers appealed the SEPA ruling. *Id.* at 241, 821 P.2d at 1206. One of the city council members was a real estate agent for the company that was selling the property that was to be the proposed site for a RV park. *Id.* at 239, 821 P.2d at 1205. The councilman did not recuse himself from the appeal hearing (and the court does not address whether this constituted a disqualifying conflict of interest). *Id.* at 242, 821 P.2d at 1206. The

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<sup>9</sup> See RCW 42.36.010.

council denied the SEPA appeal and passed the zoning amendment to allow for the RV District by a 4-2 vote. *Id.*

The court addressed a test, established in *Standow v. Spokane*, 88 Wn.2d 624, 631 (1977), to determine when an action by a local body is quasi-judicial or legislative: (1) whether the court could have been charged with the initial duty; (2) whether courts have historically performed this duty; (3) whether the action involves an application of existing law rather than an enactment of a new general law; and (4) whether the action more closely resembles the ordinary business of courts as opposed to the business of legislators or administrators. *Raynes*, 118 Wn.2d at 244, 821 P.2d at 1208.

Using this test, the court concluded that the Leavenworth City Council made a policy decision for the entire city, and thus the actions in adopting the RV amendment and dismissing the SEPA appeal were legislative in nature. *Id.* at 249, 821 P.2d at 1210. Because these actions were not taken in a quasi-judicial capacity, the appearance of fairness doctrine did not apply, and the correct standard to review the council's actions is whether they were arbitrary or capricious. *Id.* at 250, 821 P.2d at 1211. The challengers did not allege facts that the actions were arbitrary or capricious, and the court concluded there was no appearance of such action. *Id.* Therefore, the city council's actions were held valid. *Id.*

### **VIII. Conclusion**

There is no Washington case law directly on point in this matter. The analogous case law from other jurisdictions and the Washington law on the Appearance of Fairness doctrine can help guide the commission, but do not compel any specific conclusion. The only precedent directly on point to any issue before the Commission is the Commission's own prior opinion. However, this Commission, while giving regard to stare decisis, is free to depart from that opinion.