

## MEMORANDUM

TO: Oregon City Citizen Involvement Commission (CIC)  
CC: Christina Robertson-Gardiner; Laura Terway  
FROM: Bill Kabeiseman  
DATE: May 5, 2018  
RE: GC 17-04 and GC 18-01 – Grievances Filed by Michael Miller and Miranda Sierra  
FILE NO.:

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### INTRODUCTION

Michael Miller and Miranda Sierra have filed two related grievances with the City of Oregon City. The first grievance (Grievance “GC 17-04”) involved the Barclay Hills Neighborhood Association (“BHNA”) and the second grievance (Grievance “GC 18-01”) involved the City’s actions, or rather, inaction on the first grievance. This memorandum was requested by staff to provide additional support to the CIC in their decision making process of how to proceed with the submitted grievances. Additionally, this memorandum is intended to provide a method of moving forward on both of the grievances and is not intended to address the substance of the grievances.

### BACKGROUND

On November 18, 2017, Grievance file GC 17-04 was submitted against the BHNA, the BHNA Chair Betty Mum and Mayor Dan Holliday. GC 17-04 alleged that the reasons for the grievance were (1) “failure to disclose conflict(s) of interest,” and (2) “unlawful discrimination.” In addition, GC 17-04 requested that every member of the CIC be recused from participating in the grievance committee. In response to GC 17-04 and, in particular, the request for the recusal of every member of the CIC, the CIC placed the grievance on hold until those that filed the grievance could provide direction on how to proceed.

Subsequently, Miller and Sierra filed GC 18-01 against the CIC. That grievance alleged the following reasons for the grievance (1) “Detrimental Failure of Due Process,” (2) Negligence, (3) Breach of Good Faith and Fair Dealing, and (4) Misfeasance, i.e., willful violation of OCMC ref. OCMC 2.30.060(A)(B)(C), OCMC 2.30.050(E), OCMC 2.30.020(D). In addition, GC 18-01 included a tort

claim notice against the City.<sup>1</sup> The issue that motivated the filing of GC 18-01 appears to be that the CIC has not moved forward on GC 17-04, although there may well be other elements of that grievance.

## ANALYSIS

The CIC is caught between the two grievances; in GC 17-04, Miller and Sierra have alleged that every member of the CIC must recuse themselves because they were appointed by the Mayor and, in GC 18-01, Miller and Sierra protest that the City has not moved forward on GC 17-04. The simplest way to resolve this difficulty is to look at whether the CIC members actually are required to recuse themselves. As explained below, it does not appear, based on the information provided by Miller and Sierra, any recusal is necessary. Accordingly, the CIC should move forward in resolving GC 17-04. In doing so, it would also resolve the primary issue in GC 18-01.

The reason provided by Miller and Sierra for recusal are that the members of the CIC are appointed by the Mayor pursuant to OCMC 2.30.030(B).<sup>2</sup> Miller and Sierra are correct that each of the members of the CIC are appointed by the Mayor, but GC 17-04 does not state explicitly why Miller and Sierra believe that is sufficient to disqualify the members of the CIC. However, the exhibits to GC 17-04 provide some context. In particular, the exhibits indicate that the BHNA Chair, Betty Mumm shares a household with Mayor Dan Holliday. It appears that the substance of the grievance is that those persons did not disclose a “conflict of interest”<sup>3</sup> when Mr. Holladay seconded the nomination of Ms. Mumm to be BHNA Chair.

Although it appears that Miller and Sierra have requested recusal the members of the CIC were appointed by Mayor Holladay, they provide no explanation of why recusal is required. It is not defined as a conflict of interest under Oregon law, but appears, instead to be an allegation of bias, i.e., that because the CIC members were appointed by the Mayor, they cannot impartially resolve a claim against the Mayor or member of his household. However, that approach to bias is unfounded in Oregon law.

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<sup>1</sup> The tort claim was initially removed from the material provided to the CIC because the CIC has no authority to take any action on the tort claim. On the insistence of Miller and Sierra, the tort claim material was provided to the members of the CIC.

<sup>2</sup> OCMC 2.30.030(B) provides as follows:

“Each neighborhood association shall provide a primary and alternate member nomination for **appointment by the mayor**. Each primary and alternate member appointed shall have first been nominated by the neighborhood association of which they represent.” (Emphasis added.)

<sup>3</sup> In Oregon law, a “conflict of interest” is defined much more narrowly than most citizens realize. In particular, ORS 244.020(1) provides the following definition:

“(1) ‘Actual conflict of interest’ means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person’s relative or any business with which the person or a relative of the person is associated unless the pecuniary benefit or detriment arises out of circumstances described in subsection (13) of this section.”

The Oregon Court of Appeals has set a very high bar for disqualifying local decision-makers for bias.<sup>4</sup> For example, in *Eastgate Theatre v. Bd. of County Comm'rs*, 37 Or App 745, 588 P2d 640 (1978), the Court reviewed a Washington County decision on a proposed comprehensive plan map change. Two of the county commissioners recused themselves for prior actions involving the exact same parcel.<sup>5</sup> However, the Court of Appeals found that they had acted improperly by recusing themselves. First, the court noted that, when members of a decision-making body recuse themselves, there are no possible replacements:

“In judicial proceedings as in football, when a judge steps out, he can be replaced from the bench and the adjudication can be made; before a municipal governing body, as in rugby, however, there can be no substitution and the administrative adjudication may go unmade. Nonparticipation by a commissioner is therefore a drastic step.” 37 Or App 751.

The Court went on to also note that, when a majority vote is required on some action, when members recuse themselves, they prevent any action from being taken. 37 Or App at 752. This is exactly the situation that presents itself here; if all members are recused, no action can be taken.

The Court then again noted the difference between a judge and a local government official, noting that judges are “expected to be detached, independent and nonpolitical,” but that local government officials are “expected to be intensely involved in the affairs of the community.” They obtain their position “because of [their] political predisposition, not despite it, and [they are] expected to act with awareness of the needs of all elements of the county, including all government agencies charged with doing the business of the people.” *Id.* The court also noted the different requirements for judges and other officials when faced with a potential conflict of interest in ORS 244.120, the judge must be removed from the case, but a local official need only declare the conflict.

The Court of Appeals recently endorsed the high bar for recusals for bias recently in *Columbia Riverkeeper v. Clatsop County*, 267 Or App 578, 341 P3d 790 (2014). In that case, the Court of Appeals, in discussing bias, noted that under existing case law, local officials

“must maintain impartiality ‘only towards the parties and issues ‘in the matter,’ not toward all individuals and all competing interests in the community generally, and similarly, that the disqualifying contacts must be ‘concerning the question at issue.’”” 267 Or at 600-01.

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<sup>4</sup> The cases discussed below all involve land use matters in which a city or county governing body is deciding land use applications, so they are not directly on point. However, it is the closest analogy under Oregon law and the nature of the grievance process is likely closer to the quasi-judicial land use decision making process than any other process, given the interests involved and the level of decision making.

<sup>5</sup> In particular, the court described those prior actions as follows:

“One felt that he could not be impartial because he had been chairman of a community planning organization which had studied and unanimously recommended approval of the proposed plan change. The other disqualified himself because he was a director of the Metropolitan Service District which had expressed an interest in acquiring the parcel as a site for a solid waste milling-transfer station.”

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In addition, the Court went on to note that the standard for recusal in these cases was “actual bias,” and that the “appearance of bias” was not sufficient to require recusal. 267 Or App at 601.

Although these cases are not directly on point, as they involve elected officials deciding land use matters, rather than appointed officials deciding a grievance, the issues they identify are similar enough that they can be used to decide whether recusal is required in this case and, under those cases, Miller and Sierra must do more than point to the fact the CIC members were appointed by the Mayor; they must show actual bias. Otherwise, their request results in the very thing decried in *Eastgate* and which led to the second grievance – paralysis in decision-making.

## **CONCLUSION**

GC 17-04 was delayed because of the request for recusal made by Miller and Sierra with a request to identify how the CIC should proceed. In response to the delay, Miller and Sierra filed a second grievance asserting a grievance against the CIC for failing to move forward on the first grievance. Based on the understanding of bias discussed above as well as the second grievance filed, the way to move forward is to honor Miller and Sierra’s most recent direction as provided with the filing of the second grievance and reject Miller and Sierra allegations of automatic recusal because of mayoral appointment. If Miller and Sierra can demonstrate actual bias, recusal should be considered; otherwise, the CIC should move forward with their typical grievance process and resolve both grievances.