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BEFORE THE MERCER ISLAND ETHICS OFFICER

In the Matter of

August 03, 2020 Ethics Complaint Against
Planning Commission Member Lucia
Pirzio-Biroli

DETERMINATION OF SUFFICIENCY

I. INTRODUCTION – AUTHORITY

Chapter 2.60 of the Mercer Island City Code (“MICC”) constitutes the “Code of Ethics” enacted to “govern the conduct of members of the city council, the city’s boards and commissions, and council-appointed task groups or committees.” *MICC 2.60.010.A*. The purpose of the Code of Ethics is to ensure a “fair, ethical and accountable local government that has earned the public’s full confidence.” *MICC 2.60.010.B*. To that purpose, the Code of Ethics contains a listing list of prohibited conduct for city officials (*2.60.030*), authorizes the Council to adopt a “code of ethics statement” (*2.60.040*), creates the position of “ethics officer... responsible for the prompt and fair enforcement of this code of ethics when necessary” (*2.60.050*), and generally outlines the manner in which the ethical rules are to be implemented and enforced (*2.60.060-.070*). The Code of Ethics applies to “all members of the city council, the city’s boards and commissions, and other council-appointed task groups

1 or committees of the city of Mercer Island who are currently serving their positions.” *MICC*
2 *2.60.020*.

3 The Code establishes that “[a]ny person may submit a written complaint... alleging
4 one or more violations of this code of ethics by an official.” *MICC 2.60.070.A.1*. When such
5 a complaint is received, the City Code requires it be submitted to the ethics officer, who “shall
6 make a determination of sufficiency within 30 days of receipt of the complaint.” *MICC*
7 *2.60.070.A.2*.

9 **II. CURRENT COMPLAINT – APPOINTMENT OF ETHICS OFFICER**

10 On August 3, 2020 the City Clerk received an ethics complaint against Planning
11 Commission Member Lucia Pirzio-Biroli.¹ The complaint is comprised of a 1-page letter
12 that refers to and incorporates a June 30, 2020 email from Tom Acker to various City
13 officials. *See Exh. 1*. The essential allegation is as follows:

14 [T]he representatives of the new Farmer’s Market Building have hired a
15 planning commission member to evaluate the comprehensive plan as it
16 relates to Mercer Island and advise the, of what is and is not possible under
17 the city’s code.

18 *Exhibit 1 at p. 2*.² The complaint goes on to allege that Ms. Pirzio-Biroli “has ignored
19 feedback consistently, continued to push for large-scale development and pushed for what I
20 call developer giveaways.” *Exh. 1 at p. 3*. The complaint is electronically signed by 11
21 separate individuals: Tom Acker, Carvel Zwingle, Mathew Goldbach, Susan Lund, Rob
22 Dunbabin, Gary Robinson, Wendy Kristek, John Hall, Jean Dunbabin, Mike Cero, and Daniel
23 Thompson. *Id.*

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26 ¹ As a member of the Planning Commission, Ms. Pirzio-Biroli meets the definition of a city “official” to
whom the Code of Ethics applies. *See MICC 2.60.020*.

27 ² The June 30th email does not specifically identify Ms. Pirzio-Biroli in this portion, but goes on to say “If
Commission Member Lucia Pirzio-Biroli is exonerated of the complaint, I would be surprised.” It is therefore
assumed that Ms. Pirzio-Biroli is the official to whom the allegations refer.

1 On August 3, 2020, the City Manager appointed the undersigned to serve as the City’s
2 Ethics Officer as authorized by MICC 2.60.050. *See Exh. 2.* The same day, the City Clerk
3 transmitted the current complaint to the undersigned, requesting a determination of
4 sufficiency pursuant to MICC 2.60.070.A.
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6 **III. ANALYSIS**

7 In making a determination of sufficiency under the City Code, the Ethics Officer must
8 accept the facts alleged as true, and simply determine whether “the allegations, if established,
9 would violate MICC 2.60.030, including Chapter 42.23 RCW.” *MICC 2.60.070.A.2.* The
10 Ethics Officer is not empowered to assess the credibility of the complainant or the complaint,
11 interview witnesses, or otherwise make any inquiry into, or determination regarding, the facts
12 alleged. Here, the Ethics Officer must assume – without deciding – that the following facts
13 alleged in the complaint are true: (1) a private developer that has undertaken prior
14 development with the City, and that plans to participate in future development in the City,
15 has “hired” Ms. Pirzio-Biroli to provide advice on what development may be allowed under
16 the City Code, and (2) in the course of her duties on the Planning Commission, Ms. Pirzio-
17 Biroli “has ignored feedback consistently, continued to push for large-scale development and
18 pushed for ... developer giveaways.” *Exh. 1 at p. 3.* The question is whether those allegations
19 adequately allege an ethical violation under either MICC 2.60.030 or RCW ch. 42.23.
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22 **A. MICC §2.60.030**

23 MICC 2.60.030 broadly prohibits five types of action by city officials: conflicts of
24 interest (§A), misuse of public position or resources (§B), representation of third parties (§C),
25 receipt of gifts and favors (§D), and misuse of confidential information (§E). Each of these
26 are examined in turn.
27

1 **1. Conflicts of Interest (MICC 2.60.030.A)**

2 Under subsection *A* of MICC 2.60.030 (“Conflicts of Interest”), a city official is
3 prohibited from participating in any “government decisions” in which he/she has a conflict
4 of interest. A conflict of interest is presumed to exist whenever the official, his/her spouse,
5 anyone he/she lives with, or “an entity that the official serves as an employee, officer,
6 director, trustee, partner or owner” has “a financial interest that relates to a government
7 decision.” A “financial interest” is presumed if one of the listed individuals/entities “stands
8 to incur material financial gain or loss as a result of a decision under consideration by the
9 city.” *Id.*

10
11 Based on the language of MICC 2.60.030.A, the complaint here must allege three
12 specific elements in order to be deemed sufficient under that subsection: (1) that Ms. Pirzio-
13 Biroli serves “the representatives of the New Farmer’s Market Building” as an “employee,
14 officer, director, trustee, partner, or owner;” (2) that the “representatives of the new Farmer’s
15 Market Building” stand to incur material financial gain “as a result of a decision under
16 consideration by the city;” and (3) that Ms. Pirzio-Biroli is “participating in” that decision.

17
18 a. “Employee, Officer, Director, Partner, or Owner”

19 Regarding the first element, the complaint alleges a private entity has “hired” Ms.
20 Pirzio-Biroli to offer advice on the type of development allowed under the city code.
21 However, the complaint does not explicitly allege Ms. Pirzio-Biroli is serving as an
22 “employee, officer, director, trustee, partner or owner.” In fact, the type of analysis and
23 advice for which Ms. Pirzio-Biroli has allegedly been hired – to evaluate the comprehensive
24 plan and provide advice on potential development – typically occurs in the
25 consultant/independent contractor context. And though it may seem there is little difference
26 between an employee and a consultant/contractor for purposes of determining whether a
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1 conflict of interest exists, the fact that the City Code explicitly mentions “employee,” but
2 does not mention “consultant/contractor,” is important.

3 Our courts have developed a variety of principles to guide lawyers and judges in the
4 interpretation and application of statutory language. One of the more widely-cited maxims
5 of statutory construction is the Latin phrase “*expressio unius est exclusio alterius*,” which
6 broadly means “the explicit mention of one thing means the exclusion of another.” For
7 example, if a sign in a store window says “no animals allowed,” the prohibition would apply
8 to animals of any kind. However, if the sign reads “no cats, lizards, or birds allowed,” one
9 can presume that all other animals are allowed. In other words, since the sign lists specific
10 types of animals that are excluded, traditional principles of legal interpretation would mean
11 that animals not specifically listed will not be excluded.

12 Here, the City Code contains a list of specific roles that city officials are prohibited
13 from performing for entities with pending financial interests in city decisions: employee,
14 officer, director, trustee, partner or owner. *MICC 2.60.030.A*. Well-established rules of
15 statutory interpretation dictate that the explicit listing of those prohibited roles means other
16 roles not specifically listed are not prohibited. The present complaint against Ms. Pirzio-
17 Biroli does not specifically allege she serves in any of the roles explicitly prohibited by the
18 code section, and the nature of the work she is alleged to be performing is most typically
19 performed in a consultant/contractor role, which is not explicitly prohibited.³

20 As a result, because the complaint does not describe the specific nature of the role for
21 which Ms. Pirzio-Biroli is alleged to have been “hired,” and because the specific nature of
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26 ³ Under *MICC 2.6.050.B*, the ethics officer “may recommend changes or additions to this code of ethics to the
27 city council.” The undersigned recognizes the above analysis may be contrary to the council’s intent with
regard to conflicts of interest for city officials. If that is the case, *MICC 2.60.030.A* could easily be amended
to prohibit a consultant/contractor relationship either by adding “consultant/contractor” to the list of prohibited
positions, or by adding a catch-all provision (*i.e.*, “any similar position involving payment for services”).

1 the role appears relevant under the city code, I am compelled to conclude that the complaint
2 “provides too little detail for the ethics officer to reach a determination” regarding a violation
3 of MICC 2.60.030.A. *MICC 2.60.070.A.2.*

4
5 b. “Financial Interest” in a “Decision Under Consideration by The City”

6 Despite having found that the complaint provides too little detail regarding the nature
7 of Ms. Pirzio-Biroli’s alleged relationship with an outside entity under MICC 2.60.030.A, the
8 undersigned believes analysis of the remaining questions under that subsection may be
9 instructive for the complaining parties, the City Council, and the public.⁴

10 As indicated above, even if a city official were actually employed by a private entity,
11 a conflict of interest would only exist if that entity had a “financial interest [in]...a decision
12 under consideration by the city.” *MICC 2.60.030.A.* Here, the only entity/ies identified in
13 the complaint are “the representatives of the new Farmer’s Market Building.”⁵ *Exh. 1, p. 2.*
14 While the complaint alleges Ms. Pirzio-Biroli is advising that entity on “what is and is not
15 possible under the city’s codes,” and claims that the entity is “a developer actively pursuing
16 a development on the island,” it goes no further to identify any specific pending development
17 application, or any other decision under consideration by the city in which the entity may
18 have a financial interest.
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23 ⁴ Since the City’s ethics code is relatively new and untested, it may be instructive to all concerned parties how
24 the ethics code is likely to be analyzed and applied in the future, even if that analysis it is not dispositive to the
25 current complaint.

26 ⁵ As noted both above and below, the ethical prohibitions under MICC 2.60.030.A depend largely on the specific
27 identity of the entity alleged to be employing a city official, or alleged to have a financial interest in a city
28 decision. Here, the only description of the entity at issue is “representatives of the New Farmer’s Market
29 Building.” The entity is not identified by name, there is no indication whether it is a property developer, a
30 property owner, a property manager, merely a representative of such entity, or even whether it is an individual
31 or a corporation or non-profit entity. While the identity of the entity may be clear to someone familiar with the
32 background here, the ethics official is limited to the text of the complaint. For purposes of this determination
33 of sufficiency, the undersigned presumes the entity at issue is a property developer with both prior and planned
34 development in the City.

1 This distinction is important, as employment with an outside entity with no financial
2 interest in any decision currently under consideration does not appear to be prohibited by
3 MICC 2.60.030.A. In other words, MICC 2.60.030.A does not prohibit a Planning
4 Commission member – or any other city official – from being employed by a private
5 developer unless and until that developer attains a financial interest in the outcome of a
6 decision actively under consideration by the City; *i.e.*, by submitting a development proposal
7 or application, or otherwise seeking some City action or approval. Similarly, even if MICC
8 2.60.030.A were amended to include “consultant/contractor” as a prohibited position, the
9 prohibition would not appear to apply if the terms of the consultancy/contract were completed
10 prior to the entity’s request for a specific city decision.⁶
11

12 This interpretation – limiting the application of ethical prohibitions to
13 *current/ongoing* conflicts – is consistent with how such statutes are generally drafted,
14 interpreted, and applied. For example, it is not unheard of for city planners or other planning
15 staff to have prior experience in private sector development. Were ethical provisions to
16 prohibit such prior experience, they may automatically exclude a wide swath of qualified
17 candidates from public service, especially in areas where prior professional experience is
18 most helpful to the governmental entity and the public it serves.
19

20 Applying that generally-accepted interpretation to the present case (and assuming Ms.
21 Pirzio-Biroli is actually an *employee* of a private developer), the complaint does not identify
22 any current “decision under consideration by the city” in which the developer has a financial
23 interest. As a result, the August 3, 2020 complaint against Ms. Pirzio-Biroli fails to establish
24 this element of MICC 2.60.030.A.
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⁶ To be clear, this discussion only addresses subsection A of MICC 2.60.030. Depending on the facts, such
outside employment may still run afoul of other ethical provisions discussed below.

1 c. Participation in a City Decision

2 Third, it is important to note that MICC 2.60.030.A does not make it *per se* unethical
3 for a city official to have private sector employment anytime his/her employer has a financial
4 interest in a decision under consideration by the City. Rather, the Code simply prohibits an
5 official in such a situation from participating in the relevant decision-making process. *MICC*
6 *25.60.030.A*. Here, even if the complaint alleged Ms. Pirzio-Biroli was employed by a private
7 entity in a manner explicitly prohibited by the city code, and even if that entity had a financial
8 interest in a decision currently under consideration by the City, it would still be required to
9 allege that Ms. Pirzio-Biroli was *actually participating in* the decision-making process. The
10 complaint makes no such allegation, and therefore again fails to establish this element of
11 MICC 2.6.030.A.
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14 **2. Misuse of Public Position or Resources (MICC 2.60.030.B)**

15 Subsection B of MICC 2.60.030 prohibits officials from using public services (staff
16 time, equipment, supplies, etc.) for non-city purposes. The complaint here does not allege
17 any violation of this section, nor any facts that would arguably amount to such a violation.
18

19 **3. Representation of Third Parties (MICC 2.60.030.C)**

20 Subsection C of MICC 2.60.030 prohibits city officials from “appear[ing] on behalf
21 of the financial interests of third parties” either (1) before the body on which the official
22 serves, or (2) in interactions with city staff. The complaint here makes no allegation that Ms.
23 Pirzio-Biroli has appeared before the Planning Commission – the body on which she serves
24 – on behalf of any outside entity, or that she has otherwise interacted with City staff on behalf
25 of such an entity. Consequently, the complaint does not allege a violation of this subsection.
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1 **4. Gifts and Favors (MICC 2.60.030.D)**

2 Subsection D of MICC 2.60.030 generally prohibits an official from soliciting or
3 receiving “anything of monetary value” if it was – or may appear to a reasonable person to
4 have been – given/received in exchange for some “special consideration or influence as to
5 any action by the official in their official capacity.” Here, the complaint alleges Ms. Pirzio-
6 Biroli has been “hired” to advise an outside developer. The term “hired” – regardless whether
7 as an “employee” or a consultant/contractor – undoubtedly implies payment of money, and
8 therefore clearly qualifies as a thing “of monetary value.” The dispositive question, then, is
9 whether the complaint adequately alleges either (1) the developer hired Ms. Pirzio-Biroli with
10 the intent to “obtain special consideration or influence,” or (2) that it would appear to a
11 reasonable person she was hired for that purpose. *MICC 2.60.030.D*. Based on the text of
12 the complaint, it *does* appear to make such an allegation in two respects.
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15 First, as mentioned above, in addition to alleging Ms. Pirzio-Biroli receives financial
16 compensation from an outside developer, the complaint alleges Ms. Pirzio-Biroli “has
17 ignored feedback consistently, continued to push for large-scale development and pushed for
18 what I call developer giveaways.” *Exh. 1 at p. 3*. In reading the overall context of the
19 complaint, it appears to draw a connection between Ms. Pirzio-Biroli’s alleged outside
20 employment and her alleged preferential treatment of developers in her role on the Planning
21 Commission. In other words, the complaint appears not only to allege that the outside
22 developer hired Ms. Pirzio-Biroli *with the intent* to obtain special consideration or influence,
23 but that Ms. Pirzio-Biroli has *actually provided* such special consideration or influence.
24

25 Second, even if the complaint did not specifically allege Ms. Pirzio-Biroli had
26 exhibited preferential treatment for developers, the complaint would likely be sufficient to
27 allege a violation of MICC 2.60.030.D anyway. Under the Mercer Island City Code, the role

1 of the Planning Commission is to “review and make recommendations on amendments to the
2 comprehensive plan...[and] development regulations.” *MICC 3.46.020.A-B*. The Planning
3 Commission also “makes recommendations to the city council on land use regulations,
4 comprehensive plan amendments and quasi-judicial matters.” *MICC 19.15.010.C.2*. These
5 are clearly areas in which private developers have particularly strong legal and financial
6 interests. Consequently, the relationship between developers and the Planning Commission
7 is such that anytime a member of the Planning Commission is employed by a developer, or
8 anytime a developer otherwise pays a member of the Planning Commission for any services
9 rendered, it may arguably appear “to a reasonable person... to have been solicited, received,
10 or given with intent to give or obtain special treatment or consideration or influence.” *MICC*
11 *2.60.030.D.1*.

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14 This is particularly true here, because the work Ms. Pirzio-Biroli has allegedly been
15 hired to perform – reviewing a comprehensive plan and determining what type of
16 development is allowed – is so essential to property development that even small-scale
17 developers typically perform such work in-house, or have close associations with outside
18 experts they repeatedly use for such work. Simply put, when a developer allegedly hires a
19 Planning Commission member to do work that developers are typically equipped to do
20 themselves, it would be no surprise that a reasonable disinterested person would conclude
21 some special consideration or influence was being sought or provided. The complaint
22 sufficiently alleges a violation of *MICC 2.60.030D*.⁷

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27 ⁷ It bears repeating that the Ethics Officer here makes no conclusions regarding the truth of the allegations
against Ms. Pirzio-Biroli, or whether there are additional facts and circumstances that may explain or excuse
any particular action or arrangement here. The role of the Ethics Officer is solely to determine whether a
sufficient allegation has been made based on the facts as alleged.

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5. Confidential Information (MICC 2.60.030.E)

Subsection E of MICC 2.60.030 prohibits public officials from disclosing or using “any confidential information gained by reason of their official position for other than a city purpose.” While a violation of this section may be arguably implied by the complaint here, the specific allegation appears to be that Ms. Pirzio-Biroli has given developers preferential treatment, not that she has used or disclosed any confidential information gained by virtue of her position. As a result, the complaint is insufficient to allege a violation of MICC 2.6.030.E.

B. RCW Chapter 42.23

Under MICC 2.6.070.A.2, city officials are also subject to the ethical requirements of RCW 42.23, so a complaint is sufficient if it alleges a violation of that chapter. RCW 42.23 includes two subsections that outline prohibited actions for municipal officials: (1) RCW 42.23.030-.050, which prohibit a city official from having a personal interest in any contract to which the city is a party, and (2) RCW 42.23.070, which contains a list of four separate “prohibited acts.” Each provision is examined below.

1. RCW42.23.030-050: Interests in Contracts

As discussed above, the complaint here does not allege that the entity who has “hired” Ms. Pirzio-Biroli has any interest in any decision currently under consideration by the City of Mercer Island. Moreover, as a developer, the only interest such an entity would likely have is in the outcome of a development permit application, which would not meet the definition of “contract” under RCW 4.23.020 (“contract, sale, lease or purchase”). For this

1 and other reasons⁸, the complaint here is not sufficient to allege a violation of RCW
2 42.23.030-050.

3 **2. RCW 42.23.070: Prohibited Acts**

4 Subsection (1) of RCW42.23.070 prohibits a city official from “us[ing] his or her
5 position to secure special privileges or exemptions for himself, herself, or others.” As used
6 in the law, “special privileges or exemptions” traditionally means a benefit to which another
7 member of the public would not ordinarily be entitled. Here, while the complaint appears to
8 allege Ms. Pirzio-Biroli appears to be “pro-developer” in her role on the Planning
9 Commission, it does not allege she has given any specific developer any privilege or
10 exemption to which another developer or citizen would not be otherwise entitled.
11

12 Subsection (2) prohibits a city official from receiving “any compensation... from a
13 source other than the employing municipality, for a matter connected with or related to the
14 officer’s services as such an officer.” Here, the complaint alleges Ms. Pirzio-Biroli has
15 received compensation for advising an outside developer on the types of development
16 available under the city code. Since advice on city development is clearly “related to [Ms.
17 Pirzio-Biroli’s] services as” a member of the Planning Commission, the complaint here
18 adequately alleges a violation of this subsection.
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20 Subsection (3) prohibits a city official from accepting any employment or engaging
21 in any other “business or professional activity” that the official “might reasonably expect
22 would require or induce him or her...to disclose confidential information acquired by reason
23 of his or her official position.” To be clear, this section does not require *actual disclosure* of
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26 ⁸ For example, RCW 42.23.040 allows a city official to be an employee of an outside entity if (1) “the
27 compensation of such employee or agent consists entirely of fixed wages or salary,” (2) the relationship is
disclosed prior to any decision on the contract, and (3) the official takes no part in the vote. The complaint here
makes no allegation regarding the nature of the compensation, or that Ms. Pirzio-Biroli has taken part in any
votes on any specific contract.

1 any confidential information; it more broadly prohibits any situation in which the official
2 might reasonably expect that such disclosure would be required or induced. This section sets
3 a fairly low bar, and the allegations made in the complaint appear sufficient here.

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5 If, as the complaint alleges, Ms. Pirzio-Biroli has been hired by an outside developer
6 to offer advice on development under the city code, there are a variety of situations in which
7 she might “reasonably expect” to feel a responsibility or inducement to disclose confidential
8 information she has acquired by reason of her official position. The same would be true of
9 any member of a planning commission employed in a similar capacity by a private developer:
10 her/she “might reasonably expect” that such employment would induce the disclosure of
11 confidential information gained by virtue of his/her official position. For example, if a
12 member of the Planning Commission became aware the City Council was confidentially
13 considering a moratorium on a certain type of development, and the member were employed
14 by a developer with specific plans to pursue that type of development, it is reasonable to
15 expect the member would feel pressure to disclose that information to his/her employer. In
16 fact, failure to do so may violate his/her ethical responsibilities to the employer. It is that sort
17 of ethical Catch-22 that statutes like RCW 42.23.070 were intended to avoid. Consequently,
18 I am compelled to conclude that the complaint here sufficiently alleges a violation of RCW
19 42.23.070(3).
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22 Subsection (4) of RCW 42.23.070 prohibits the actual disclosure of confidential
23 information. Here, the complaint makes no allegations that Ms. Pirzio-Biroli has actually
24 disclosed any confidential information gained by reason of her official position, so it does
25 not sufficiently allege a violation of this section.
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IV. CONCLUSION

Based on the foregoing, and pursuant to my authority as Ethics Officer for the City of Mercer Island, I conclude as follows:

The August 3, 2020 complaint against Planning Commission Member Lucia Pirzio-Biroli IS SUFFICIENT to allege a violation of the following standards: MICC 2.60.030.D, RCW 42.23.070(2), and RCW 42.23.070(3).

It is NOT SUFFICIENT to allege a violation of any other provision of MICC 2.60.030 or RCW ch. 42.23.

DATED this 26th day of August, 2020.

By: 

Jeremy W. Culumber, WSBA #35423
Mercer Island Ethics Officer