May 5, 2017

Fox Blackhorn

Public Disclosure Commission

711 Capital Way, Rm 206

P.O. Box 40908

Olympia, WA 98504-0908

Re: Response to PDC Complaint # 16801 (De'Sean Quinn) Supplement

Dear Mr. Blackhorn,

Thank you for the opportunity to respond this is a coordinated partisan effort that is being replicated in South King County and throughout the state on many people of good character who want to serve the public.

I am writing to follow up on the supplemental to the PDC complaint. The organization in question Forterra has built a relationship with Tukwila and has invested in it since 2001. I am a volunteer board member and I do not receive compensation of any kind from the organization. Participating in community, non-profit organizations is in the tradition of many decades of elected officials in our state. I consult with the City of Tukwila Attorney on a frequent basis to make sure I am in compliance with all roles and responsibilities. The supplemental to the original complaint makes assumptions and interpretations that do not match case law on these issues. I read the attached article in the MRSC which references Barry v. Johns also included. The case involved two Councilmembers who were serving on Boards of a non-profit that the City was contracting with. It concluded a financial interest in that it provided relief from liability for Board members of the nonprofit. The court concluded that "beneficial interest" under RCW 42.23.30 equated with a more direct financial interest. I do not have a financial interest or a remote interest in the agreement. In my initial responses I have been very clear that I am not an "officer" and I do not have a beneficial interest in any Forterra contract. Consistent with case law that I've attached. The item listed in the complaint was a consent agenda item. Although in my estimation I have not violated the law I do plan to recuse myself from any future agreements and continue to be very transparent regarding my participation on the non-profit boards that allow me the opportunity serve the people.

Thank you for the opportunity to respond,

De'Sean Quin

3

# Potential Conflicts and Ethical Guidelines

Holding the public trust requires maintaining high ethical standards. To help assure the public's trust, court decisions, state laws and local codes have placed limits on the personal interests and relationships officeholders can have with subjects and actions under their control. Violations can have serious consequences, both to the officeholders and their local jurisdictions

## Prohibited Uses of Public Office

Our state supreme court, citing principles "as old as the law itself," has held that a councilmember may not vote on a matter where he or she would be especially benefitted. *Smith v. Centralia*, 55 Wash. 573, 577, 104 Pac. 797 (1909) (vacation of an abutting street). With some limited exceptions statutory law strictly forbids municipal officials from having personal financial interests in municipal employment or other contracts under their jurisdiction, regardless of whether or not they vote on the matter.

The public's concern is also reflected in several sections of the "Open Government Law"; a major segment of that act (RCW 42.17A.700) is devoted to requiring candidates and public officials to make financial disclosures at various times so that the public can be informed about potential conflicts.

## Code of Ethics

State law, codified at RCW 42.23.070, provides a code of ethics for county, city, and special purpose district officials. The code of ethics has four provisions, as follows:

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.

This last provision is particularly significant because it potentially applies to disclosure of information learned by reason of attendance at an executive session. Clearly, executive sessions are meant to be confidential, but the Open Public Meetings Act does not address this issue. Arguably, RCW 42.23.070(4) is applicable to information received in an executive session. See the section of this booklet on Open Public Meetings for more information on executive sessions.

## Statutory Prohibition Against Private Interests in Public Contracts

### *Basics*

The principal statutes directly governing the private interests of municipal officers in public contracts are contained in ch. 42.23 RCW, which is entitled "Code of Ethics for Municipal Officers – Contract Interests." RCW 42.23.030 sets out the general prohibition that:

> No municipal officer shall be beneficially interested, directly or indirectly, in any contract 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 from any other person beneficially interested therein . . . .

### *General Application*

1. The act applies to all municipal and quasi-municipal corporations, including cities, towns, counties, special purpose districts, and others. As to a charter city or county, however, charter provisions are permitted to control in case of conflict, if the charter provisions are more stringent. The standards contained in the act are considered to be minimum ones. RCW 42.23.060.

2. Although the act refers to "officers," rather than employees, the word "officers" is broadly defined to include deputies and assistant officers, such as a deputy or assistant clerk, and any others who undertake to perform the duties of an officer. RCW 42.23.020(2).

**Question:** Does the statute prohibit a local official from accepting gifts of minimal intrinsic value from someone who does or may seek to do business with his or her office?

***Answer:*** Many officials, either because of the broad language of that statute or on principle, refuse to accept even a business lunch under those circumstances. Others regard items of only token or trivial value to be de minimis; i.e., of insufficient amount to cause legal concern.

3. The word "contract" includes employment, sales, purchases, leases, and other financial transactions of a contractual nature. (There are some monetary and other exceptions and qualified exceptions, which will be described in later paragraphs.)

4. The phrase "contracting party" includes any person or firm employed by or doing business with a municipality. RCW 42.23.020(4).

### *Interpretation*

1. The beneficial interests in contracts prohibited by RCW 42.23.030 are financial interests only. *Barry v. Johns*, 82 Wn. App. 865, 868, 920 P.2d 222 (1996).

2. The statutory language of RCW 42.23.030, unlike earlier laws, does not prohibit an officer from being interested in *any and all* contracts with the municipality. However, it does apply to the control or supervision over the making of those contracts (whether actually exercised or not) and to contracts made for the benefit of his or her particular office. In other words, assuming that the clerk or treasurer of a particular city has been given no power of supervision or control over that city's contracts, he or she would be prohibited from having an interest

only in contracts affecting his or her own office, such as the purchasing of supplies or services for that office's operation. Members of a council, commission, or other governing body are more broadly and directly affected, because the municipality's contracts are made, as a general rule, by or under the supervision of that body, in whole or in part. It does not matter whether or not the member of the governing body voted on the contract in which he or she had a financial interest; the prohibition still applies. *City of Raymond v. Runyon*, 93 Wn. App. 127, 137, 967 P.2d 19 (1998). The employment and other contracting powers of executive officials, such as city managers, mayors, and county or other elected officials, also are generally covered by the broad provisions of the act.

3. Subject to certain "remote interest" exceptions, explained later in this section, a member of a governing body who has a forbidden interest may not escape liability simply by abstaining or taking no part in the governing body's action in making or approving the contract. Nor does it matter that the contract was let through the use of competitive bidding. *See* AGO 53-55 No. 317.

**Question:** May a city, county or special purpose district official accept a valuable gift from a foreign dignitary in connection with a visit?

***Answer:*** A common policy is to allow the acceptance of such a gift on behalf of the jurisdiction, but not for personal use. Arguably, under the wording of RCW 42.23.070(2), a jurisdiction may adopt a formal policy by local "law" governing such occasions, allowing exceptions in appropriate cases involving essentially personal items, subject to disclosure and other procedures to guard against abuse.

4. Both direct and indirect financial interests are prohibited, and the law also prohibits an officer from receiving financial benefits from anyone else having a contract with the municipality, if the benefits are in any way connected with the contract. In an early case involving a similar statute, where a mayor had subcontracted with a prospective prime contractor to provide certain materials, the state supreme court struck down the entire contract with the following eloquent expression of its disapproval:

> Long experience has taught lawmakers and courts the innumerable and insidious evasions of this salutary principle that can be made, and therefore the statute denounces such a contract if a city officer shall be interested not only directly, but indirectly. However devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void.

*Northport v. Northport Townsite Co.*, 27 Wash. 543, 549, 68 Pac. 204 (1902).

**Question:** May a local official permit an individual or company to pay his or her expenses for travel to view a site or plant in connection with business related to the official's office?

***Answer:*** The statute can be construed to prevent an official from being "compensated" in that manner. On the other hand, payment of expenses for a business trip arguably does not constitute compensation. Prudence suggests that if the trip is determined to be meritorious (and assuming that there is no potential violation of the appearance of fairness doctrine, described in a later chapter), the city, county, or district itself should pay the expenses and any payment or reimbursement from a private source should be made to the jurisdiction.

5. The statute ordinarily prohibits a public officer from hiring his or her spouse as an employee because of the financial interest each spouse possesses in the other's earnings under Washington community property law. However, a bona fide separate property agreement between the spouses may eliminate such a prohibited conflict if the proper legal requirements for maintaining a separate property agreement are followed. *State v. Miller*, 32 Wn.2d 149, 157-58, 201 P.2d 136 (1948). Because of a similar financial relationship, a contract with a minor child or other dependent of the officer may be prohibited. However, chapter 42.23 RCW is not an anti-nepotism law and, absent such a direct or indirect *financial* interest, does not prohibit employing or contracting with an official's relatives. A mere emotional or sentimental interest is not the type of interest prohibited by that chapter. *Mumma v. Brewster*, 174 Wash. 112, 116, 24 P.2d 438 (1933).

As indicated in earlier paragraphs, individual local jurisdictions commonly adopt supplementary codes of ethics.

A question often arises when the spouse of a local government employee or contractor is elected or appointed to an office of that local government that has authority over the spouse's employment or other contract:

**Question:** Must the existing employment or contract be terminated immediately?

***Answer:*** The answer to the question is, ordinarily, "no"; however, any subsequent renewal or modification of the employment or other contract probably would be prohibited. For example, in a letter opinion by the attorney general to the state auditor, the question involved the marriage of a county commissioner to the secretary of another official of the same county. If the employment had occurred after the marriage, the statute would have applied because of the community property interest of each spouse in the other's earnings. The author concluded that the statute was not violated in that instance because the contract (employment) pre-existed and could not have been made "by, through, or under the supervision of" the county commissioner or for the benefit of his office. However, the letter warned, the problem would arise when the contract first came up for renewal or amendment. That might be deemed to occur, for instance, when the municipality adopts its next budget. Or, in a case where the spouse is an employee who serves "at the pleasure of" the official in question, the employment might be regarded as renewable at the beginning of the next monthly or other pay period after the official takes office. Attorney General's letter to the State Auditor, dated June 8, 1970.

## *Exceptions*

RCW 42.23.030 exempts certain types of contracts from the provisions of the Act, such as:

1. The furnishing of electrical, water, or other utility services by a municipality to its officials, at the same rate and on the same terms as are available to the public generally.

2. The designation of public depositaries for municipal funds. Conversely, this does not permit an official to be a director or officer of a financial institution which contracts with the city or county for more than mere "depository" services.

3. The publication of legal notices required by law to be published by a municipality, upon competitive bidding or at rates not higher than prescribed by law for members of the general public.

4. Except in cities with a population of over 1,500, counties with a population of 125,000 or more, irrigation district encompassing more than 50,000 acres, or in a first-class school district; the employment of any person for unskilled day labor at wages not exceeding $200 in any calendar month.

5. Other contracts in cities with a population of less than 10,000 and in counties with a population of less than 125,000, except for contracts for legal services, other than for the reimbursement of expenditures, and *except sales or leases by the municipality as seller or lessor*,[1] provided:

   > That the total amount received under the contract or contracts by the municipal officer or the municipal officer's business does not exceed $1,500 in any calendar month.

   However, in a second class city, town, noncharter code city, or for a member of any county fair board in a county which has not established a county purchasing department, the amount received by the officer or the officer's business may exceed $1,500 in any calendar month but must not exceed $18,000 in any calendar year. The exception does *not* apply to contracts with cities having a population of 10,000 or more or with counties having a population of 125,000 or more. This exemption, if available, is allowed with the following condition:

   > A municipal officer may not vote in the authorization, approval, or ratification of a contract in which he or she is beneficially interested even though one of the exemptions allowing the awarding of such a contract applies. The interest of the municipal officer must be disclosed to the governing body of the municipality and noted in the official minutes or similar records of the municipality before the formation of the contract.

   It is important to note that the language of this section is so structured that the statute cannot be evaded by making a contract or contracts for larger amounts than permitted in a particular

[1]From the legal phrase de minimis non curat lex (the law does not concern itself with trifles).

period and then spreading the payments over future periods.

6. In a rural public hospital district (see RCW 70.44.460) the total amount of a contract or contracts authorized may exceed $1,500 in any calendar month, but shall not exceed $24,000 in any calendar year, with the maximum calendar year limit subject to additional increases determined according to annual changes in the consumer price index (CPI).[2]

7. The leasing by a port district as lessor of port district property to a municipal officer or to a contracting party in which a municipal officer may be beneficially interested, if in addition to all other legal requirements, a board of three disinterested appraisers and the superior court in the county where the property is situated finds that all terms and conditions of such lease are fair to the port district and are in the public interest.

8. Other exceptions apply to the letting of contracts for: school bus drivers in a second class school district; substitute teachers or substitute educational aid in a second-class school district; substitute teachers, if the contracting party is the spouse of an officer in a school district; certificated or classified employees of a school district, if the contract is with the spouse of a school district officer and the employee is already under contract (except, in second class districts, the spouse need not already be under contract).[3]

9. Under certain defined circumstances, any employment contract with the spouse of a public hospital district commissioner.[4]

If an exception applies to a particular contract, the municipal officer may not vote for its authorization, approval, or ratification and his or her interest of the municipal officer must be disclosed to the governing body and noted in the official minutes or other similar records before the contract is formed.

## *Qualified Exceptions*

RCW 42.23.040 permits a municipal officer to have certain limited interests in municipal contracts, under certain circumstances. Those types of interest are as follows:

1. The interest of a nonsalaried officer of a nonprofit corporation.

2. The interest of an employee or agent of a contracting party where the compensation of such employee or agent consists entirely of fixed wages or salaries (i.e., without commissions or bonuses). For example, a councilmember may be employed by a contractor with whom the city does business for more than the amounts allowed under RCW 42.23.030(6) (if they apply), but not if any part of his or her compensation includes a commission or year-end bonus.

3. That of a landlord or tenant of a contracting party; e.g., a county commissioner who rents an apartment from a contractor who bids on a county contract.

4. That of a holder of less than one percent of the shares of a corporation or cooperative which is a contracting party.

The conditions for the exemption in those cases of "remote interest" are as follows:

1. The officer must fully disclose the nature and extent of the interest, and it must be noted in the official minutes or similar records before the contract is made.

2. The contract must be authorized, approved, or ratified after that disclosure and recording.

3. The authorization, approval, or ratification must be made in good faith.

4. Where the votes of a certain number of officers are required to transact business, that number must be met without counting the vote of the member who has a remote interest.

5. The officer having the remote interest must not influence or attempt to influence any other officer to enter into the contract.

It is accordingly recommended that the officer with a remote interest should not participate, or even appear to participate, in any manner in the governing body's action on the contract.

---

[2]The statute allows no exception, based on value or otherwise, for a sale or lease by the city or county to an official under whom the contract would be made or supervised.

[3]See RCW 42.23.030(6)(c)(ii).

[4]RCW 42.23.030(8)-(11).

### *Penalties*

1. A public officer who violates chapter 42.23 RCW may be held liable for a $500 civil penalty "in addition to such other civil or criminal liability or penalty as may otherwise be imposed."

2. The contract is void, and the jurisdiction may avoid payment under the contract, even though it may have been fully performed by another party.

3. The officer may have to forfeit his or her office.

## Dual Office-Holding

### *Basics*

The election or appointment of a person to public office, unlike "public employment," is not considered to be a "contract" within the meaning of chapter 42.23 RCW and similar statutes. McQuillin, *Municipal Corporations*, § 12.29; *see also Powerhouse Engineers v. State*, 89 Wn.2d 177, 184, 570 P.2d 1042 (1977). Under case law, however, it is unlawful for a public officer to appoint himself or herself to another public office unless clearly authorized by statute to do so. *See* McQuillin, *Municipal Corporations*, § 12.75.[5] There are also statutory provisions and case law governing the holding of multiple offices by the same person. To apply those general principles, it is necessary to know the distinction between a public "office" and "employment." See, for a detailed analysis, McQuillin, *Municipal Corporations*, § 12.30. In *State ex rel. Brown v. Blew*, 20 Wn.2d 47, 51, 145 P.2d 554 (1944), the Washington State Supreme Court, quoting from another source, held the following five elements to be indispensable in order to make a public employment a "public office":

1. It must be created by the constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature;

2. It must possess a delegation of a portion of the sovereign power of government to be exercised for the benefit of the public;

3. The powers conferred and the duties to be discharged must be defined, directly or impliedly, by the legislature or through legislative authority;

4. The duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office created or authorized by the legislature and by it placed under the general control of a superior officer or body; and

5. It must have some permanency and continuity and not be only temporary or occasional.

As the cases also point out, usually a public officer is required to execute and file an official oath and bond.

### *Statutory Provisions*

There is no single statutory provision governing dual office-holding. In fact, statutory law is usually silent on that question except where the legislature has deemed it best either to prohibit or permit particular offices to be held by the same person regardless of whether they may or may not be compatible under common law principles. For example, see RCW 35.23.142, 35A.12.020, and 35.27.180, which expressly permit the offices of clerk and treasurer to be combined in certain cases. On the other hand, RCW 35A.12.030 and 35A.13.020 prohibit a mayor or councilmember in a code city from holding any other public office or employment within the city's government "except as permitted under the provisions of chapter 42.23 RCW."

A statute expressly permits city councilmembers to hold the position of volunteer fire fighter (but not chief), volunteer ambulance personnel, or reserve law enforcement officer, or two or more of such positions, but only if authorized by a resolution adopted by a two-thirds vote of the full city council. RCW 35.21.770 and RCW 35A.11.110; *see also* RCW 35.21.772 which allows volunteer members of a fire department, except a fire chief, to be candidates for elective office and be elected or appointed to office while remaining a fire department volunteer.

In addition, RCW 35A.13.060 expressly authorizes a city manager to serve two or more cities in that capacity at the same time, but it also provides that a

[5]As an exception to this general rule, however, a councilmember may vote for himself or herself for appointment to a position, such as mayor pro tem, which must be filled from the membership of the council. See *Gayder v. Spiotta*, 206 N. J. Super. 556, 503 A.2d 348, 351-52 (1985).

city council may require the city manager to devote his or her full time to the affairs of that code city.

## Incompatible Offices

In the absence of a statute on the subject, the same person may hold two or more public offices unless those offices are incompatible. A particular body of judicial decisions (case law "doctrine") prohibits an individual from simultaneously holding two offices that are "incompatible."

Although the Washington State Supreme Court has never had the occasion to apply the doctrine in a situation actually involving two "offices," the court in *Kennett v. Levine*, 50 Wn.2d 212, 310 P.2d 244 (1957) cited the doctrine approvingly and applied it in a different context. The court explained in its opinion:

> Offices are incompatible when the nature and duties of the offices are such as to render it improper, from considerations of public policy, for one person to retain both.

The question is whether the functions of the two are inherently inconsistent or repugnant, or whether the occupancy of both offices is detrimental to the public interest.

(Citations omitted.) *Kennett v. Levine*, supra, at 216-217.

Other authorities point out that the question is not simply whether there is a physical impossibility of discharging the duties of both offices at the same time, but whether or not the functions of the two offices are inconsistent, as where one is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to faithfully and impartially discharge the duties of both. Incompatibility may arise where the holder cannot *in every instance* discharge the duties of both offices. McQuillin, *Municipal Corporations*, § 12.67.

Applying those tests, the Washington State Attorney General's Office has found various offices to be incompatible with each other, such as mayor and county commissioner (AGO 57-58 No. 91), county engineer and city engineer (letter to the Prosecuting Attorney of Douglas County, July 16, 1938), mayor and port commissioner (AGO 1978 No. 12), commissioner of a fire protection district and the district's civil service commission (AGO 1968 No. 16), and others. Courts in other jurisdictions have held incompatible the positions of mayor and councilmember, mayor and city manager, city marshal and councilmember, to mention only a few. McQuillin, Municipal Corporations, § 12.67(a).

## Prohibition Against Pay Increases

As a means of preventing the use of public office for self-enrichment, the state constitution (article 11, section 8) initially prohibited any changes in the pay applicable to an office having a fixed term, either after the election of that official or during his or her term. However, by Amendment 54 (article 30), adopted in 1967, and an amendment to article 11, section 8 (Amendment 57) in 1972, the rule was modified to permit pay increases for officials *who do not fix their own compensation*. More recently, the ability to receive mid-term compensation increases was expanded to include councilmembers and commissioners, provided a local salary commission is established and the commission sets compensation at a higher level. See RCW 35.21.015 and 36.22.024. Otherwise, members of governing bodies who set their own compensation still cannot, during the terms for which they are elected, receive any pay increase enacted by that body *either* after their election *or* during that term. The prohibition is not considered to apply, however, to a mayor's compensation, unless the mayor actually casts the tie-breaking vote on the question. Mid-term or post-election *decreases* in compensation for elective officers are entirely forbidden by article 11, section 8 of the constitution.

The term "compensation," as used in that constitutional prohibition, includes salaries and other forms of "pay," but does not include rates of reimbursement for travel and subsistence expenses incurred on behalf of the municipality. *State ex rel. Jaspers v. West*, 13 Wn.2d 514, 519, 125 P.2d 694 (1942); *see also State ex rel. Todd v. Yelle*, 7 Wn.2d 443, 461, 110 P.2d 162 (1941). The cost of hospitalization and medical aid policies or plans is not considered additional compensation to elected officials. RCW 41.04.190.

## Appearance of Fairness Doctrine in Hearings

Until 1969, Washington law dealing with conflicts of interest generally applied only to financial interests, as opposed to emotional, sentimental, or other biases. The "appearance of fairness doctrine," however, which governs the conduct of certain hearings, covers broader ground. That doctrine was first applied in this state in 1969. In two cases decided in that year, the Washington State Supreme Court concluded that, when boards of county commissioners, city councils, planning commissions, civil service commissions, and similar bodies are required to hold hearings that affect individual or property rights ("quasi-judicial" proceedings), they should be governed by the same strict fairness rules that apply to cases in court. See *Smith v. Skagit County*, 75 Wn.2d 715, 453 P.2d 832 (1969); *State ex rel. Beam v. Fulwiler*, 76 Wn.2d 213, 456 P.2d 322 (1969). Basically, the rule requires that for justice to be done in such cases, the hearings must not only be fair, they must also be free from even the appearance of unfairness. The cases usually involve zoning matters, but the doctrine has been applied to civil service and other hearings as well.

For additional information on this doctrine, see the MRSC publication entitled *The Appearance of Fairness Doctrine in Washington State*, Report No. 32 Revised, April 2011. Also, there is a listing of appellate court decisions showing the history of the appearance of fairness doctrine in the Appendix to this publication.

As the listing also indicates, the appearance of fairness doctrine has been used to invalidate proceedings for a variety of reasons; for example, if a member of the hearing tribunal has a personal interest of *any* kind in the matter or takes evidence improperly outside the hearing (*ex parte*). In those cases, that member is required to completely disassociate him or herself from the case, or the entire proceeding can be overturned in court.

In 1982, the legislature reacted to the proliferation of appearance of fairness cases involving land use hearings by enacting what is now chapter 42.36 RCW. This RCW chapter defines and codifies the appearance of fairness doctrine, insofar as it applies to local land use decisions.[6] In substance, those statutes now provide that in land use hearings:

1. The appearance of fairness doctrine applies only to "quasi-judicial" actions of local decision-making bodies. "Quasi-judicial" actions are defined as:

   > actions of the legislative body, planning commission, hearing examiner, zoning adjuster, board of adjustment, or boards which determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding.

   RCW 42.36.010.

2. The doctrine does not apply to local "legislative actions"

   > adopting, amending, or revising comprehensive, community, or neighborhood plans or other land use planning documents or the adoption of area-wide zoning ordinances or the adoption of a zoning amendment that is of area-wide significance.

   RCW 42.36.010.

3. Candidates for public office may express their opinions about pending or proposed quasi-judicial actions while campaigning (but see paragraph 9 below), without being disqualified from participating in deciding those matters if they are later elected;

4. Acceptance of campaign contributions by candidates who comply with the public disclosure and ethics laws will not later be a violation of the appearance of fairness doctrine. *Snohomish County Improvement Alliance v. Snohomish County*, 61 Wn. App. 64, 73-74, 808 P.2d 781 (1991) (but see paragraph 9 below);

5. During the pendency of any quasi-judicial proceeding, no member of a decision-making body may engage in ex parte (outside the hearing) communications with proponents or opponents about a proposal involved in the pending proceeding, unless that member:

[6]However, in *Bunko v. Puyallup Civil Service Commission*, 95 Wn. App. 495, 975 P.2d 1055 (1999), the state court of appeals applied the statutory doctrine to the proceedings of a civil service commission.

a. Places on the record the substance of such oral or written communications; and

b. Provides that a public announcement of the content of the communication and of the parties' rights to rebut the substance of the communication shall be made at each hearing where action is taken or considered on that subject. This does not prohibit correspondence between a citizen and his or her elected official if the correspondence is made a part of the record (when it pertains to the subject matter of a quasi-judicial proceeding).

6. Participation by a member of a decision-making body in earlier proceedings that result in an advisory recommendation to a decision-making body does not disqualify that person from participating in any subsequent quasi-judicial proceedings (but see paragraph 9 below);

7. Anyone seeking to disqualify a member of a decision-making body from participating in a decision on the basis of a violation of the appearance of fairness doctrine must raise the challenge as soon as the basis for disqualification is made known or reasonably should have been known prior to the issuance of the decision; upon failing to do so, the doctrine may not be relied on to invalidate the decision;

8. A challenged official may participate and vote in proceedings if his or her absence would cause a lack of a quorum, or would result in failure to obtain a majority vote as required by law, provided a challenged official publicly discloses the basis for disqualification prior to rendering a decision; and

9. The appearance of fairness doctrine can be used to challenge land use decisions where a violation of an individual's right to a fair hearing is demonstrated. For instance, certain conduct otherwise permitted by these statutes may nevertheless be challenged if it would actually result in an unfair hearing (e.g., where campaign statements reflect an attitude or bias that continues after a candidate's election and into the hearing process). RCW 42.36.110. Unfair hearings may also violate the constitutional "due process of law" rights of individuals. State ex rel. *Beam v. Fulwiler*, 76 Wn.2d 313, 321-22, 456 P.2d 322 (1969) (cited in Appendix). Questions of this nature may still have to be resolved on a case-by-case basis.

# BARRY v. JOHNS

*NO. 36927-0-I.*

*920 P.2d 222 (1996)*
*82 Wash.App. 865*

***Joyce BARRY, an individual and councilwoman for the City of Mountlake Terrace, Washington, Appellant,***
***v.***
***Candice C. JOHNS and Pat M. Cordova, individuals and councilwomen for the City of Mountlake Terrace, Washington, Respondents.***

*Court of Appeals of Washington, Division 1.*
*August 5, 1996.*

*Michael David Brandt, Seattle, for appellant.*

*George W. Cody, Cody Hatch & Blanchard, Inc., P.S., Lynnwood, for respondents.*

AGID, Judge.

The code of ethics for municipal officers, RCW ch. 42.23, prohibits them from having a beneficial interest in contracts entered into on the municipality's behalf. We are asked to decide whether a municipal contract that limits the liability of a non-profit organization's board members for discretionary decisions made in their official capacity gives those board members a beneficial interest in the contract. Because the code seeks only to regulate municipal officers' financial interests in contracts, not the type of non-pecuniary interest involved here, we conclude that it does not.

## FACTS

In 1992, the Mountlake Terrace police chief, representatives of the Mountlake Terrace Parks and Recreation Department and a group of community representatives created the Neutral Zone to provide volunteer support services to the city's at-risk youth. The Neutral Zone was housed in a facility provided by the Edmonds School District. In its early stages, it was funded, in part, by appropriations from the city budget. Because of the city's close affiliation with the project, two city council members, Candice Johns and Pat Cordova, were on the Neutral Zone's board of directors.

**[920 P.2d 223]**

In 1993, the board of directors incorporated the Neutral Zone as a non-profit organization. The city, the school district and the Neutral Zone then drafted an agreement outlining their roles in the operation. The provision of the agreement at issue here, section 9, limits the liability of Neutral Zone board members for making or failing to make discretionary decisions when the board members are acting in their official capacity, unless the decision or failure constitutes gross negligence.

In 1994, the proposed agreement came before the Mountlake Terrace city council for consideration. At the time, Cordova and Johns were members of the city council and were also serving as unpaid directors of the Neutral Zone. Before the vote, Councilmember Joyce Barry challenged Johns' and Cordova's right to participate, contending their involvement in the Neutral Zone presented a conflict of interest under the code of ethics. Johns and Cordova disagreed and voted to adopt the measure, which passed by a vote of four to three. Barry sought a writ of mandamus and declaratory relief to void the agreement. The trial court granted Johns and Cordova's cross-motion for summary judgment and dismissed Barry's complaint. Barry appeals.

## DISCUSSION

RCW 42.23.030 prohibits a municipal officer from making contracts on the municipality's behalf that give the officer a beneficial interest in the contract:

> No municipal officer shall be beneficially interested, directly or indirectly, in any contract 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 or her office, or accept, directly or indirectly, any compensation, gratuity or reward in connection with such contract from any other person beneficially interested therein.

Contracts made in violation of the statute are void, and any officer violating the provisions of the statute is liable to the municipality for a $300 fine. RCW 42.23.050. Barry contends Johns and Cordova were "beneficially interested" in the contract between Mountlake Terrace and the Neutral Zone within the meaning of RCW ch. 42.23 because it limited their liability for decisions made in their capacity as Neutral Zone board members.

RCW ch. 42.23 does not define beneficial interest. Johns and Cordova submit that the term is limited to financial interests. Barry argues that it should be read broadly to prohibit municipal officers from approving contracts that provide them any benefit, financial or otherwise. Read as a whole, the code of ethics clearly supports Johns and Cordova's interpretation. Although the code does not define a beneficial interest, its list of the types of beneficial interests that are not prohibited by the code is instructive. These exceptions include contracts for utility services, publication of legal notices required by law and employment contracts for school bus drivers and other school district employees. *See* RCW 42.23.030(1)-(10). Because the exceptions to the general rule prohibiting a municipal officer from having a beneficial interest in certain municipal contracts all involve business transactions or employment matters, we conclude the Legislature intended the term beneficial interest under the general rule to encompass the same thing. We conclude, therefore, that RCW 42.23.030 applies only to municipal contracts involving business transactions, employment matters and other financial interests and cannot be read to apply to the contract here, which conferred no financial benefit on Johns or Cordova.[1]

Section 9 of the agreement did not confer even a potential financial benefit on Johns and Cordova because state law extends them the same benefit. Section 9 provides:

Pursuant to RCW 4.24.264, the Neutral Zone board members shall not be individually liable for any discretionary decision or failure to make a discretionary decision within his or her official capacity

**[920 P.2d 224]**

as a board member unless the decision or failure to decide constitutes gross negligence.

Like section 9, RCW 4.24.264 provides that members of board of directors and officers of nonprofit corporations are not individually liable for any discretionary decision or failure to make a discretionary decision within his or her official capacity unless it constitutes gross negligence. Because the two provisions extend the same protection from liability to board members of non-profit organizations, Johns and Cordova did not receive any benefit from the agreement with the Neutral Zone that they did not already have under state law.

Barry's proposed reading of the statute is also seriously at odds with the Legislature's declared purpose which is to regulate municipal officers' involvement in some municipal contracts from which they could benefit financially and, at the same time, enlarging a municipality's pool of potential officeholders:

> It is the purpose and intent of this chapter to revise and make uniform the laws of this state *concerning the transaction of business* by municipal officers, as defined in this act,[ ] in conflict with the proper performance of their duties in the public interest; and to promote the efficiency of local government by prohibiting certain instances and areas of conflict while at the same time sanctioning, under sufficient controls, certain other instances and areas of conflict wherein the private interest of the municipal officer is deemed to be only remote, to the end that, without sacrificing necessary public responsibility and enforceability in areas of significant and clearly conflicting interests, the selection of municipal officers may be made from a wider group of responsible citizens of the communities which they are called upon to serve.

RCW 42.23.010 (italics ours).

Barry's reading of the statute would produce the opposite effect. In the case before us, for example, she would require that Johns and Cordova either resign their positions at the Neutral Zone, depriving the organization and the community of two active volunteers, or refrain from voting on the Neutral Zone agreement, thereby compromising their ability to influence an important community issue. The fault with Barry's approach is evident when carried to its logical extreme. She would give voters the choice of either electing active members of the community who would have to resign upon taking office from any community organizations the municipality works with or electing less involved members of the community, who would not have the conflict of interest she believes exists here. In our view, neither option is required by the law or common sense.

At oral argument, Barry's counsel argued passionately that the statute's true aim is to prevent municipal officers with outside agendas from unduly influencing the municipality's relationship with organizations they favor or causes they advocate. He warned that this type of entanglement subverts the democratic process because one or two officers can dictate the council's actions by directing the municipality into contracts with selected organizations, thereby overriding the popular will. While we unquestionably share Barry's concern for the integrity of our democratic system, we cannot agree that it will be threatened if elected municipal officers are allowed to influence decisions that will benefit one community organization over another. On the contrary, in a representative democracy, we elect our legislators precisely to carry out agendas and promote causes with full knowledge that "their own personal predilections and preconceptions" will affect their decisions. *Evergreen Sch. Dist. No. 114 v. Clark County Comm. on Sch. Dist. Org.,* 27 Wn.App. 826, 833, 621 P.2d 770 (1980). As long as these predilections do not lead them to line their pockets or otherwise abuse their offices, we leave the wisdom of their choices to the voters. If the voters do not like their representatives' agendas or voting decisions, they are free to vote them out of office.

Barry further contends that Johns' and Cordova's participation in the vote to approve the agreement violated the appearance of fairness doctrine. Because Barry did not raise this issue below, we do not address it further except to note that the appearance of fairness doctrine does not apply to legislative

**[920 P.2d 225]**

actions. *See Zehring v. City of Bellevue,* 99 Wn.2d 488, 494, 663 P.2d 823 (1983).

The summary judgment is affirmed.

COLEMAN and BECKER, JJ., concur.

## FOOTNOTES

1. As further support for this reading, we note that the statutory counterpart for state officers and employees, RCW 42.52.030, which is worded similarly to RCW

42.23.030, is entitled "*Financial* interests in transactions."

---