

Bainbridge Island Ethics Board – Advisory Opinion

RE: AO2008-3

SUBJECT: Elected Official and Ethical Concerns Regarding Property Dispute

DATE of ISSUE: January 7, 2009

Thank you for your inquiry to the Ethics Board.

You have requested an opinion regarding the conduct of an elected official, a hearing examiner, and other city staff involving a complex set of issues related to a boundary dispute. As you may know, all documents you submitted have been redacted before being read by the Ethics Board, as we strive to maintain impartiality and confidentiality while an issue is being considered.

The City of Bainbridge Island Ethics Program is the basis for all Ethics Board advisory opinions. The program applies to “elected officials” (the Mayor and City Council members) and to a limited extent, to major city contractors. It is not therefore within our purview to render an opinion concerning an appointed hearing examiner or City staff (covered by other ethics provisions and answerable to their supervisors within the City administration).

This advisory opinion is based on the facts as you have presented them. The Board’s opinion is based on the assumption that these facts are accurate; we have no investigative power, and the facts of the case would be further examined if you decide to take this case to the next level. In your submission, you have included the following ten points, which you have labeled “Ethical Concerns – Elected official.”

1. Ignored prior litigation and permit decisions regarding docks in the cove.
2. Influenced planning officials by stating unwillingness to have a joint use dock.
3. Supported the 10 foot boundary line survey by the Applicant’s surveyor which totally ignored both the cove rule survey accepted by the Courts and the prior permits issued by Kitsap County.
4. Influenced staff to “rush” the permit approval.
5. Signed [REDACTED] contract without having the [REDACTED] ratify appointment.
6. Failed to bring the conflict of interest before [REDACTED] or this Board before urging that the Examiner be appointed on a permanent basis.
7. Entered into a Boundary Line Agreement in order to influence the outcome of the hearing.
8. Received substantial economic value and a disproportionate share of tidelands in the cove.
9. Allowed City legal funds to be used to defend the Elected official’s personal interests in real property.
10. Failed to get a permit for a fence within the 50 foot shoreline setback.

The Board agrees that the elected official had a private and financial interest in the matter. However, the conflict of interest provisions of the Ethics Code specifically do not apply to an elected official's representation of him- or herself before the hearing examiner or any other city board, commission, or agency, as long as the official does not participate in the deliberations or decision in an official capacity (paragraph D, 2 a). This provision recognizes that elected officials have a right to take a position in a proceeding with regard to their private interests, as long as they are not taking direct official action on the matter.

Your items 1, 2, 3 7 and 8 deal with positions taken by the elected official which appear to fall under this exclusion (paragraph D, 2 a). An individual acting in his or her private capacity has a right to take a position contrary to prior decisions. Such an individual is also not required to agree to joint use of a dock, and may enter into any form of boundary line agreement at any time during the proceeding. In the circumstances you describe, these positions are simply representations made by a party to the proceeding before the hearing examiner.

Item #10

You have alleged a failure to obtain a required permit. The Ethics Code does not cover such situations; it deals only with prohibited gifts, use of city property, confidentiality, and conflicts of interest.

We deal with your remaining items 4, 5, 6 and 9 individually below.

Item # 4

You have alleged that the elected official "influenced staff to 'rush' the permit approval." Any citizen may, of course, attempt to influence a staff member by speaking or writing to him or her to provide a perspective. If, however, an elected official has a private or financial interest and uses his or her position to unduly influence the staff or to rush a decision that may have required more time for investigation and deliberation, that behavior would create an unfair advantage for the elected official. This situation would be a conflict of interest under the Ethics Code and therefore unethical. The Code's conflict of interest provision specifically applies to actions an elected official may take indirectly through another city official or employee.

Item #5

You have alleged that the elected official "signed [REDACTED] contract without having the [REDACTED] ratify appointment." Under Article V of the Code, "direct official action" includes actions to appoint employees, temporary workers, or independent contractors, unless the official's action on the appointment is "purely ministerial." The official's signature on the hearing examiner's contract would not be a conflict of interest if the official did not initiate, select, or negotiate the appointment. The hiring of the hearing examiner would appear to be a conflict of interest if the elected official was actively involved in selecting the hearing examiner and was also aware that the hearing examiner would be involved in a case related to his or her own property.

Item #6

You have alleged that the elected official "failed to bring the conflict of interest before [REDACTED] or this [Ethics] Board before urging that the examiner be appointed on a

permanent basis.” The Code allows but does not require an elected official to seek a waiver or an advisory opinion. Failure to take this discretionary action does not constitute a conflict of interest. However, you have also alleged that at the time of ratification of the hearing examiner’s contract by the Council, the possible conflict of interest was not disclosed by the elected official. From what we know of this situation from your request and related information, the Board agrees that a disclosure on the elected official’s part would have contributed to greater transparency and to increasing public trust and confidence in City government.

Item #9

You have alleged that the elected official “allowed City legal funds to be used to defend the elected official’s personal interests in real property.” In the circumstances you describe, the involvement of the City in this matter (through its legal counsel) would be for the purpose of defending the City’s decision (made by the appointed hearing examiner). Counsel for the City would not appear as a representative of the private interests of the elected official.

In summary, the Ethics Board finds that if an elected official attempted to pressure City employees to improperly rush a decision in which the official has a private financial interest, that situation would constitute a violation of the Code as a conflict of interest. We also find that the appointment of the hearing examiner may have been a conflict of interest, but further information would be needed to make a clear determination of this question. Finally, the Board encourages elected officials to seek advisory opinions or waivers from the Board if they find themselves in a situation that could create an actual or apparent conflict of interest.

If you wish to pursue this matter, you are advised to refer to the City Ethics Program, Article IV – Enforcement, which can be found on the COBI website (http://www.ci.bainbridge-isl.wa.us/ethics_board.aspx) and clicking on “Code of Ethics Program.” The next step, as outlined in the Code is to submit the complaint to the City Clerk for review by the City Council, the Mayor, and the accused official. This advisory opinion should also be attached to the complaint.