



BUSINESS OF THE CITY COUNCIL CITY OF MERCER ISLAND

AB 5849
May 4, 2021
Regular Business

AGENDA BILL INFORMATION

TITLE:	AB 5849: Code of Ethics Revisions (Ordinance No. 21C-10, First Reading)	<input checked="" type="checkbox"/> Discussion Only
RECOMMENDED ACTION:	Set Ordinance No. 21C-10 for second reading and possible adoption on May 18, 2021.	<input type="checkbox"/> Action Needed: <input checked="" type="checkbox"/> Motion <input type="checkbox"/> Ordinance <input type="checkbox"/> Resolution

DEPARTMENT:	City Council
STAFF:	Jessi Bon, City Manager Ali Spietz, Chief of Administration Bio Park, City Attorney
COUNCIL LIAISON:	n/a
EXHIBITS:	1. Ordinance No. 21C-10, including Exhibit A (revisions to Code of Ethics)
CITY COUNCIL PRIORITY:	n/a

SUMMARY

At the January 19, 2021 Council Meeting, the City Council directed the City Manager to prepare an ordinance amending chapter 2.60 MICC – the City’s Code of Ethics. Matthew Segal and Sarah Washburn of Pacifica Law Group were hired to assist the City and evaluate and recommend revisions to the current Code of Ethics. A draft ordinance with Pacifica’s potential revisions (see Exhibit 1) is presented to City Council for a first reading and discussion.

BACKGROUND

In 2018, the City Council adopted for the first time its own Code of Ethics (see [Ordinance No. 18C-15](#)) providing direction for members of the City Council and the City’s boards and commissions (“Officials”) in their roles with the City.

In November 2019, the City Council requested amendments to the Code of Ethics, after the filing of complaints earlier that year led to issues with the process for reviewing and investigating complaints and determining disposition of violations. The code revisions included improving the process for responding to a complaint, removing references to State law, and adding guidance on the acceptance of gifts, conflict of interest, representation of third parties, and misuse of public position and resources. As a result, the current Ethics Code was adopted on December 10, 2019 (see [AB 5643](#) | [Ordinance No. 19C-20](#)).

In January 2021, the City Council requested an opportunity to discuss additional revisions to the Code of Ethics, and in response, Matthew Segal and Sarah Washburn of Pacifica Law Group were hired to assist the City evaluate the current Code of Ethics and recommend revisions to it.

EVALUATION OF CURRENT CODE OF ETHICS

Pacifica has reviewed current and prior versions of the Code of Ethics as well as relevant background information and documents, including examples of recent complaints filed under the Code. In March, Pacifica interviewed each member of the City Council to gain insight into procedural and substantive issues that have arisen in applying the Code of Ethics. Pacifica is also analyzing and comparing (1) relevant State law and persuasive authority addressing several themes raised in the interviews, such as conflicts of interest, appearance of fairness, recusal, and enforceability of particular provisions; and (2) other Washington jurisdictions' approaches to ethics codes both substantively and procedurally as they relate to the issues identified in the background and interviews. The results of that analysis, as well as the Councilmembers' input, has guided the Pacifica's work and informed the recommendations regarding the Code of Ethics.

REVISIONS TO CURRENT CODE PROPOSED

At the April 6 City Council meeting, Pacifica provided a status update and initial observations (see [AB 5827](#)). Pacifica has drafted proposed revisions to the Code of Ethics in line with its legal and jurisdictional research.

The proposed revisions fall into six main categories:

1. The Code's **policy section** (2.60.010 MICC) will be amended to incorporate key values from the Code of Ethics Statement (Resolution 1572) and to clarify that those values represent encouraged behaviors and an interpretive aid informing the adoption of the remainder of the Code, but not independently actionable provisions of the Code. In keeping with this framing, 2.60.070 MICC will be amended to require the ethics officer and hearing examiner to consider the policy section in rendering sufficiency determinations and final decisions on ethics violations, respectively. Under these proposed revisions, there will no longer be a separate Code of Ethics Statement; rather, officials will sign a general acknowledgment that they have read the Code and agree to be bound by it.
2. The **prohibited conduct** section (2.60.030 MICC) will be amended to include two new provisions. A proposed "appearance of conflict" provision is intended to capture circumstances that do not amount to a conflict of interest, but that nevertheless could appear to impair an official's judgment. Disclosure will be the remedy in such circumstances. A proposed "interest in contracts" provision tracks State law (and related exceptions) prohibiting officials from having any beneficial interest in contracts. This provision also incorporates State law on remote interests, under which certain limited interests are deemed not to constitute beneficial interests in contracts so long as the interest is disclosed and noted in the City's official minutes prior to contract formation, and the contract is approved without counting the vote of the official having the remote interest. These changes are recommended to provide additional guidance to officials on prohibited conduct, as well as to provide remedies short of recusal in specific circumstances.
3. The **advisory opinion** section (2.60.060 MICC) will be amended to remove the informal city attorney opinion process. Under this proposed revision, advisory opinions will be rendered solely by the ethics officer. This change is recommended to streamline, simplify, and ensure neutrality of the advisory opinion procedure.
4. Several changes are proposed to the **complaint, hearing, and enforcement procedures** section (2.60.070 MICC). A slightly higher bar is proposed for complaint sufficiency to facilitate meritorious complaints while discouraging unfounded ones. The hearing process will be amended to allow either party to request the issuance of subpoenas upon a showing of reasonable necessity, and to clarify

that such issuance is at the discretion of the hearing examiner. The decision process will be amended in several key areas, including (1) requiring the hearing examiner to dismiss complaints if he or she determines no violations were proven, (2) authorizing the hearing examiner to recommend particular sanctions if he or she determines violations were proven, and (3) authorizing the City Council to take several actions in disposition of a complaint, but requiring that the City Council afford deference to the hearing examiner's recommendations in doing so. Under the proposed revisions, either the official or the complaining party may, following final City Council action, appeal to State superior court under the writ procedure provided by State law. These changes are proposed to promote fairness and neutrality in the investigation and adjudication of ethics violations.

5. The Code's **fees and costs** provision (2.60.070(G)) will be amended to allow for recovery of reasonable attorney fees incurred by an official where the complaint is dismissed by the hearing examiner. This change will remove the current \$5,000 cap on such fees and is consistent with the common municipal practice of providing for defense and indemnity of officials against whom claims are brought in the course of performing their official duties and particularly where no violation is found.
6. The proposed revisions include **confidentiality provisions** applicable to the initial sufficiency determination phase and to unsubstantiated allegations, to the extent allowed under the state Public Records Act. These changes are recommended to discourage the filing of frivolous or otherwise unfounded complaints. A third-party notice provision will apply in the event members of the public request records of the ethics officer and/or hearing examiner, requiring the complaining party and/or the official complained against to obtain a court order precluding disclosure.

The ordinance with the revisions proposed by Pacifica is attached as Exhibit 1.

NEXT STEPS

At Tuesday's meeting, Pacifica will present the proposed revisions. The City Council will then have an opportunity to ask questions and discuss the revisions as part of the first reading of Ordinance No. 21C-10. A majority of the City Council may direct the City Manager to prepare amendments to the ordinance for consideration during second reading which is scheduled for May 18, 2021.

RECOMMENDATION

Move to set Ordinance No. 21C-10 for a second reading and possible adoption on May 18, 2021.