

(Draft) Advisory Opinion 2013-X

I. Introduction

The City is considering creating a local improvement district (an LID) to partially fund a set of 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 the 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.

II. Summary Answer

Councilmember Bagshaw's ownership of a condominium within the likely boundaries of a possible LID means she would have a financial interest in LID matters that would affect either: 1) the fair market value of her property; or 2) the amount of her property's LID assessment.

The Ethics Code contains a categorical exception for financial interests that are widely shared. Councilmember Bagshaw's financial interests in the value of her property and the amount of her property's LID assessment, although shared with other property owners within the LID, are not shared with a sufficiently "substantial segment of the City's population" (as required by the Ethics Code and interpreted in prior Commission opinions). She therefore should not participate in matters that would be reasonably likely to affect either financial interest. She should not participate in matters such as the legislation necessary to establish the LID, define its boundaries, set its overall budget, adopt an assessment methodology, or approve preliminary or final assessments, because those matters are reasonably likely to affect the fair market value of her property or the amount of her property's LID assessment.

Councilmember Bagshaw could in general participate in ongoing LID-related matters after the LID and its budget are determined and the LID assessments are finalized. She also

should not participate in a waterfront matter if that particular matter would be reasonably likely to affect the fair market value of her condominium, regardless of whether the matter is connected to an LID or not.

III. Facts

A. Local Improvement Districts

An LID is a mechanism to help fund public improvements built on public property. In order to be assessed to pay for part or all of the improvements, individual properties within the LID boundaries must be “specially benefitted” by the local improvements paid for with the LID assessments. Each individual property’s assessment is determined based on the estimated increase in its fair market value resulting from the LID-financed public improvements.

B. The Proposed Seattle Central Waterfront LID

The City of Seattle has thus far only discussed the general possibility of forming a Seattle Central Waterfront LID, but has not yet: declared the City's intent to form an LID, established its geographic boundaries, or decided what public improvements would be funded by the LID.

The LID establishment process is described in RCW Chapter 35.43. The City could form an LID through a series of legislative actions that would:

- 1) Declare the City’s intent to form an LID and preliminarily describe the proposed improvements, the overall cost, and the LID boundaries, and establish the public hearing process;
- 2) After the public hearing, form an LID and establish the improvements to be funded, the overall cost, and the methodology for determining the individual assessments for all parcels located within the LID¹
- 3) Adopt a preliminary roll of individual parcel assessments and an appeal process;
- 4) Adopt a final roll of assessments by parcel and approve the final assessments.

¹ In general, pre and post-improvements property values would be calculated for all parcels located within the LID. Individual parcels would then be individually assessed an amount based on that parcel’s estimated increase in value.

C. Councilmember Bagshaw's Situation²

Councilmember Sally Bagshaw has been active in a large variety of downtown and waterfront issues both before and after she was first elected to the City Council in 2009. She has lived in a condominium located at First and Spring since 2000. She and her husband have owned a condominium there since 2001. The current assessed value of the 1,000 square foot condominium is \$422,000. She anticipates the condo will be within the geographic boundaries of a potential waterfront LID. She estimates that about 10,000 property parcels may be within the LID, that the total assessed value of those properties is in the range of \$20 billion, and therefore that her condominium is worth approximately 1/50,000 of the total value of property within the proposed LID.

IV. Councilmember Bagshaw's Questions³

Councilmember Bagshaw asks to what extent she can continue to participate in a variety of City matters related to central waterfront redevelopment in general and the proposed LID in particular, including matters such as:

- a. the formation of the LID and the selection of the public improvements to be funded in whole or in part through the LID;
- b. establishing the total dollar amount of the LID financed improvements, its geographic boundaries, and the assessment methodology;
- c. establishment of the relative weight of assessments within the LID;
- d. LID related matters after the LID is in place;
- e. the design of the improvements to be funded in whole or in part by the LID;
- f. Council's ongoing oversight role once implementation begins; and,
- g. other projects located along the waterfront not funded by 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 versus her official activities as a councilmember.

² Summarized from Councilmember Bagshaw's May 31, 2013 letter to the Commission

³ Summarized from Councilmember Bagshaw's May 31, 2013 letter.

V. Analysis

A. 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 a categorical exception for financial interests that are sufficiently widely shared. “Section 1.a shall not apply if the prohibited financial interest is shared with a substantial segment of the City’s population.”

B. Analytical Framework

In analyzing conflict of interest issues under 4.06.070, the Commission has found it helpful to ask a series of questions about each particular action (or proposed action) that is being analyzed.

1. Is the person a “covered individual? That is not an issue. As an elected City official, Councilmember Bagshaw is a covered individual.
2. Does the covered individual’s particular action (or proposed action) constitute “participation” in a City “matter”?
3. If so, does the covered individual have a financial interest in that particular matter? (“financial interest” is not defined the Ethics Code, but has been interpreted in prior Advisory Opinions).
4. If so, is the financial interest shared by a “substantial segment of the City’s population”, so that it falls within the Ethics Code’s categorical exception for such widely-shared interests? (“Substantial segment of the City’s population” is also not defined in the Ethics Code, but has been interpreted in a prior Advisory Opinion).

C. Analysis of Councilmember Bagshaw’s Questions

Councilmember Bagshaw’s questions fall into three general categories:

1. City actions that would establish the LID, its budget, boundaries, and the resulting LID assessments;
2. City actions that would implement the LID improvements after the LID is formed and the assessments are established; and,
3. Other City actions that relate to the central waterfront, but that would not be funded in whole or in part by the LID.

We analyze and answer those questions, as well as whether preliminary LID discussions that have taken place thus far pose an issue under the Ethics Code.

D. Preliminary pre-LID discussions.

The type of preliminary LID discussions that have occurred thus far are not “matters” under the Ethics Code.

“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.”

No LID legislation has been introduced, and we are not aware that Councilmember Bagshaw has participated in the preparation of any possible future LID legislation. General discussions about possible downtown waterfront improvements and the possible formation of an LID to finance part of those improvements are the type of “advice or recommendations regarding broad policies and goals” expressly excluded from coverage under the Ethics Code.

Councilmember Bagshaw may participate in such discussions.

E. LID matters.

1. **Matter.** The type of legislative actions described in Section III.b. above (such as resolutions or ordinances necessary to form an LID, establish its overall budget and geographic boundaries, adopt an assessment methodology, and approve the assessment roll) are all City” matters” subject to the Ethics Code.

2. Does Councilmember Bradshaw have a Financial Interest in such LID matters?

The Code does not define “financial interest”. However, previous Commission Advisory Opinions have interpreted the term.

i) Effect on Property Values

Commission Advisory Opinion 1996-3, applying the then-Ethics Code language, determined that two members of a City commission who owned property in the area near two proposed baseball stadium sites “could gain or lose financially if either is chosen for the future baseball stadium. Thus, pursuant to SMC 4.16.070(1)(a), they must disqualify themselves from participating in the discussion and vote with respect to all aspects of any review (of the two sites).⁴

In Advisory Opinion 2010-01 the Commission considered whether a councilmember had a financial interest in two separate legislative proposals. The first matter was a proposed overhaul of the City’s zoning code that applies to low-rise multifamily zones. The Commission concluded the Councilmember had a financial interest in the proposed multi-family zoning ordinance because it would impact the fair market value of property he owned.

A fundamental premise of an LID is that each parcel within the district “specially benefits” from the public improvements financed by the LID and therefore may be legally required to pay an assessment to help pay for those improvements. An LID, almost by definition, affects the value of properties located within its boundaries. If the LID-financed public improvements do not specially benefit a property within the LID boundary, then that property may not be legally required to pay an LID assessment.

ii) The amount of an LID assessment

The second matter in Advisory Opinion 2010-01 was a proposed residential rental property licensing ordinance that would create a license fee for owners of covered residential rental property.

⁴ At the time the Ethics Code required disqualification if the individual either had a financial interest in the matter or their impartiality could reasonably be questioned. However, the quoted language at least suggests the Commission considered the ownership of property to be a financial interest since they could “gain or lose financially” if one site is chosen.

The Commission decided the Councilmember also had a financial interest in the rental housing inspection program legislation because it included a licensing fee he would have to pay because he owned rental property subject to the fee. The Commission also observed that the rental inspection program will likely also impact the fair market value of the two rental properties which the councilmember owned.

The Commission has never considered whether an LID-type assessment constitutes a financial interest. However, the reasoning in Advisory Opinion 2010-01 that the amount of a licensing fee is a financial interest requiring disqualification seems equally applicable to the amount of an LID assessment.

Although the City Council does not directly determine the amount of preliminary individual parcel assessments, the LID legislation does affect the overall budget of the LID-financed improvements and the number of parcels subject to the assessment (by determining the LID boundaries). Since the LID legislation affects both the total amount of revenue that must be raised by the assessments and the number of properties subject to the assessment, that legislation indirectly affects the amount of individual parcel's preliminary assessment. The Council also must formally approve the roll of individual final assessments, which constitutes direct Council participation in determining the final assessments.

For all these reasons, the Commission concludes that a covered individual who owns property within a possible LID has a financial interest in LID legislation that is reasonably likely to affect either: 1) the fair market value of that property; or 2) the amount of the LID assessment applied to that property.

3. Does Councilmember Bagshaw share those financial interests with a “substantial segment of the City’s population”?

Even if a 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 financial interest is shared with a substantial segment of the City’s population. A “substantial segment of the City’s population” is not defined in the Ethics Code.

Many jurisdictions' ethics laws contain an 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". Since we must apply the Code language we have, we do not find those cases applicable.

We therefore turn to the Commission's prior advisory opinions. Advisory Opinion 2010-01 also addressed when a financial interest does not require disqualification because it is shared by a substantial segment of the City's population. The Commission considered the applicability of the exception to the two separate legislative matters involved in that opinion.

The Commission concluded that the covered individual's financial interest in the multi-family 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 29% of the City's population was a "substantial segment" of the City's overall population.

Here, the Commission also finds that the Ethics Code language requires that the relevant determination to be whether those individuals who share the same financial interest as the covered individual constitute a substantial segment of the City's overall population.

Councilmember Bagshaw's financial interest in the value of the property she owns located within the likely LID boundaries is shared by all other property owners within those boundaries. Her financial interest in the amount of the assessment attributed to her property is also shared with the other property owners within the likely LID. While many others (such as those who live, work, operate a business, or regularly visit the district) have some interest in the LID, they do not share the same financial interest as those who own property within the LID.

The inquiry required by the SMC's language then is whether those who own property within the LID are a "substantial segment" of the City's population. Although we do not know exactly how many individuals own property within the as-yet-to-be-determined LID area, Councilmember Bagshaw estimates that about 10,000 separate parcels may be within the likely LID area. Assuming that reflects approximately 10,000 separate owners, the issue is whether

10,000 is a sufficiently “substantial segment” of the Seattle’s overall population of about 600,000 people.⁵

In Advisory Opinion 2010-01, 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.

Ten thousand property owners within the likely LID represent about 1.7% of the City’s population. Applying the reasoning in Advisory Opinion 2010-01, the financial interest is not shared with a sufficiently “substantial segment of the City’s population” to apply the Code’s categorical exception.

Because the categorical exception does not apply, Councilmember Bagshaw should not participate in LID matters that are reasonably likely to affect her financial interests. Participation includes more than voting on LID legislation. “Participate” means to consider, investigate, advise, recommend, approve, disapprove, decide, or take other similar action. Participation in the types of LID legislation described above includes official actions that pre-date the actual introduction of the LID legislation. Councilmember Bagshaw should not, for example, participate in drafting or proposing LID legislation that would affect the LID budget, boundaries, or assessments, as well as not participate in considering that legislation after it is introduced.

F. LID matters after the LID is formed and the final assessments are determined.

City Council LID-related actions after the LID is established and the final assessments are approved would also be City matters (unless a particular action is merely a “recommendation regarding broad policies and goals.”) However, Councilmember Bagshaw would not typically have a financial interest in those matters, since they would no longer be likely to affect either the value of her property or the amount of her assessment. Those interests would have already been determined. Councilmember Bagshaw could therefore participate in most post-formation and assessment LID matters.

⁵ This is a rough estimate since more than one person may own an individual parcel (such as Councilmember Bagshaw and her husband, who together own their condominium) and an individual may own more than one parcel.

G. Particular Post- LID or non-LID matters affecting the value of her property.

However, a particular LID or non-LID matter could still involve a financial interest requiring disqualification if that particular matter would reasonably affect the value of her property. If, for example, a particular City project was close enough geographically to her property to reasonably likely affect the value of her property, then she would have a financial interest in that matter and should not participate in it - whether it is financed by the LID or not. This is simply the general rule about not participating in official actions reasonably likely to affect covered individuals' financial interest in the value of property they own. Since such a financial interest is typically limited to properties geographically close to the project, the "substantial segment" exception is very unlikely to apply.

H. Non-official actions.

Councilmember Bagshaw also asks what limits if any the Ethics Code would place on her activities as a private citizen, and how she might avoid public confusion about those activities versus her official activities as a Councilmember.

The Ethics Code conflict of interest provisions apply to the covered individual's official actions. The analysis described above would not apply to Councilmember Bagshaw's activities as a private citizen. However, other provisions of the Ethics Code require that a covered individual not use their City position or City resources for a non-city or private purpose.⁶

A covered individual may under the Ethics Code generally participate in the City's political process on the same terms available to any other person. The Ethics Code would not prohibit a covered individual from offering public comment during a public hearing, for example, as long as they did not use any public resources to prepare the testimony and did not have any special access due to their public position (sign up to speak like any other member of the public, speak from the audience, and comply with all Council rules regarding public

⁶ The Commission's jurisdiction and this Advisory Opinion are limited to interpreting and applying the Seattle Ethics Code and do not reach other provisions of law that might arguably apply.

participation. The Ethics Code would require the covered individual to clearly identify that they are speaking purely in their private capacity and not in any official capacity.⁷

⁷ An individual who holds elective office is very publicly identified as a City official and therefore should take particular care to draw a very clear line between their official activities and their activities as a private individual.