

**BEFORE THE ETHICS HEARING EXAMINER
FOR THE CITY OF MERCER ISLAND**

In the Matter of an Ethics Complaint)	No. HEA-2020-01-Ethics
)	
By Tom Acker and Others)	
)	
)	
Against Planning Commission Member)	FINDINGS, CONCLUSIONS,
<u>Lucia Pirzio-Biroli</u>)	AND RECOMMENDATION

SUMMARY OF RECOMMENDATION

Because the record reflects that Planning Commission Member Lucia Pirzio-Biroli did not violate the applicable provisions of the Mercer Island Code of Ethics that the Hearing Examiner has the authority to address based on the filed complaint and Determination of Sufficiency issued by the City's Ethics Officer, the Hearing Examiner recommends that the City Council dismiss the complaint without penalties.

SUMMARY OF RECORD

Hearing Date:

The City of Mercer Island Hearing Examiner held a hearing on the Ethics Complaint on October 19, 2020, using remote technology due to the ongoing COVID-19 pandemic.

Testimony:

The following individuals presented testimony under oath at the hearing:

Complainant's Witnesses:

Tom Acker, Complainant

Official's Witnesses:

Lucia Pirzio-Biroli, Official

Attorney Daniel Thompson represented the Complainant.

Attorney Alexandra Kenyon represented the Official

Exhibits:

The following exhibits were admitted into the record:

Complainant's Exhibits:

- C-1. Website article heading – "Mercer Island's Farmers Insurance Office Trades for \$46.5MM," dated April 17, 2020

Findings, Conclusions, and Recommendation

City of Mercer Island Hearing Examiner

Pirzio-Biroli Code of Ethics Complaint

No. HEA-2020-01-Ethics

- C-2. June 2, 2020, City Council Meeting Agenda; Ordinance No. 20-12, published June 10, 2020
- C-3. June 2, 2020, City Council Meeting Minutes
- C-4. Website article – “City Council Adopts Temporary Moratorium on Town Center Development,” dated June 2, 2020
- C-5. Website publication – MI Weekly, Vol. 15, No. 29, dated July 15, 2020
- C-6. July 21, 2020, City Council Meeting Agenda; Ordinance No. 20-12, published June 10, 2020
- C-7. Letter from March Gearhart, Ryan Companies, to Mercer Island City Council, dated June 18, 2019
- C-8. Email from March Gearhart to Mercer Island City Council and Staff, dated July 22, 2020
- C-9. Letter from Marc Gearhart, Ryan Companies, to Community Members, dated August 28, 2020
- C-10. September 1, 2020, City Council Meeting Agenda; Ordinance No. 20-12, published June 10, 2020
- C-11. Draft Ordinance No. 20-18, undated and unsigned, with attachments
- C-12. Ethics Complaint, received August 3, 2020, with email from Tom Acker, dated June 30, 2020.

Official’s Exhibits:

- O-1. Answer to Ethics Complaint, dated October 12, 2020
- O-2. Declaration of Lucia Pirzio-Biroli in Support of Dismissal of Ethics Complaint
- O-3. Declaration of Evan Maxim in Support of Dismissal of Ethics Complaint

Pleadings and Orders:

- Ethics Complaint, received August 3, 2020, with email from Tom Acker, dated June 30, 2020.
- Determination of Sufficiency, dated August 26, 2020
- Hearing Examiner’s Pre-Hearing Order, dated September 11, 2020
- Hearing Examiner’s Response to Inquiries, corrected September 22, 2020
- Official’s Document List, dated October 12, 2020
- Official’s Witness List, dated October 12, 2020
- Complainant’s Witness List, dated October 12, 2020
- Complainant’s Document List, received October 13, 2020
- Complainant’s Pre-Hearing Statement, dated October 13, 2020, including Complainant’s “Motion in Liminy” [sic] and Motion for Partial Summary Judgment
- Official’s Response to Complainant’s Pre-Hearing Statement and Motion to Strike, dated October 14, 2020
- Complainant’s Response to Official’s Motion to Strike, dated October 15, 2020
- Official’s Reply to Complainant’s Response, dated October 16, 2020
- Hearing Examiner’s Decision on Motions, dated October 16, 2020

Findings, Conclusions, and Recommendation
City of Mercer Island Hearing Examiner
Pirzio-Biroli Code of Ethics Complaint
No. HEA-2020-01-Ethics

The Hearing Examiner enters the following findings and conclusions based upon the admitted testimony and exhibits:

FINDINGS

Background and Complaint

1. Lucia Pirzio-Biroli (Official) is a member of the City of Mercer Island (City) Planning Commission. Pirzio-Biroli is also a licensed architect and principal of an architectural firm, Studio Ectypos Architecture. On June 18, 2020, a development firm, Ryan Companies, hired Studio Ectypos Architecture to analyze the City Comprehensive Plan and land use code for potential development opportunities related to Ryan Companies' acquisition of property within the city commonly referred to as the "Farmers Insurance Building." *Exhibit O-2.*
2. On August 3, 2020, Tom Acker (Complainant) filed a complaint under Mercer Island City Code (MICC) 2.60.070.A.1, alleging violations of the City's adopted Code of Ethics (Chapter 2.60 MICC) by the Official, Pirzio-Biroli, related to her firm's consulting work with Ryan Companies.¹ The complaint incorporates a June 30, 2020, email from Tom Acker to various City officials, which states in pertinent part:

It is my understanding [that] the representatives of the new Farmer's Market Building have hired a planning commission member to evaluate the comprehensive plan as it relates to Mercer Island and advise them of what is and is not possible under the city's codes. Even if the scope of work as I understand it is not 100% accurate, any business relationship with the potential developers would not be appropriate for a sitting planning commission member.

...

[Pirzio-Biroli] is well known for not representing the interests of the community as she has ignored feedback consistently, continued to push for large scale development[,], and pushed for what I call developer giveaways.

Ethics Complaint.

Sufficiency Determination

3. On August 3, 2020, the City appointed Attorney Jeremy W. Culumber to serve as the City's Ethics Officer pursuant to MICC 2.60.050. The designated Ethics Officer reviewed Acker's complaint to determine whether the allegations, if established as true, would be sufficient to constitute a violation of MICC 2.60.030 or Chapter 42.23 of the

¹ The complaint was also signed by the following: Carvel Zwingle, Mathew Goldbach, Susan Lund, Rob Dunbabin, Gary Robinson, Wendy Kristek, John Hall, Jean Dunbabin, Mike Cero, and Daniel Thompson. Daniel Thompson, who is an attorney, later was designated as the "Complainant Representative" for this matter.

Revised Code of Washington (RCW).² Accordingly, the Ethics Officer assumed the veracity of all allegations in the complaint in conducting his review. After reviewing the complaint, the Ethics Officer issued a Determination of Sufficiency, on August 26, 2020, which determined that the complaint was sufficient to allege violations of MICC 2.60.030.D, RCW 42.23.070(2), and RCW 42.23.070(3). *Determination of Sufficiency.*

4. MICC 2.60.030.D generally prohibits officials from soliciting or receiving gifts from persons or entities where it would appear to a reasonable person that the gift was solicited or given with the intent to influence actions taken by the official in their official capacity. In determining that the complaint was sufficient to allege a violation of MICC 2.60.030.D, the Ethics Officer reasoned that the complaint sufficiently alleged that the Official received financial compensation from an outside developer and that the Official has provided special considerations or influence by consistently ignoring community feedback, pushing for large-scale development, and pushing for developer giveaways. The Ethics Officer further reasoned that, because members of the Planning Commission make recommendations on land use regulations, comprehensive plan amendments, and quasi-judicial matters, any payment from a developer for services rendered by a planning commission member could arguably appear to constitute conduct prohibited under MICC 2.60.030.D. *Determination of Sufficiency.*
5. RCW 42.23.070(2) prohibits a municipal officer from receiving “any compensation . . . from a source except the employing municipality, for a matter connected with or related to the officer’s services as an officer.” In determining that the complaint was sufficient to allege a violation of RCW 42.23.070(2), the Ethics Officer reasoned that advice on city development is related to the municipal officer’s services as a member of the Planning Commission and that the complaint sufficiently alleged that the municipal officer received compensation from the developer for providing such advice. *Determination of Sufficiency.*
6. RCW 42.23.070(3) prohibits a municipal officer from accepting employment or engaging in business or professional activity that “the officer might reasonably expect would require or induce him or her . . . to disclose confidential information acquired by reason of his or her official position.” In determining that the complaint was sufficient to allege a violation of RCW 42.23.070(3), the Ethics Officer reasoned that there are a variety of situations in which a municipal officer might reasonably expect to feel a responsibility to disclose confidential information when hired by a developer. *Determination of Sufficiency.*
7. The Determination of Sufficiency also determined that the complaint did not sufficiently allege a violation of any of the remaining provisions of MICC 2.60.030 or Chapter 42.23 RCW. In determining that the complaint did not sufficiently allege a violation of MICC

² MICC 2.60.030 incorporates by reference the code of ethics set forth in Chapter 42.23 RCW.

2.60.030.A, which prohibits an official from participating in government decision when the official has a conflict of interest, the Ethics Officer reasoned that the prohibition requires an official to serve as an “employee, officer, director, trustee, partner[,] or owner” to an outside entity and that, here, the complaint’s allegation that the Official was “hired” by the outside developer was insufficient to ascertain whether the Official was compensated by the developer as an employee or as an independent consultant/contractor. The Ethics Officer further reasoned that, even if the developer compensated the official as an employee, a conflict of interest under MICC 2.60.030 would only arise if the developer had a financial interest in a decision under consideration by the City and, here, the complaint did not allege that the developer had any pending development application or other decision under consideration by the City in which it had a financial interest. Finally, the Ethics Officer reasoned that a violation of MICC 2.60.030 would occur only if an official actually participates in the decision-making process for which the outside entity has a financial interest and that, here, the complaint made no such allegation.

Determination of Sufficiency.

Pre-Hearing Matters

8. MICC 2.60.070.B provides the Hearing Examiner with authority to conduct hearings on complaints “found to be sufficient” by the Ethics Officer and to make a recommendation on the complaint to the City Council. By its terms, MICC 2.60.070.B limits the Hearing Examiner’s authority to reviewing only those complaints found to be sufficient by the Ethics Officer. Accordingly, the Hearing Examiner’s recommended disposition in this matter is limited to whether the complainant has shown, by a preponderance of the evidence, that the Official engaged in conduct prohibited under MICC 2.60.030.D, RCW 42.23.070(2), and RCW 42.23.070(3). The Hearing Examiner lacks authority to recommend a disposition on whether the Official engaged in conduct prohibited under the remaining provisions of MICC 2.60.030 or Chapter 42.23 RCW, including whether the Official engaged in conduct constituting a conflict of interest under MICC 2.60.030.A.

See MICC 2.60.070.B.

9. On September 11, 2020, the Hearing Examiner issued a Pre-Hearing Order (PHO) setting the hearing date and requesting the parties submit a witness list, a documents list, and copies of the documents by October 12, 2020. Shortly after the PHO was issued, Attorney Daniel Thompson (one of the persons who signed the initial complaint submitted by Tom Acker) requested clarification of the PHO. In response, the Hearing Examiner issued a “Response to Inquiries,” on September 17, 2020 (with minor corrections on September 22, 2020), which clarified several matters, including that: the Complainant need not hire an attorney; the municipal code does not provide a mechanism for the parties to compel discovery, but the applicable parties have the opportunity to produce witness testimony and submit documents for consideration by the Hearing Examiner; the hearing is informal in nature, and strict rules of evidence are not applicable; and the Complainant carries the burden of proving, by a preponderance of the

evidence, that a violation of the ethics code has occurred. *Hearing Examiner's Pre-Hearing Order, dated September 11, 2020. Hearing Examiner Response to Inquiries, corrected September 22, 2020.*

10. On October 12, 2020, the Official, represented by Attorney Alexandra Kenyon, timely submitted its witness list and documents. On October 12, 2020, the Complainant, represented by Attorney Daniel Thompson, submitted its witness list, although the submission occurred after the noon deadline established in the PHO. On October 13, 2020, the Complainant submitted its documents (again, past the deadline outlined in the PHO). In addition, the Complainant submitted a pleading entitled "Complainant Tom Acker's: 1. Pre-Hearing Statement; 2. Motion in Liminy [sic] to Strike Portions of Evan Maxim's Declaration; 3. Motion for Partial Summary Judgement." The Official submitted a response to the Complainant's pleading the next day. On October 15, 2020, the Complainant filed a reply to the Official's response. On October 16, 2020, the Official filed a reply to the Complainant's reply to the Official's response to Complainant's pleading. Later that day, on October 16, 2020, the Hearing Examiner issued a decision denying all the various motions contained within the parties' pleadings. The Hearing Examiner's decision stressed that the PHO did not request, call for, condone, or solicit such pleadings and that the municipal code does not envision the ethics complaint process to mimic civil litigation but, instead, envisions a more informal process. Specifically, the Hearing Examiner denied the Complainant's motion in limine to strike Evan Maxim's declaration, the Complainant's motion for partial summary judgment, the Complainant's request for discovery, the Official's request to strike the Complainant's witness list and documents, the Official's request for a continuance, and the Official's request to strike the Complainant's pre-hearing statement. *Hearing Examiner Decision on Motions, dated October 16, 2020.*
11. The Complainant's pre-hearing statement notes:
 - On or before April 17, 2020, Ryan Companies purchased the Farmers Insurance building for \$46.5 million.
 - On June 2, 2020, the Council adopted Ordinance 20-12, which placed a moratorium on development within the Town Center south of SE 29th Street. The moratorium includes the Farmers property.
 - Sometime shortly after June 2, 2020, Ryan Companies hired Planning Commission Member Pirzio-Biroli. Any development regulation amendments, which would presumably include mandating retail uses in future development south of SE 29th Street, would begin at the Planning Commission level. The Planning Commission would then forward its recommendation to the City Council.
 - Ryan Companies hired Planning Commissioner Pirzio-Biroli, knowing that if the Farmers property was part of the moratorium, the Planning Commission would draft the development regulations under the moratorium. Those regulations could

impact future development of the Farmers property and cause Ryan Companies millions of dollars in losses.

- The timing of Planning Commissioner Pirzio-Biroli hire by Ryan Companies, shortly after the moratorium, shows that she was retained to advocate and campaign on behalf of Ryan Companies to exempt the Farmers property from the moratorium. Any sophisticated developer would have conducted an analysis of the development regulations and regulatory limits on the property prior to purchasing it for \$46.5 million.

Complainant's Pre-Hearing Statement.

12. The Official submitted an answer to the ethics complaint, as well as declarations from the Official and from former City Community and Planning Development Director Evan Maxim, in support of the answer. The answer notes:

- The complaint is not ripe for adjudication because the last time the Official could have taken any action in her official capacity was February 5, 2020, when the Planning Commission held its last meeting. The Official contracted with Ryan Companies on June 18, 2020, and the Official completed her work for the developer on July 6, 2020. The Official could not have given the developer special consideration or influence because the Planning Commission was not in session during the entire term of the contract and has not been in session since. The Commissioner would recuse herself from any consideration of future work involving the Town Center or the Ryan Companies' property.
- A violation of RCW 42.23.070(2) requires that an official receive compensation for services provided in his or her official capacity as "an officer." The Official did not violate RCW 42.23.070(2) because she was not acting in her official capacity as a Planning Commissioner when providing consulting services to Ryan Companies but, rather, was acting in her capacity as a professional architect.
- A violation of RCW 42.23.070(3) does not incorporate a reasonable person standard and permits an officer to determine if he or she expects to be required or induced to disclose confidential information. The Official did not violate RCW 42.23.070(3) because she did not reasonably expect to be induced or required to disclose confidential information. When deciding to contract with Ryan Companies for consulting work, the Officer knew that she had received confidential information on only one occasion during her four years of service on the Planning Commission, that the Planning Commission had not held a meeting since February, that no Planning Commission meetings were yet scheduled in the future, and that the City Council adopted a moratorium without the knowledge or participation of the Planning Commission.
- The complaint and Determination of Sufficiency provide only theories and speculation as to how the Officer could violate the ethics code, and there is no admissible evidence showing that such violation has occurred.

Exhibits O-1 through O-3.

*Findings, Conclusions, and Recommendation
City of Mercer Island Hearing Examiner
Pirzio-Biroli Code of Ethics Complaint
No. HEA-2020-01-Ethics*

13. As noted above, the Hearing Examiner convened an open record hearing on the complaint on October 19, 2020, using remote meeting technology, consistent with the PHO that was earlier issued for this matter. *Hearing Examiner's Pre-Hearing Order.*

Testimony and Argument³

Complainant's Argument and Witnesses

14. Attorney Dan Thompson represented Tom Acker (the Complainant Representative)⁴ and made an opening statement. Attorney Thompson stated that this should be a fact-finding hearing with the focus on MICC 2.60.030.D. He emphasized that the purpose of the Code of Ethics is not to punish public officials but to educate, so that violations are prevented from the beginning. He briefly outlined the timeline of events concerning a Ryan Companies development proposal for the Town Center and the City's development moratorium. He noted that, in late June, Ryan Companies told Evan Maxim⁵ that they had hired [Planning Commissioner] Ms. Pirzio-Biroli. He emphasized the importance of the zoning moratorium for half of the Town Center, noting that the proposed development was contentious and that draft development regulations are proposed for 2021, along with a ballot levy. *Statement of Mr. Thompson.*
15. Tom Acker, former City Council member, testified about his background at Boeing and about moving to Mercer Island from Seattle in 2013. He organized a local organization, Save Our Suburbs. He was elected to the Mercer Island City Council in 2017 and is no longer on the Council. He testified that, when he became a City Council member, the City did not have an ethics code. He explained the history of developing an ethics code for the City and expressed disappointment that the adopted version lacked a method allowing for a more thorough investigation of ethics complaints. Mr. Acker described a telephone call with Ryan Companies' Marc Gearhart on June 4, 2020. During a subsequent exchange of texts and phone calls, Mr. Gearhart told him that that Ryan Companies had hired City Planning Commissioner Lucia Pirzio-Biroli to help with the application process. In response, he sent an email on June 30, 2020, to the City concerning a conflict of interest violation.⁶ In his opinion, by taking this action, Ryan

³ The summation of testimony and arguments was taken from a video of the hearing.

⁴ As noted above, Tom Acker and ten others filed an ethics complaint. The Hearing Examiner identified Mr. Acker as the Complainant Representative for purposes of this hearing. Attorney Dan Thompson represented Mr. Acker, as well as the other complainants.

⁵ Evan Maxim was previously the City's Director of the Community Planning and Development Department. He no longer held this position by the time the hearing on this matter was conducted.

⁶ A separate statement designating this email a formal complaint and signed by Mr. Aker and 10 other complainants between July 28 and August 3, 2020, was also sent to the Mercer Island City Clerk and Ethics Officer.

Companies clearly believed that Commissioner Pirzio-Biroli would have the opportunity to influence the City in a favorable way to potentially protect its investment.

Attorney Thompson asked Mr. Acker to respond to Commissioner Pirzio-Biroli's statement that, to remedy any conflict of interest, she would recuse herself from any decisions related to the property in question and announce that she had been working for Ryan Companies if and when the development regulations to implement the moratorium were remanded back to the Planning Commission. Mr. Acker stated that this would be a violation of her peers' trust on the Planning Commission and would undermine the City Council and impugn its integrity, because such an action was not the intention of the Code of Conduct. He explained that there is a document all officials have to sign when they join the Council or a commission, and a process that is implemented that she should have gone through, including requesting an advisory opinion from the City Attorney (as allowed by MICC 2.60.060). Mr. Acker stressed that Commissioner Pirzio-Biroli should have been aware of this option and that, in failing to seek the advice of the City Attorney and moving forward with work for Ryan Companies, it created a perception of impropriety. The purpose of the Code of Conduct, in Mr. Acker's view, is to protect the public from the perception of impropriety. Mr. Acker denied that the intent of his complaint was to have Commissioner Pirzio-Biroli removed from office or was politically motivated.

In response to cross-examination by Attorney Kenyon, Mr. Acker clarified that he understands Mr. Gearhart's hiring of Commissioner Pirzio-Biroli was to help keep the Ryan Company property out of the moratorium and have a development code that worked for his project. He testified that he has no evidence that there was any undue influence applied from Commissioner Pirzio-Biroli to the Council, but the fact that she took money from an active developer at the very least shows exceptionally poor judgment. *Testimony of Mr. Acker.*

Official's Argument and Witnesses

16. Attorney Alexandra Kenyon, representing Planning Commissioner Pirzio-Biroli, gave an opening statement. She referred the Hearing Examiner to arguments already made in the answer to the complaint. She noted that Mr. Acker has admitted no evidence of any undue influence and had provided only opinion and irrelevant testimony. She argued that this does not meet the burden of proof and that the complaint is not ripe for review. Therefore, the complaint should be dismissed. *Statement of Ms. Kenyon.*
17. Ms. Pirzio-Biroli testified that she is an architect by profession and has been on the City Planning Commission since June of 2016. She described the duties of the Planning Commission as including reviewing proposed land use code and Comprehensive Plan

amendments. She noted that the Planning Commission does not have any quasi-judicial authority. She testified that her firm was hired by Ryan Companies and that she provided fact-based site analysis of a parking structure area to the north of the existing buildings. This involved overlaying the Comprehensive Plan and land use requirements as they pertained to what is allowed outright. She explained that the work also involved analyzing the site in the context of surrounding zoning, including transportation patterns around the site. This analysis was based on public information that can be complicated. These are standard services the firm provides to interested developers and is completely separate from the type of work she does on the Planning Commission. Her firm also does work on single-family residential property in Mercer Island. She testified that the contract with Ryan Companies was with her firm, Studio Ectypos Architecture. The last Planning Commission meeting was on February 5, 2020, there has been no review of the land use moratorium since it was adopted in June, and the Planning Commission has not met since the adoption of the moratorium. She said that, if any future issues related to the Ryan Companies or the property in question came before the Planning Commission, she would recuse herself.

In response to cross-examination by Attorney Thompson, she acknowledged that she may have initiated contact with Ryan Companies. She noted, however, that she did no design work for the property and only performed a site analysis. She testified that she did not request a “conflicts check,” because she was not aware that she was doing anything unethical. She was not aware that the Ethics Code had a process to request an advisory opinion until after the complaint was filed. She was informed by the Mayor that she could submit a letter in response to the complaint. She did submit a letter to City Attorney Bio Park and was told that it would be kept on file.

She testified that, while analyzing the property, she spoke with a planner at the City’s Community Planning and Development Department to ask for code clarifications. Therefore, her work on behalf of Ryan Companies was not a secret. She referred to her declaration and stated that her firm would not contract in the future with Ryan Companies while she remains on the Planning Commission. She testified that, in response to a call from Evan Maxim [then City Director of the Community Planning and Development Department], she had told Mr. Maxim that, if any matters involving the Ryan Companies’ property ever comes before the Planning Commission, she would recuse herself to avoid any potential conflicts of interest. She noted that Ryan Companies’ intentions were to avoid coming before the Planning Commission, that they did not want a variance, and that she was not aware of the City’s moratorium until three quarters of the way through the analysis process. Nobody she spoke with at the City’s Community Planning and Development Department informed her of the moratorium. She subsequently requested a letter from Mr. Maxim after he left the City concerning their conversation from June 30, 2020.

When asked if she agreed with the statement in Mr. Maxim's letter that the complaint was aimed at getting her removed and had a political agenda, Commissioner Pirzio-Biroli replied that she did not know. She agreed that, if the development regulations had come before the Planning Commission, she would have recused herself because of an appearance of a conflict of interest. She testified that it would be acceptable for a member of the Planning Commission to accept employment from a Town Center property owner, subject to a City moratorium, if the Planning Commissioner intends to be recused when the Planning Commission is asked to develop new development regulations for that property. She noted that she has had no contact with Ryan Companies since July 6, 2020. *Testimony of Ms. Pirzio-Biroli.*

Closing Statements

18. Attorney Kenyon argued that the Complainant's testimony was speculative and included irrelevant facts and opinions. She stressed that the Complainant has not met its burden of proof and that, while there was discussion of "perception," no evidence of a violation was provided. She argued that, if perception should be a violation, then the code should be amended. Ms. Kenyon argued that the Hearing Examiner should dismiss the complaint for failing to meet the burden of proof and to recommend to the City Council that they award attorney fees to Ms. Pirzio-Biroli.⁷ In response to a question from the Hearing Examiner, Ms. Kenyon stated that, under both RCW 42.23.070(2) and MICC 2.60.030.D.1, Ms. Pirzio-Biroli would have to actually participate on the Planning Commission for a violation to have occurred. Because she has not had a chance to act under her position on the Planning Commission, the complaint is not ripe and should be dismissed. *Closing Statement of Ms. Kenyon.*
19. Attorney Thompson argued that, under MICC 2.60.030.D, the Hearing Examiner must ask himself whether a reasonable person would have considered Ms. Pirzio-Biroli's employment and compensation to appear as a conflict of interest. Mr. Thompson stressed that the Ethics Code does not become effective upon doing the quid pro quo but, instead, it is important to look at when compensation is received. Mr. Acker's complaint relates to preventing conduct that is going to appear as a conflict to a reasonable citizen as "pay for play," or unethical. Mr. Thompson argued that, if the development regulations for half the Town Center came before the Planning Commission, and Commissioner Pirzio-Biroli recused herself, explaining that she had received compensation for working with the Ryan Companies in the past, that would create the kind of conflict of interest that MICC 2.60.030 attempts to avoid.

⁷ MICC 2.60.070.G. provides that City *shall* reimburse reasonable legal fees incurred by the Official, up to \$5,000, relating to or arising out of the defense of an ethics complaint that results in a dismissal of the complaint by the City Council without penalties subsequent to a hearing by the Hearing Examiner. The municipal code does not ask the Hearing Examiner to make a recommendation related to legal fees and, as a result, he has not done so here.

Mr. Thompson also stressed that Commissioner Pirzio-Biroli failed to obtain an advisory opinion before moving forward with her work for Ryan Companies. He argued that, while she may not have been familiar with that process, she signed an ethics form that outlines the process pretty clearly upon joining the Commission. Mr. Thompson argued that he could not see how a reasonable citizen would look at this and think that it was appropriate. He stressed that Ryan Companies is going to be arguing about the development regulations and some of these could cost it millions and millions of dollars. If, for instance, they had to put in retail rather than three stories of housing. Mr. Thompson stressed the Code of Ethics was designed primarily to prevent compensation, or a quid pro quo, before it happens. *Closing Statement of Mr. Thompson.*

RECOMMENDATION

To be clear, much of the hearing on this matter focused on “conflicts of interest.” Under MICC 2.60.030.A, “officials shall not participate in government decisions where they have a conflict of interest.” This code provision does not require an official to refrain from all behavior that could result, later, in a conflict of interest. Instead, it prohibits an official from participating in a government decision when an established conflict of interest occurs. This, though, is beside the point because the Determination of Sufficiency issued by the City’s Ethics Officer did not determine that the complaint sufficiently alleged a conflict of interest in violation of MICC 2.60.030.A. Accordingly, the Hearing Examiner lacks the authority to address such a conflict.

Instead, the focus must be on whether the Complainant has proven by a preponderance of the evidence that Commissioner Pirzio-Biroli has violated MICC 2.60.030.D, RCW 42.23.070(3), or RCW 42.23.070(3). In short, the Complainant has not met this burden.

First, MICC 2.60.030.D generally prohibits officials from soliciting or receiving gifts from persons or entities where it would appear to a reasonable person that the gift was solicited or given with the intent to influence actions taken by the official in their official capacity. While Commissioner Pirzio-Biroli admitted that she (through her architectural firm) received compensation to perform work for Ryan Companies related to the Farmers Insurance building, the evidence simply does not establish that she took “special advantage of services or opportunities for personal gain, by virtue of [her] public office” which would not be “available to the public in general” or received anything of monetary value with “intent to give or obtain special consideration or influence as to any action by the official” in her official capacity, as required by MICC 2.60.030.D.1. Here, Commissioner Pirzio-Biroli’s architectural firm was hired to analyze a specific property within the city. As a Planning Commissioner, Ms. Pirzio-Biroli does not act in a quasi-judicial capacity and lacked authority to make any specific decision about the property in question. At best, one could argue that she could influence the Planning Commission to provide favorable treatment to Ryan Companies in terms of future zoning regulations (as opposed to specific permit approvals). No evidence of this, however, has been provided, and Commissioner Pirzio-Biroli testified that she would recuse herself on any future

matter related to the property in question. Accordingly, the Complainant has not met its burden of proving a violation of this provision has occurred.

Next, RCW 42.23.070(2) prohibits a municipal officer from directly or indirectly receiving or agreeing to receive compensation for a matter connected with or related to the officer's services. As the record shows, Commissioner Pirzio-Biroli received compensation to perform a site-specific analysis of certain aspects of the property purchased by Ryan Companies. She did this in her capacity as an architect, not in her capacity as a Planning Commission member. Moreover, she testified that, if the Planning Commission was called upon to make any decisions or recommendations about the property in question, she would recuse herself from those decisions. The Complainant has not met its burden of proving a violation of this provision has occurred.

Finally, RCW 42.23.070(3) prohibits municipal officers from accepting employment or engaging in business that they would reasonably expect would require, or induce them, by reason of their official position, to disclose confidential information acquired by reason of their position. Here, the Planning Commission last met in February 2020 and has not met since. Commissioner Pirzio-Biroli testified that, during her time as a Planning Commissioner, she had been made privy to confidential information on only one occasion. She did not believe that the basic site analysis she performed for Ryan Companies would reasonably require her to divulge confidential information. The Hearing Examiner concurs with this assessment and determines that the Complainant has not met its burden of showing that a violation of this provision occurred.

As noted by Attorney Kenyon in her arguments, much of the argument made by the Complainant focused on "perceptions." It is not up to the Hearing Examiner to determine whether a "perceived" violation of the Code of Ethics has occurred. Instead, the Hearing Examiner must determine whether an actual violation has occurred. Here, the record does not reflect that this is the case, especially because Commissioner Pirzio-Biroli was not involved in the City Council's decision to pass a development moratorium and has not even had the opportunity to work with the Planning Commission since February 2020, when last they met. She has testified, under oath, that she will recuse herself from any matters the Commission may hear related to the Ryan Properties. This is sufficient to avoid a conflict.

In the future Commissioner Pirzio-Biroli—and other volunteer board or commission members—are urged to seek an advisory opinion from the City Attorney prior to accepting employment opportunities related to development within the city. Failure to do so, however, is not grounds for sustaining an ethics complaint. Accordingly, the Hearing Examiner recommends the City Council dismiss the complaint without penalties.

Finally, Attorney Thompson and Mr. Acker both expressed concern that the City's Code of Ethics "lacks teeth," as it were and does not provide adequate opportunity to investigate complaints. As to the first matter, the Hearing Examiner notes that most positions subject to the

Findings, Conclusions, and Recommendation
City of Mercer Island Hearing Examiner
Pirzio-Biroli Code of Ethics Complaint
No. HEA-2020-01-Ethics

Code of Ethics are voluntary and the threat of being subjected to the kinds of inquiries and expenses that occur in civil litigation may dissuade able volunteers from participating in local government. As to the adequacy of investigation, the Code of Ethics does give the Hearing Examiner (as opposed to the parties themselves) authority to request and/or subpoena information. Having reviewed the complaint and the evidence submitted by the parties, the Hearing Examiner determined there was no need to issue subpoenas or request additional evidence. In addition, it should be noted that the Code of Ethics states that the City's Ethics Officer may provide suggestions to improve the Code of Ethics. Although the Hearing Examiner is not asked to provide suggestions, he would be happy to do so at the request of the City.

Findings 1 – 19.

DECIDED this 20th day of November 2020.



ANDREW M. REEVES
Hearing Examiner
Sound Law Center