M E M O R A N D U M

TO: City of Seattle Ethics and Elections Commission

FROM: Councilmember Sally Bagshaw

RE: Participation in City Council Proceedings Regarding Seattle's Potential Waterfront Local Improvement District

DATE: July 12, 2013

Dear Commissioners,

This memo is in response to Wayne Barnett's informal opinion concluding that I would be violating the Seattle Municipal Code, Chapter 4.16, Ethics Code should I participate in City Council proceedings regarding a potential Local Improvement District (the "LID").

The LID would fund, in part, improvements to the Central Waterfront as part of the integrated program for removal of the Alaskan Way Viaduct, new streets and public places and other public improvements. Mr. Barnett reached this decision because my husband and I own a condo within the boundaries of the LID, as the boundary has been preliminarily identified. This property is one of nearly 10,000 parcels within the LID's preliminary boundary. I'd like to suggest to the Commission that Mr. Barnett's interpretation of the Ethics Code restrictions may be unnecessarily narrow and does not consider the precedential value on future votes involving similar issues. Because I have been integrally involved in the Waterfront decisions for over a decade, I have asked for your review and reconsideration.

The LID allows the citizens within the LID boundary to pay for improvements that are of special benefit to the properties within the district. The local improvement district assessment is not a tax (and therefore an exception to the Constitutional restriction that a government may only tax its citizens if it does so uniformly, (*i.e.* if the City taxes the residents of Georgetown it must impose the same taxes on the residents of Laurelhurst, and vice versa)).

Under the LID structure, only property owners within the LID are assessed to finance the specific improvements. Generally, the assessment for a specific property parcel is based on the difference between the fair market value of the property before and after the local improvement project. An LID may only be formed by petition of the property owners within the benefit area, or if the City Council votes to form the LID and not more than 60% of the property subject to assessment objects. See RCW 35.43.180. The decision to form an LID is a legislative action.

Our Ethics Code generally, and appropriately, prohibits council members from voting on matters that affect their personal interests or appears to affect their personal interest *in ways different from the ways they affect the interests of the citizens generally*. Specifically, the Ethics Code in Section 4.06.070(A)(1)(d) does not prohibit participation in a project where an individual has a financial interest "shared with a substantial segment of the City's population." For example, in a 2010 Advisory Opinion regarding rental housing, this Commission concluded that a shared interest with less than five percent of the City's population did not satisfy this exception. Thus, during the recent Rental Housing Inspection conversation and votes, three council members appropriately recused themselves from the discussion because they were landlords.

In contrast, councilmembers may participate on issues where they have a financial interest that is more widely shared with the City's population. Thus, a car-owning council member may vote on raising the excise tax on cars because many citizens own cars, so the car-owning council member's interests align with the interests of many citizens. In another example, the 2010 advisory opinion also discussed councilmember involvement in proposed zoning changes to low-rise zones. The opinion concluded that a shared interest with thirty percent of the City's population who own property in low rise zones was a shared interest with a substantial segment of the population, and therefore councilmembers who owned property in a low-rise zone could still participate.

The situation before us today is much like the car case, or the property in a low rise zone example. Although the exact boundaries of the LID have not been finalized, the preliminary concept involves a district that extends from the downtown stadiums to Denny Avenue, and from Elliott Bay east to I-5. As mentioned above, there may be close to 10,000 affected properties in a geographical area that encompasses the entire downtown core. My property is just one of those properties, a 1000 s.f. apartment..

The 2010 advisory opinion made one additional point that warrants consideration. The opinion concluded that the Ethics Code exception in 4.06.070(A)(1)(d) applies to shared financial interests, whether or not those shared financial interests are equal. The exception applied to the councilmember who owned property in low rise zones, regardless of whether the individual owned only one, or owned multiple properties in the zones. Therefore, the shared financial interest with others in the LID zone should justify application of the 4.06.070(A)(1)(d) exception, regardless of the location of the specific property, or level of special benefit.

Most significantly, unlike the financial interests addressed in the 2010 advisory opinion, the LID concept involves a financial interest where the affected property owners will contribute monetarily in direct proportion to the related benefit to their property.

This Commission has not had the opportunity to consider how a councilmember's property ownership within a LID affects her involvement in related policy-making. The

Commission may wish to consider how other jurisdictions have analyzed this issue. There are cases and comments having direct applicability to the LID issue at hand.

As stated by the Idaho Supreme Court, a majority of courts have concluded that ownership of property within a LID does not disqualify a council member from proceedings related to the formation of the LID, or the assessment of property levies. *Simmons v. City of Moscow*, 111 Idaho 14, 18, 720 P.2d 197, 201 (1986); *see also* 14 *McQuillin*, *Municipal Corporations,* § 38:98 (3d Ed. 2008) ("[t]he interests of officers who make the assessment, due to ownership of real estate affected thereby, does not disqualify them."); *see also Schumacher v. City of Bozeman*, 174 Mont. 519, 529, 571 P.2d 1135 (1977) (where the Montana Supreme Court concluded that an official would not be disqualified from voting on whether to create a special improvement district solely because he owned property within the district); *see also Federal Const. Co. v. Curd*, 179 Cal. 489, 496 (1918) (where the California Supreme Court concluded that property ownership within a special assessment district did not disqualify a decision-maker such that their participation would violate due process); *accord Klindt v. Pembina County Water Resource Bd*. 697 N.W.2d 339, 349 -350 (2005).[1] One of the primary considerations that support this general rule is that, to the extent the relevant official who owns property within the LID receives any special benefit, there is a special cost proportionally attached. *Simmons v. City of Moscow*, 111 Idaho at 18. As you can see, courts in our sister states including Idaho, Montana, California, and Minnesota have reviewed similar situations and have concluded that an elected official should not be disqualified from voting simply because he or she has property within the district to be assessed.

Whether or not to have a LID, and what the assessment should be, will primarily be an issue for the property owners within the LID to decide. My interests are aligned with the interests of other property owners within the LID because I am one of them. I will enjoy the benefits of the LID, and I will be asked to bear the burdens, just like every other property owner in the LID. I support the LID because of the value it will bring to our city, and am prepared to pay the fee assessed.

Speaking hypothetically, council members who live outside the LID arguably have a greater conflict of interest in voting on a LID than a councilmember who lives within the LID. In a general sense, council members living outside the LID will also enjoy the benefits of the LID's public improvement, including the economic improvements to downtown, the improved transportation, the beautiful new promenade, the connections

[1] *See also Lenz v. Coon Creek Watershed Dist.,* 278 Minn. 1, 15-16, 153 N.W.2d 209 (1967) (where the Minnesota Supreme Court concluded that officials who owned land in a proposed watershed district should not be disqualified from consideration and approval of a proposed improvement where (1) any large improvement would necessarily benefit land owned by some or all of the officials; and (2) the public process involved, including a public hearing and opportunity to challenge assessments, provided a sufficient safeguard to ensure that the officials would not act arbitrarily to further their own interests; *accord City of Coral Gables v. Hayes* 74 F.2d 989, 991 (5th Cir. 1935).

into downtown from the waterfront. But they will never be asked to pay any of the costs. That, in a modest way, is a tangible conflict and is one that all councilmembers face from time to time.

I will be the only one of the nine councilmembers who could potentially vote on the LID because I am the only one of the nine who currently lives within the potential district. The ethics rules would be odd indeed if my alignment of interest with property owners within the LID means that I am the only Councilmember who could not speak or vote on the matter when it comes before us. Imagine, by extension, how awkward this conclusion would be if all councilmembers were disqualified because they reap a benefit on a particular vote; the only council members who can ethically vote to tax Seattle residents would be council members who live on Mercer Island, or in some other jurisdiction outside the City.

Should I be restricted from participating in the LID conversation or vote, this would create an unfortunate precedent for other council votes. In the future, this precedent could result in council members having to recuse themselves from the discussion and consideration of any projects proposed in or near their neighborhoods that potentially benefit the councilmember's property value (for example, the addition of a new park, a new sewer extension, or a vote on roadway improvements).

Since I have a demonstrated ten-year history of effort to promote a Waterfront for All and have fully disclosed my interest in my condo property, it would be an unfortunate turn of events if at this late date I should be barred from continuing my work on the waterfront program. For your interest, I have attached a document I co-authored many years ago called Waterfront for All. The document was the result of years of volunteer work -- my own and scores of local architects, designers and interested participants across the city. The document and our initial vision have provided the foundation for James Corner, the City's consultant's work in the ambitious new waterfront designs.

Thank you for giving careful consideration to the general rule followed by other jurisdictions, and potential precedent for Council consideration and action on future legislation. I respectfully request that the Commission issue an advisory opinion that my involvement in the LID or with Waterfront design issues already underway is not a conflict of interest, thus allowing me to continue to be involved in the discussions and votes.

Cc: Sally Clark, President
Seattle City Council

Ben Noble