

**INTERNATIONAL SPECIAL REVIEW DISTRICT (ISRD) BOARD
TRAINING SESSION
June 2016**

**Liza Anderson
Assistant City Attorney**

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Appendix A: SMC 4.16.070, Code of Ethics and Conflicts of Interest

I. ROLE OF BOARD MEMBERS

SMC 23.66.316 defines Board Members' Roles: ***The Board reviews all applications for certificates of approval and makes recommendations to the DON Director.****

Certificates of approval are required for: 1) any proposed changes to the external appearance of structures (which includes fences and walls) on private property as well as 2) public rights of way and 3) public spaces. 4) A certificate is also required for any proposed changes to the principal use of property.

B. The Board is required to:

1. Review applications;
2. Hold public meetings; and
3. Make recommendations to DON Director recommending approval, approval with conditions, or denial of certificate of approval.

** All recommendation must be based on the extent to which the proposal is consistent with the goals and objectives of the ISRD, the use and development standards in the applicable ordinances, and the District Design Guidelines.*

*** It is your duty to make informed, reasoned, consistent recommendations for applications for Certificates of Approval.*

C. Based on the Board's recommendation, the DON Director makes the final decision on the issuance or denial of a certificate of approval. The Director's decision is appealable to the Hearing Examiner. If the Director's decision is appealed to the Hearing Examiner, Board members may be called to testify at the hearing about the basis for their recommendation.

D. Board members are City Officers with special obligations and responsibilities

1. Board members are extensions of the government and are subject to the Code of Ethics.
2. Board members should not have any actual or perceived conflicts of interest in relation to any application under consideration.
3. Decision-making should be done in a fair and open manner.

E. Board members play no role in the following decisions:

1. Determination of Code violations (DON can refer alleged violations to DPD for enforcement);
2. Issuance of DPD and SDOT permits.

II. MAKING DEFENSIBLE DECISIONS

- A. Know the Law: Your recommendation must be based on the Code and Guidelines. Maintain a small notebook with the relevant legal texts:
1. SMC 23.66 – Includes the Development and Use Standards
 2. District Design Guidelines – Implementing and interpreting the Code
 3. Secretary of the Interior's Standards of Rehabilitation for Historic Buildings

Your recommendation must be based on the Code and Guidelines. Get to know the relevant standards very well. Mark up your materials to highlight the key standards.

- B. Staff Report: Prior to the meeting, take time to review the staff report. The staff report will provide a list of standards and guidelines that staff believes is important to the discussion. The report will also include a draft motion
- C. Deliberations: In discussions, do your best to link relevant facts to specific standards. Expressly refer to all the relevant standards, even ones that disfavor your decision. Discussing the specific standards during deliberations will:
1. Instill confidence that your recommendation is grounded in law
 2. Show that your decision is being made in a fair and impartial manner
 3. Makes your vote more understandable to the audience
 4. Just saying “It looks good to me” or “I like it” does not instill a lot of confidence that your recommendation is grounded in the law
- D. Avoid dwelling on standards or issues that are not relevant. You may have very good reasons for thinking that a particular proposal is desirable or not. But if those reasons cannot fit under the banner of a relevant standard, you should avoid saying things that make the Board look like it was wandering beyond the standards it’s authorized to consider.

Do not discuss or make a recommendation based on something outside of the Board’s purview, for example:

- Prior violations
- Economic impact (but you can consider surrounding community’s need for parking) (Costs of complying with standards)
- Personal preference

- E. Motions: Once the Board is ready to make a motion, a member may refer to the draft motion or propose a separate motion generated from the Board’s discussion of an application. *Include references to the reasons for the Board's decision.* If the written motion provided by staff accurately expresses the Board’s decision and the basis for that decision, the Board member may read the motion verbatim.

III. CODES OF ETHICS AND CONFLICTS OF INTEREST

City Code of Ethics applies to Board members. Ask before you proceed.

A. **SMC 4.16.070 sets forth the Code of Ethics and Conflicts of Interest.** The Code language is set forth in Appendix A of this packet (p. 10-12).

1. It applies to Board Members because you are an extension of the government
2. The Code's purpose is to ensure fairness and the appearance of fairness.
3. Requires you to act in a judicial capacity- as an independent and neutral decision-maker.
4. Conduct that is specifically prohibited by the Code
 - a. Engage in any transaction or matter that would be in conflict or appear to a reasonable person to be in conflict with duties as a board member
 - b. You or a family member have a financial or other private interest in any matter before the board- direct or indirect interest
 - c. The applicant has been a client within the past 12 months or is a family member
 - d. Improperly uses- or appears to use- your official position
 - i. For the purpose of private benefit (not city benefit)
 - ii. Use city property for private benefit
 - iii. Assist any person in any city transaction or matter where your board position enhances the transaction
 - e. Accept gifts or loans that could be seen as an attempt to influence your decisions
 - f. Disclose privileged information gained by your board position

B. How the Ethics and Elections Commission interprets the City code of ethics.

The Commission reads “**transaction**” and “**matter**” broadly. The terms include applications for certificates of approval that come before this review board.

According to past Commission rulings, **you must disqualify yourself** as a Board member in any of the following circumstances:

1. You are the applicant or have a financial or private interest in the applicant or application.
 - Includes circumstances where you are a member of an association or other group that is applying for a certificate of approval
2. You have ever performed work “related to” the matter before the Board EITHER:
 - directly for the applicant; OR
 - indirectly as some sort of subcontractor to another contractor for the applicant.
3. The applicant is in a certain type of client relationship to you now or in the last 12 months. Either:
 - the **matter** involves any client of a firm of which you are or were a partner or in which you had some financial interest (simply being an employee of the firm does not count, however); or
 - you personally performed work for that **client**, even if that work is unrelated to the matter before the Board.
 - If any member of your immediate family¹ would have to disqualify himself or herself for one of these reasons, you must disqualify yourself.

¹Includes any: (1) spouse or domestic partner; (2) dependent parent, parent-in-law, child or son-in-law or daughter-in-law; or (3) parent, parent-in-law, child, son-in-law, daughter-in-law, sibling, uncle, aunt, cousin, niece or nephew residing in your household. SMC 4.16.030.F.

C. Navigating potential conflicts of interest.

1. In general:

- Be aware of personal and employment situations that might form the basis for a challenge.
- Evaluate whether a personal or family interest would limit your ability to function as an impartial Board member.
- Remember that appearances matter to that “reasonable” third party.

2. Procedure:

- Check the agenda in advance of the meeting.
- If you see a matter on the agenda that might present a conflict, notify Rebecca Frestedt (684-0226) ASAP, so she can tell the Chair, who is responsible for determining if there is a conflict of interest. The Chair or staff can call the City Attorney’s office for further advice if they need to assess a close call or question.
- If your reasons need to stay confidential and you are still uncertain whether the situation constitutes a conflict, you can call the City Attorney’s office directly (contact information below).

3. If in doubt, ask in advance.

- There are going to be close calls to make.
- Remember that you can ask the Ethics and Elections Commission for advisory opinions if you have questions ahead of time. Those inquiries can remain confidential, but the response time may not be as quick as necessary.

4. If you have to disqualify yourself....

- DO NOT participate in the meeting as a Board member—either to deliberate or to vote. Physically get up from the table and sit in the audience.
- A quorum remains in effect despite the disqualification of one or more members from voting on any particular matter. The remaining members participate and vote on the matter.

- You may participate as a member of the public on matters from which you have disqualified yourself.

D. Consequences for violating the Ethics Code (SMC 4.16.100)

The Commission may take one (1) or more of the following actions for violation of any provision of Chapter 4.16:

1. Recommend prosecution or other remedy to the appropriate authorities;
2. Impose a monetary fine of up to five thousand dollars (\$5,000) per violation or three (3) times the economic value of anything sought or received in violation of Chapter 4.16, whichever is greater;
3. Require reimbursement for damages of up to ten thousand dollars (\$10,000) sustained by the City that were caused by the violation and were not recovered by the City;
4. Require costs, including reasonable investigative costs, that do not exceed the amount of any monetary fine;
5. Recommend to the Mayor and the appropriate agency that they request the City Attorney to bring an action to cancel or rescind the result of action taken by the violator, upon a Commission finding that:
 - a. The violation has substantially influenced the City action, and
 - b. Interests of the City require cancellation or rescission.

Each act that violates one or more provisions of Chapter 4.16 may constitute a separate violation. Violation may be proven by a preponderance of evidence, and need not be proven beyond a reasonable doubt.

E. State code of ethics (RCW 42.23.070).

Basically, this code of ethics has four provisions regarding “municipal officers,” which term arguably includes members of this Board. These might be superseded by the City’s more specific ethics code:

1. No municipal officer may use his or her position to secure special privileges or exemptions for himself, herself or others.
2. No municipal officer may, directly or indirectly, give or receive any compensation, gift, gratuity, or reward from any source, except the employing municipality, for a matter connected with or related to the officer’s services unless otherwise provided by law.

3. No municipal officer may accept employment or engage in business that the officer might reasonably expect would require him or her to disclose confidential information acquired by reason of his or her official position.
4. No municipal officer may disclose confidential information gained by reason of the officer's position, nor may the officer use such information for his or her personal gain.

IV. OPEN PUBLIC MEETINGS ACT (RCW CHAPTER 42.30).

A. What is subject to the Act?

1. Any meeting at which "action" is taken.
 - a. "Action" means the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions.
 - b. The Act spells out some exceptions, but they are not frequent occurrences for this Board.

2. Do you need a quorum to be subject to the Act?

Technically, yes. But if something less than a quorum of the whole Board has the authority to act in some official way, then be careful.

3. Are telephone and e-mail discussions subject to the Act if they do not happen in real time?

The case law is not clear on this. But if you are conducting Board business in some kind of interactive way (something more than sending out a notice or other neutral information over e-mail, for example), the Act might come into play.

B. Putting limits on public comment.

1. Limits are OK, but try to be fair.
 - a. The Act does not require public comment, but where you allow public comment, you should strive to do so even-handedly.
 - b. Try to apply time limits consistently, although the applicant probably has a fair claim to make a more detailed presentation than do those commenting on the proposal.
 - c. If you have to limit available time, consider inviting people to supplement their testimony with written comments (which might force you to postpone a decision until the written comments are submitted).

2. The Act provides a process by which to handle unruly meeting participants (RCW 42.30.050), paraphrased below.

If order cannot be restored by the removal of individuals, the members of the governing body conducting the meeting may order the meeting room cleared and continue in session or may adjourn the meeting and reconvene at another location selected by majority vote of the members. If so, final disposition may be taken only on matters appearing on the agenda. Press reps or other news media, except those participating in the disturbance, shall be allowed to attend relocated session.

V. APPEARANCE OF FAIRNESS AND *EX PARTE* COMMUNICATIONS (RCW CHAPTER 42.36).

- A. In 1982, the Legislature codified the appearance of fairness doctrine in the context of land use decisions.
- B. Technically, because the ID Board is not conducting “quasi-judicial” proceedings within the meaning of this statute, it does not apply to you.
 1. However, as a matter of policy and to further insulate the Director’s decisions from legal challenge, it is a good idea to stay within the bounds of the statute’s parameters.
 2. Increases public confidence in the fairness of your decisions and eliminates needless legal disputes down the line.
- C. The idea is that the proceedings should not only be fair in fact, but they should also **appear** to be fair.
 1. **Avoid conflicts of interest**, as outlined above, **and *ex parte* communications**, as outlined below.
 2. Strive to preserve an atmosphere of fairness and impartiality, even if a given decision may seem to be a foregone conclusion. For example, do not announce that your mind is made up before the hearing.
- D. ***Ex parte* communications**
 1. What is an *ex parte* communication?

An *ex parte* communication is a one-sided discussion between a decision-maker and the proponent or opponent of a particular application or matter that takes place outside of the hearing or meeting process. It might be one-way communication—including a letter or a phone message from a party to which you do not respond.

2. Does it apply before the filing of an application?
 - a. The statute's ban on *ex parte* communications applies only during the pendency of a proceeding.
 - b. The bright line is probably the filing of an application. Communications with parties before that time is likely not subject to the appearance of fairness doctrine.
3. What happens if it occurs?

Under the statute, *ex parte* communication is not automatic grounds for disqualification. If such a communication occurs, the statute says to place the substance of that communication on the record, make a public announcement of the content of the communication, and allow persons to rebut the substance of the communication. The statute says that this must happen at *each hearing* on the matter.

VI. USEFUL RESOURCES.

- ❑ **Rebecca Frestedt** (684-0226) and **Sarah Sodt** (615-1786). They likely have dealt with many of these situations before.
- ❑ **City Attorney's Office. Roger Wynne**, Land Use Section Director (233-2177). We are here to make certain that you get the advice you need. Roger will be best able to assign someone if follow-up is necessary.
- ❑ **City Ethics and Elections Commission** (<http://www.seattle.gov/ethics>). Their web site contains answers to frequently asked questions and other interpretative resources. For example, you may search their ethics opinions by topic or by section of the Seattle Ethics Code. These opinions put real-life facts to the test with the Code, usually while keeping names confidential.

Appendix A:

As noted in Section III, the Code of Ethics and Conflicts of Interest are set forth below.

SMC 4.16.070 outlines prohibited conduct.

No current City officer or employee shall:

1. Disqualification From Acting On City Business.
 - * a. **Engage in any matter or activity, which is, or would to a reasonable person appear to be, in conflict with or incompatible with the proper discharge of official duties**, or which impairs, or *would to a reasonable person appear to impair*, the officer's or employee's independence of judgment or action in the performance of official duties **and fail to disqualify** him or herself from official action in those instances where the conflict occurs;
 - * b. **Have a financial or other private interest**, direct or indirect, personally or through a member of his or her immediate family, **in any matter upon which the officer or employee is required to act** in the discharge of his or her official duties, **and fail to disqualify** himself or herself from acting or participating;
 - * c. **Fail to disqualify** himself or herself from acting on any manner which involves the City and any person who is, or at any time within the preceding **twelve (12) month period has been a private client** of his or hers, or of his or her firm or partnership;
 - * d. **Have a financial or other private interest**, direct or indirect, personally or through a member of his or her immediate family, **in any contract or matter** to which the City or any City agency may be a party, **and fails to disclose** such interest to the appropriate City authority prior to the formation of the contract or the time the City or City agency enters into the matter; **provided**, that this paragraph shall not apply to any contract awarded through the public bid process in accordance with applicable law.
2. Improper Use Of Official Position.
 - a. **Use his or her official position for a purpose that is, or would to a reasonable person appear to be primarily for the private benefit of the officer or employee**, rather than primarily for the benefit of the City; or to achieve a private gain or an exemption from duty or responsibility for the officer or employee or any other person;

b. **Use or permit the use of any person, funds, or property under his or her official control, direction, or custody, or of any City funds or City property, for a purpose which is, or to a reasonable person would appear to be, for other than a City purpose;** provided, that nothing shall prevent the private use of City property which is available on equal terms to the public generally (such as the use of library books or tennis courts), the use of City property in accordance with municipal policy for the conduct of official City business (such as the use of a City automobile), if in fact the property is used appropriately; or the use of City property for participation of the City or its officials in activities of associations of governments or governmental officials;

* c. Except in the course of official duties, **assist any person in any City matter where such City officer or employee's assistance is, or to a reasonable person would appear to be, enhanced by that officer or employee's position with the City;** provided that this subsection 4.16.070 A1c shall not apply to: any officer or employee **appearing on his or her own behalf** or representing himself or herself as to any matter in which he or she has a proprietary interest, if not otherwise prohibited by ordinance;

* d. Regardless of prior disclosure thereof, **have a financial interest**, direct or indirect, personally or through a member of his or her immediate family, **in a business entity** doing or seeking to do business with the City, **and influence or attempt to influence** the selection of, or the conduct of business with, such business entity by the City.

3. Accept Gifts or Loans.

Solicit or receive any retainer, gift, loan, entertainment, favor, or other thing of monetary value from any person or entity where the retainer, gift, loan, entertainment, favor, or other thing of monetary value has been solicited, or received or given or, *to a reasonable person, would appear to have been solicited, received or given* **with intent to give or obtain special consideration or influence** as to any action by such officer or employee in his or her official capacity; provided, that nothing shall prohibit contributions which are solicited or received and reported in accordance with applicable law.

4. Disclose Privileged Information.

Disclose or use any privileged or proprietary information gained by reason of his or her official position for a purpose which is for other than a City purpose; **provided**, that nothing shall prohibit the disclosure or use of information which is a matter of public knowledge, or which is available to the public on request.

5. Hold Financial or Beneficial Interest in City Transaction.

a. Regardless of prior disclosure thereof **hold or acquire a beneficial interest**, direct or indirect, personally or through a member of his or her immediate family, **in any contract** which, in whole or in part, is, or which may be, made by, through, or under the supervision of such officer or employee or **which may be made for the benefit of his or her office; or accept**, directly or indirectly, **any compensation, gratuity, or reward in connection with such contract** from any other person or entity beneficially interested therein, in violation of Chapter 42.23 RCW;

b. Regardless of prior disclosure thereof, **be beneficially interested**, directly or indirectly, **in any contract or transaction** which may be made by, through or under the supervision of such officer, in whole or in part, or **which may be made for the benefit of his office, or accept**, directly or indirectly, any compensation, gratuity or reward in connection with such contract or transaction from any other person beneficially interested therein. This subsection shall not apply to the furnishing of electrical, water, other utility services or other services by the City at the same rates and on the same terms as are available to the public generally.