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City Receives Wayne Golf Course Investigative Report
Bothell City Council Waives Its Attorney Client Privilege & Votes to Release Report

BOTHELL, WASHINGTON, May 5, 2015 - The Bothell City Council, for purposes of transparency, has waived its attorney client privilege with regard to the Wayne Golf Course Investigative Report and voted to release the report. In mid-March City Manager Bob Stowe ordered an independent investigation into whether City Council members violated the State’s Conflict of Interest laws (RCW 42.23.070), City ethics rules (Bothell Protocol Manual Section 1.4 (B)), and other applicable regulations, rules or policies related to potential acquisition by the City of the Wayne Golf Course (both front and back nine).

The report concludes that no conflicts of interest or ethics violations have been committed by any member of the City Council.

When asked about the investigation, City Manager Stowe said that he was satisfied with the thoroughness of the investigation as well as it findings. Stowe further stated that, “WCIA was selected to conduct the investigation due to its ability to independently select and pay for an outside investigator who is highly regarded in the legal community for his understanding and knowledge of ethics, land use and development matters. This made WCIA a logical choice to choose the outside investigator and pursue this important investigation on behalf of the City of Bothell.”

Attached is a copy of the full report that has been released by the Bothell City Council.

(Continued on page 2)
About WCIA
The Washington Cities Insurance Authority (WCIA) is a municipal organization of Washington public entities (over 150 members) that join together for the purpose of providing liability and property financial protection to its members.

In the context of the Wayne Golf Course matter, the WCIA’s appropriate focus is to protect the interest of the insurance pool because of its fiduciary duty to make sure that all the allegations within the identified scope of work have been thoroughly investigated and, to the extent any violations occurred, to report on such actions. A key purpose of WCIA is the early identification of potential risks and litigation for its members so appropriate steps can be taken to mitigate or eliminate such practices from harming the financial interest of its members.

About the City of Bothell
Bothell, Washington is a riverfront community with 41,630 people, thriving with high-tech and bio-med businesses, and undergoing exciting revitalization changes in downtown. Bothell is located in the Puget Sound region, nestled in both King and Snohomish counties. The City of Bothell incorporated in 1909 and covers 13.66 square miles.

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I. Introduction

This memorandum responds to the City Manager’s March 13, 2015 specific direction for an “independent investigation” into whether City Council members violated our State’s Conflict of Interest laws (RCW 42.23.070), and City Ethics rules (Bothell Protocol Manual 1.04 (B)), and other applicable regulations, rules or policies related to potential acquisition by the City of the Wayne Golf Course (both front and back nine).” This memorandum is therefore concerned specifically with objective application of actual ethics rules and laws.

The legal conclusion reached is that, based on the data gathered and reviewed, state law and City strictures on conflict of interest/ethics have not been violated, including by Mayor Joshua Freed and Councilmember Mark Lamb. The explanation for this conclusion is presented below.

II. Background

In 1995\(^1\) the Richards family executed a Conservation Easement (“Easement”) which included a grant to Bothell of the following right:

17. Right of First Opportunity to Purchase.

a. Grantor (which shall include for purposes of this Section 17, David L. Richards and Sharyn M. Richards due to their ownership interest in the Back Nine

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1 The investigation is being underwritten by the Washington Cities Insurance Authority which requested that the author take on this assignment in light of his experience and expertise in land use and development matters and related ethical questions. The author’s background and experience are summarized in an appendix to this memorandum.

2 The Richards signature is dated 1995, but the Easement is often referred to as granted in 1996.
and/or Clubhouse Area) hereby grants to Grantee the right to purchase the Property, Bank [sic] Nine and Clubhouse Area (collectively the "Subject Property" or "Properties") as provided herein. If at any time during the term of this Easement Grantor elects to sell or offer for sale all or any of the Subject Properties (including any portion of a single Subject Property), Grantee shall have the first right to purchase the same.

b. Grantor shall give notice to Grantee, in writing, that Grantor desires to offer such Properties or any one (1) of them for sale. If Grantee is not then in default hereunder and wants to submit an offer to purchase the property Grantor wishes to offer for sale, Grantee shall deliver to Grantor, within forty-five (45) days of delivery of notice to Grantee, a written proposal setting forth the purchase price and all other terms and conditions of such offer. Said terms and conditions must provide, for payment of the full purchase price at closing, unless Grantor is willing to accept an installment sale.

c. Once Grantee's offer to purchase is delivered, Grantor shall have thirty (30) days either to accept or reject the offer. In the event Grantee's offer to purchase is rejected by Grantor, Grantor may, for twelve (12) months after Grantor's rejection, sell or offer to sell and/or accept an offer to buy said property for a price higher than the price offered by granted plus five percent (5%) of that price (taking into consideration all terms and allocations of costs between buyer and seller). If within twelve (12) months after Grantor's rejection Grantor receives a bona fide offer to purchase for a price equal to or less than five percent (5%) greater than that offered by Grantee that Grantor desires to accept, Grantor shall provide Grantee with written notice of the price and other terms of such offer. Grantee shall have forty-five (45) days, thereafter to decide whether to purchase the property. In the event Grantee decides to purchase the property, the price and terms of the purchase shall be at Grantee's option, either (i) the price and terms originally offered by Grantee upon notice of Grantor's desire to sell or (ii) that price and terms offered by the third party pursuant to the bona fide offer. Grantee shall provide written notice to Grantor of its exercise of its right to purchase and its choice of terms.

d. If the Grantee fails to exercise its option to purchase the sale of said property to a party other than Grantee as provided herein is closed, Grantee's right of first opportunity to purchase such property (but not any other portion of the Properties) shall automatically terminate and be of no further force or effect. If such property is not sold to, or a binding purchase agreement for its sale executed with, a party other than Grantee with twelve (12) months from the date of Grantor's rejection, Grantee's right of first opportunity to purchase shall be reinstated, and Grantor must again give thirty (30) days written notice to Grantee if Grantor desires to offer such property for sale.
Pursuant to this Easement section 17, the City received, on November 27, 2013 a letter from the Richards family giving notice that the Back Nine would be sold. This triggered the City’s forty-five day opportunity to make an offer and resulted in a City Council executive session in late 2013 to discuss the City’s response. No actual record is made of executive session proceedings, so this memorandum relies in particular on the description of what occurred obtained in an interview with Pat Parkhurst, a longtime City employee, now retired, who attended the Executive Session and made the staff presentation on the Wayne Golf Course Back Nine matter.3

According to Ms. Parkhurst, she was the staff person assigned to present the Richards’ Back Nine offer letter to Council. As part of what she prepared to present, she obtained the property’s assessed value (which she acknowledges is not necessarily the same as appraised value). Ms. Parkhurst does not specifically remember whether the Conservation Easement was in the room during the Council executive session. But she states that she is the kind of person who would have taken the file with her into the room for the executive session and that the Conservation Easement was in the file. She indicates that she likely did not distribute copies of the Conservation Easement in the executive session because it was “so thick” (so many pages).

According to Ms. Parkhurst, Erin Leonhart and Clark Meek were also in the executive session. Clark Meek was Parks Director at the time and also, according to Ms. Parkhurst, when the City bought the development rights and acquired the Conservation Easement. Ms. Parkhurst’s memory is that Mr. Meeks did not comment and was not asked to. Ms. Parkhurst cannot recall all of the Councilmembers who were in the executive session but her best recollection is that Councilmembers Evans and Spivey were among them. Ms. Parkhurst does not recall any particular comments by the City Attorney and does not recall any particular questions directed to him.

According to Ms. Parkhurst there was not extensive discussion in the executive session. She does not recall any Councilmember asking to see the Conservation Easement or asking any particular questions about it. Her recollection is that there was no conversation about making an offer for the property and that it was “taken for granted” by all that there was no means to acquire the property. As she puts it, the Council as a whole was “pretty quiet that night” and what was said was long the lines of “it could be great but there is no money.” She indicates there was “no question the Council did not have the money” and that no Councilmember questioned that. She states that was not surprised because the Council by then was used to the fact that they did not have the dollars for such acquisitions.

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3 It is the author’s judgment from interviewing her that Ms. Parkhurst’s description is reliable and that she has no particular “axe to grind” in describing what occurred.

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telephone 206.441.1069  •  www.cklaw.com  •  facsimile 206.441.1089
Ms. Parkhurst describes that the City was already “scraping the bottom of the barrel” for purchase of the North Creek Forest. She explained that had been accomplished “by cobbling grants together grant by grant” and that the property had been “bought a little at a time, but there was nothing like that for the Wayne Golf Course property.”

Ms. Parkhurst recalls that there appeared to be general acceptance in the executive session of a comment speculating about the possibility of Blyth Park access if a developer ended up with the property.

Ms. Parkhurst describes herself as disappointed at the close of the executive session because the acquisition of the golf course property had been a goal for so long, but she emphasizes that she “also knew there was no money.”

Ms. Parkhurst indicates that she received no calls from anyone asking where matters stood on the Wayne Golf Course property until “long after” -- probably a year or so after -- the executive session.

In response to specific questions, Ms. Parkhurst states that there had been no orchestration by anyone of her presentation and that no one had asked her to “trim her sails” (as the question was asked) in making her presentation. She did not have a direct conversation with the City Manager about the presentation; any such conversation had been with the Public Works Director.

All in all, Ms. Parkhurst describes the executive session as a “pretty innocuous meeting.” According to her, at the executive session’s conclusion, there was no direction set, just a “thank you.” 4 No Council action was proposed when the Council went back into open session. The City’s forty-five day purchase opportunity therefore lapsed.

Subsequently, the Richards family offered the Back Nine property for sale and potential development. This was done in consultation with Ken Bellamy of Tri-Met Development 5, which was working with them on disposition of the property and had worked with the family on prior projects. According to Mr. Bellamy, the family was not talking with any potential purchasers prior to or during the pendency of the offer letter to the City. 6 Once the time had passed for a City response, an informal list of builders who might have a potential interest in development in Bothell was created with Tri-Met’s assistance and follow-up contacts were made. 7

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4 At the conclusion of the telephone interview with Ms. Parkhurst, she was asked if there was anything else that she thought she should have been asked or that she wanted to add and she indicated there was not.
5 Mr. Bellamy contacted me in response to my several requests for information from the Richards family and ultimately answered questions about the sale of the Back Nine in a lengthy (one hour approximately) telephone interview. Written responses were also received from the Richards family itself. A follow-up response from the Richards family addressing additional questions posed to them was received at 9:30 AM on April 28.
6 Responses from Mayor Freed and Councilmember Lamb confirm this from their perspectives.
7 The list has not been provided.
Per Mr. Bellamy, follow-up was by various informal means (e.g. telephone, emails, etc.); there was no formal letter soliciting offers from a more general audience. He explained that it would not be typical to “market the property to the world”: the search was for a potential developer with known expertise, financial resources, and proven capability to carry the property through the planning process. Element, Mayor Freed’s company, was one of the firms contacted, according to Mr. Bellamy.8

The Richards apparently have a long-standing family friendship with Councilmember Lamb. They are also apparently known to other Councilmembers and members of the public, perhaps because of their operation of the golf course. Councilmember Lamb notes that he has been socially acquainted with the Richards for almost fifteen years. However, there is no indication in what was reviewed for this memorandum (and Councilmember Lamb confirms) that he has ever had any legal or financial interest in the Wayne Golf Course Property, although he has played there regularly over the years. Further, Councilmember Lamb states that he has not acted in this matter as counsel or agent for the Richards family, an assertion that Mr. Bellamy confirmed.

Councilmember Lamb acknowledges that he and Mayor Freed are also personal friends, that he has performed work for Element Residential, and that their business relationship is a matter of public record, having been previously disclosed on Councilmember Lamb’s annual PDC disclosure form. Councilmember Lamb has declined, based on attorney-client privilege, to discuss specifics of his law firm’s work for Element Residential.

According to Mr. Bellamy there was “no preference whatsoever” for a sale to any particular developer. Element ultimately was the successful buyer for the Back Nine based on “best offer, best price”. Again, per Mr. Bellamy, Councilmember Lamb was not involved for Element until relatively late in the process. According to him, “weeks -- not months” before the Real Estate Purchase and Sale Agreement (“REPSA”) was executed, Councilmember Lamb became engaged in helping Element negotiate a “term sheet” and then a final REPSA, executed on May 30, 2014. The Richards family was represented in negotiating the transaction by their own counsel apparently from a Seattle law firm.

The Back Nine sale has not yet closed per Mr. Bellamy because “it does not have to per its terms.” However, he declined to provide specifics on those terms.9

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8 According to information available from the Washington Secretary of State, Element Residential Inc. and Element Ventures LLC are two distinct entities with which Mayor Freed is associated. Mayor Freed is the president, secretary, treasurer and vice president for Element Residential, Inc. Councilmember Lamb is listed as Element Residential’s registered agent, a role often played by counsel for a client corporation. Mayor Freed is the “member, manager” as well as the registered agent for Element Ventures. The Richards family and Mr. Bellamy, in their communications with the author, generally refer to Element and do not make a distinction between the two.

9 After several requests, an opportunity was given by Mayor Freed to review but not copy or disclose details from the REPSA and successive amendments to it. At least an hour was spent in review and note taking. The REPSA was 1000 Second Avenue, Suite 3130 Seattle, Washington 98104 telephone 206.441.1069 • www.eklaw.com • facsimile 206.441.1089
The Richards response to follow-up inquiries, received on April 28, 2015, is generally consistent with Mr. Bellamy's narrative as to the origin of the contract with Element for the Back Nine:

Further to your email of April 23, 2015, I you [sic] have reviewed our sales agreement along with the amendments you referenced you have seen the complete agreement. There are no other agreements between the parties and there has been no additional consideration requested or offered in this matter. We have a business relationship with TriMet and have done a number of real estate projects with them over the last 15 years. We engaged them on this project to assist us with analyzing its development potential and alternatives to assist with the potential re-zoning of the clubhouse parcel.

Our initial contact and discussions on the back 9 with all potential buyers, including Mr. Freed and Element or Mark Lamb or others representing them commenced after the expiry [sic] of the City's First Right to Offer. There were no discussions with any potential buyers prior to then. After The City's First Right To Offer expired we identified at least 16 builders we thought were financially and technically able to complete the platting process and subsequently purchase the property. We first approached all of these builders in February of 2014 and ultimately concluded our negotiations in May 2014. The agreement was amended as a result of negotiations with the buyer as they discovered additional information during the due diligence investigation of the property. We did not contact the city again because the property was never out of contract.

More recently the Richards have offered the Front Nine to the City, again per Easement Section 17. This resulted in discussion of potential purchase of the Front Nine and, eventually interest in pursuing an acquisition that would include the Back Nine as well. In light of this, Mayor Freed and Councilmember Lamb ultimately disclosed their work for Element on acquisition of the Back Nine after the City’s first opportunity to purchase had lapsed.

Per Mr. Bellamy, there is no connection or “synergy” between development of the Back Nine and the fate of the Front Nine. This is confirmed in a recent (April 22, 2015) e-mail from the City Community Development Director\(^\text{10}\) explaining his perspective on any development relationship (or lack thereof) between the Front and Back Nine and incidentally describing a meeting with a development team for the Back Nine:

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\(^{10}\) The Director’s information is also viewed by the author as particularly reliable based on observation of his work over the years as well as the fact that he is retiring very shortly.
Eric Clarke had requested the December 8, 2014, meeting. Staff was not aware of the topic until Joshua [Freed] and Eric introduced it at the meeting. At that meeting, Joshua said he was considering purchasing the Back Nine of the Wayne Golf Course, and wanted some preliminary feedback from staff concerning a particular development approach - the Green Planned Unit Development - that, he said, appeared appropriate for the property.\footnote{Upon follow-up inquiry, the Director confirmed for attribution in this memorandum that the development forms and approvals discussed for the Back Nine at this meeting would not come before the Council or require Council action.}

The Community Development Department regards the Front and Back Nines as independent of each other in terms of future development potential, for the following reasons:

1. The City owns the development rights to the Front Nine, except for a four-acre exclusion containing the clubhouse, some parking, and small portions of two holes;

2. The City Council in 2013 considered but chose not to act on an opportunity extended by the Back Nine owners to the City to purchase the property; and

3. The Front Nine and Back Nine are physically separated by Waynita Way.

Since the Council declined to pursue acquisition of the Back Nine, staff has assumed that developers would eventually inquire about, and subsequently submit plat applications for, that property.

Indeed, early speculation among staff and the development community was that Toll Brothers, which is developing Pipers’ Glen immediately south of the Back Nine, would acquire and develop the Back Nine as well. I recall discussing that possibility with a Toll Brothers representative, but I don’t remember his response.

Please be aware that the potential redevelopment of the four-acre exclusion from the Front Nine was proposed by the Golf Course owners themselves. The proposed redevelopment, comprising 76 townhomes and construction of a much larger clubhouse and restaurant, is not allowed under the current R 9,600 zoning, and the owners were so advised. The owners consequently availed themselves of the opportunity presented by the GMA-mandated Plan Update in process at the time and requested a Plan Amendment and Rezone to allow the proposed development.

The proposal generated substantial controversy, prompting the Planning Commission to vote to defer any further consideration until after the Plan Update had been approved by the City Council. The Council concurred in the Commission’s deferral.
The proposal for the exclusion was the catalyst for OneBothell to form and to request that the entire Wayne Golf Course (protected portion of the Front Nine; the four-acre exclusion from the Front Nine; and the Back Nine) be purchased for public use and enjoyment.

Council discussions, disclosures, and recusals leading to the request for this memorandum are documented on the City Council record and will not be further described here.

III. Applicable Rules

There are two principal (and overlapping) sources of ethics regulations for Bothell elected officials. One is in state law and the other is in the corpus of materials collected and referred to in the City’s Protocol Manual. Each will be addressed below.

Bothell is subject to the state “Code of Ethics for Municipal Officers.” This code, found in RCW Chapter 42.23 includes the following statutory conflict of interest standard: 

42.23.030. Interest in contracts prohibited—Exceptions

No municipal officer shall be beneficially interested, directly or indirectly, in any contract which may be made by, through or under the supervision of such officer, in whole or in part, or which may be made for the benefit of his or her office, or accept, directly or indirectly, any compensation, gratuity or reward in connection with such contract from any other person beneficially interested therein.

Contracts made in violation of this statute are void, and any municipal officer who violates the statute is liable to the municipality for a fine of $500, and may also be removed from office. RCW 42.23.050.

“Contract” is defined as “any contract, sale, lease or purchase”. RCW 42.23.020(3). This provision, as with the others in this RCW chapter, is concerned with municipal officers benefitting through a municipal contract. So, for example, if the City had decided to buy the Back Nine when the Richards offered it and a Councilmember had benefitted from the purchase contract, then a potential violation would be raised that could require further analysis.

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12 RCW Chapter 42.52 concerns “Ethics in public service” but by its terms regulates state employee and agency activities so has no application here.
13 Note however that in at least one appellate precedent no violation of RCW 42.23.030 was found despite a Councilmember’s longstanding and continuing lucrative business doing towing work for the city. Citizens for Des Moines, Inc., et al. v. Petersen, 125 Wn.App. 760, 106 P.3d 290 (Div. 1 2005), reconsideration granted in part Oct. 13, 2005, as corrected Oct. 13, 2005.
It can be debated as a policy and political matter whether, with hindsight, the Councilmembers sitting at the time should have moved to attempt a City/Richards purchase contract. But RCW 42.23.030 has no traction here in the absence of such a contract.

“The Code of Ethics for Municipal Officers” in RCW 42.23.070 also includes a list of “Prohibited acts”:

(1) No municipal officer may use his or her position to secure special privileges or exemptions for himself, herself, or others.

(2) No municipal officer may, directly or indirectly, give or receive or agree to receive any compensation, gift, reward, or gratuity from a source except the employing municipality, for a matter connected with or related to the officer’s services as such an officer unless otherwise provided for by law.

(3) No municipal officer may accept employment or engage in business or professional activity that the officer might reasonably expect would require or induce him or her by reason of his or her official position to disclose confidential information acquired by reason of his or her official position.

(4) No municipal officer may disclose confidential information gained by reason of the officer's position, nor may the officer otherwise use such information for his or her personal gain or benefit.

Again, these prohibitions are not invoked by the facts concerning the Richards’ letter to the City, the Richards’ subsequent solicitation of offers from local developers, and the subsequent execution of a REPSA between the Richards and Element. The letter offer to sell to the City pursuant to Conservation Easement section 17 was not legally confidential although its existence may not have been actively publicized. It was and is part of the City’s public record. Further, the materials reviewed for preparation of this memorandum did not provide evidence of use of confidential information or official position with regard to the Back Nine. It is likely of course that Mayor Freed and Councilmember Lamb have received or are hoping for compensation for activities concerning the property subsequent to the lapse of the City’s right of first opportunity to purchase. However, the RCW does not prohibit elected officials from pursuing for their direct or indirect benefit a purchase that the City Council has declined to pursue.

The City’s Protocol Manual also contains several provisions that potentially bear here. They start with section 1.04 “Overview of Basic City Documents”:

...
B. Personnel Policies and Procedures Handbook

It is the policy of the City of Bothell to uphold, promote, and demand the highest standards of ethics from all of its elected and appointed officials. Accordingly, all members of the City Council, members of all appointed boards, commissions, committees, City employees, consultants and professional service providers are expected to maintain the utmost standards of personal integrity, truthfulness, honesty and fairness in carrying out their public duties; avoid any improprieties in their roles as public servants; and never use their City position or powers for personal gain. Section 2 and 10 of the City of Bothell Personnel Policies and Procedures address general rules of conduct and provides guidelines for City officials to be worthy of the public trust and abide by their Oath of Office. Copies of Sections 2.1, 2.2, 10.1, 10.2 and 10.5 are included in the Appendix.

This section is aspirational rather than stating an objectively enforceable definition of conduct constituting impropriety.\textsuperscript{14}

Protocol Manual Chapter 6. “Conflicts of Interest, Appearance of Fairness Doctrine, and Liability of Elected Officials” gives the initial appearance of providing more operative substance. But, again, for legislative purposes\textsuperscript{15} it turns largely on the same provisions and questions as RCW Chapter 42.23, addressed above. See Protocol Manual section 6.01A.

Section 10.1 and 10.2 of the Personnel Policies appended to the Protocol Manual might be brought to bear here as an additional level of ethics regulation by the City apart from RCW Chapter 42.23. However, as quoted above, Protocol Manual section 1.04B, in referring to the application of, for example, Personnel Policy 10.2, states that the policies “address general rules of conduct and provide [...] guidelines for City officials ...” Further, the sections themselves speak largely to basic regulation of employee conduct (e.g., no drugs, no firearms, no bribes, etc.) rather than to the kinds of issues inherent in a Council conflict question.

Personnel Policy 10.2 has also been cited in connection with the Wayne Golf Course matter. However, it is vague, precluding objective application. For example, attention has been directed to Personnel Policy 10.2 4A which is supposed to “communicate to the employees that they should avoid an action or behavior which constitutes the reality or the appearance of any of the following”:

\begin{itemize}
  \item Using a City position for private gain;
  \item Offering preferential treatment to any person or organization;
\end{itemize}

\textsuperscript{14} It is perhaps akin to the famously flexible Google motto, “Don’t be evil.”

\textsuperscript{15} There is no Council quasi-judicial decision involved here, so the “appearance of fairness doctrine” does not apply in any event.
• Impeding the efficiency, productivity, economy or effectiveness of the City;
• Losing complete impartiality;
• Making and/or representing oneself as having the authority to make a City decision outside of official channels;
• Adversely affecting the confidence of the public in the integrity of the City.

No colorable evidence has been reviewed demonstrating that any of these precepts were violated, particularly in light of the lack of a proposal, motion, or question by any Councilmember for pursuit of purchase of the Back Nine.

The accusation has nonetheless been made that Mayor Freed and Councilmember Lamb violated the provision concerning “Adversely affecting the confidence of the public in the integrity of the City”. Examination of the facts and the standard’s actual wording does not bear this out as an objective conclusion.

A Councilmember cannot be deemed to have violated ethics rules by creating an “adverse affect” simply because there is an accusation against him or her. Adoption of a per se rule that, where someone is enveloped in smoke, there must be an actual fire – rather than, for example, a smoke bomb tossed from the sidelines -- would lead to arbitrary and inequitable results. A conclusion that a violation has occurred must be based on something more than the “optics” an accusation may create.

Whether there is an “adverse affect” on public confidence in the first place also must be objectively grounded. Is the presence of an “adverse affect” decided based on how many citizens speak for or against what has occurred? By a newspaper editorial or article, a blog, or a TV report? Is it proven by the results of public opinion polls? Is it determined by who wins or loses in an election? Certainly on the facts here, this “adverse affect” formulation does not lead to an objective legal conclusion of unethical conduct by elected officials.

In summary, the standards that can actually be objectively applied to the facts here compel these conclusions:

• Mayoral and Councilmember involvement in private purchase of a property subsequent to lapse of the City’s purchase right due to Council inaction is not on its face an ethical violation.16

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16 A useful analogy may be to a desirable but expensive vehicle first offered by a dealership to the City. If the City affirmatively follows up, then competition from a City official also interested in purchasing the vehicle might in some circumstances raise ethical issues. But if the City declines to make an offer, then ethical strictures are not.

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Had there been City action or even an expression of interest by any Councilmember resulting in follow-up with the Richards, then the analysis might be different, depending on what other facts came to light.

City and public follow-up on the discrete Front Nine did not automatically create a retroactive conflict for Councilmembers already involved in a private Back Nine transaction. Disclosures and recusal were appropriate when linkage ultimately occurred.

IV. Additional Questions

Various factors cited by one or two Councilmembers in e-mails to me as support for concluding that Mayor Freed and/or Councilmember Lamb violated ethics rules were not probative. Others were also beyond the scope of this report. Several will nonetheless be addressed briefly below.

One suggestion -- that Mayor Freed and/or Councilmember Lamb had manipulated other Councilmembers and the situation so that the City would not affirmatively follow up on the November 27, 2013 Richards letter -- is not borne out by the record reviewed. There is no showing for example of any particular communication by either Mayor Freed and or Councilmember Lamb with anyone else in City government concerning the Richards letter.17 There is no indication in internal staff correspondence reviewed of a particular interaction with Councilmembers attempting to influence staff input to Council on potential response to the Richards letter.

There are no shortcomings attributable to Mayor Freed or Councilmember Lamb in the information given to Councilmembers after the City received the November 27, 2013 letter and the matter was set for Council consideration in executive session. Further, the record reflects that it was recognized that the properties had previously been designated as ones the City should try to acquire. The Conservation Easement itself telegraphed this in its inclusion of a right of first refusal for the City. Based for example on Ms. Parkhurst’s account, no Councilmember requested more information or sought to identify further options -- in or out of executive session -- because, as she explains, everyone understood that there was no money available for Back Nine acquisition.18

17 Collection of all e-mails is of course not a foolproof process and in any event in person conversations and telephone calls do not leave a paper trail reflective of what substance has been discussed.
18 City interest in the property has apparently been confirmed over the years by mention in City plans, but without identification of a funding source or plan. Whether more should have been done in the twenty years after the Conservation Easement right of “first opportunity” was established toward the day when the golf course might go up for sale is beyond the scope of this memorandum. What can be said is that proposals for such follow-up are not
One comment suggested that Mayor Freed had violated Code strictures on property entirely unrelated to the Wayne Golf Course. No explanation was provided of how that allegation, even if proven true, would demonstrate a violation of ethical strictures with regard to this matter. It was therefore not considered further.

A concern was also registered that Mayor Freed and/or Councilmember Lamb had been insufficiently supportive at a Council retreat when a colleague raised drafting and adoption of a new City ethics code such as had occurred in the City of Bellevue. However, a lack of enthusiasm -- real or perceived -- for a colleague’s suggestion about future legislation is not evidence of wrongdoing under current rules.19

A question has been asked about why the Council was not advised in executive session concerning the Back Nine to make an offer on the property regardless of the unavailability of funds to make the purchase. However, advice to make a purchase offer under circumstances in which its good faith could be open to question would raise its own legal and ethical issues.20

Another question asks why the Council discussion of the Richards November 27, 2013 letter was held in executive session. Typically, consideration of real property acquisition is discussed in executive session pursuant to the Washington Open Public Meetings Act (OPMA) RCW 42.30.110 1(b) which authorizes executive sessions “To consider … the acquisition of real estate by lease or purchase when public knowledge regarding such consideration would cause a

the exclusive province of any one participant in the process - staff, Council, or the public itself. One Councilmember has noted, in an e mail responding to questions posed, the failure of a Parks Levy subsequent to the Richards November, 2013 letter.

19 Bellevue Code 3.92.040 “Ethical standards” includes such exhortatory provisions as the following:

B. Officials are also encouraged to comply with the following standards:

1. Personal Integrity. The professional and personal conduct of officials must be above reproach and avoid even the appearance of impropriety. Officials shall refrain from abusive conduct, threats of official action, personal accusations or verbal attacks upon the character or motives of other members of council, boards and commissions, the staff or public. Officials shall maintain truthfulness and honesty and not compromise themselves for advancement, honor, or personal gain. Additionally, officials shall not directly or indirectly induce, encourage or aid anyone to violate this code of ethics and it is incumbent upon officials to make a good faith effort to address apparent violations of this code of ethics.

20 The lack of appraisal information for the executive session has also been raised. As noted above, Ms. Parkhurst recalls checking assessment information as part of her preparation. Whether an actual appraisal should have been obtained is beyond the scope of this memorandum and poses a potential chicken-and-egg problem. Should time and money have been spent on appraisal information when a funding source was not apparent, the Council had not yet set a direction, and the order of magnitude of funds necessary to make such a purchase could be approximated without an appraisal?
likelihood of increased price...” The OPMA and case law is clear that Council action must be taken in public, not in executive session. Of course, it cannot be known going into an executive session what Council as a body will decide to do when it comes out of the session. Here, the Council took no action after the Back Nine executive session. The post-executive session inaction has been cited in questioning whether the executive session was appropriate in the first place. However, this hindsight standard is not consistent with the statute and would be unworkable.21

A question has been asked about whether disclosure of the Back Nine REPSA is required under the Conservation Easement. The 1995 Conservation Easement does not explicitly give the City the right to review any REPSA or analogous communications or agreements between the Richards (Grantors) and purchasers. Nonetheless, it has been reasonably pointed out that compliance with the terms of Conservation Easement section 17 “Right of First Opportunity to Purchase” cannot be readily verified absent such information. For example, per Conservation easement Section 17d, “reinstatement” of the City’s “first opportunity” right is dependent on whether there is a pre-existing “binding purchase agreement for its sale executed with, a party other than the Grantee...” Because the Conservation Easement does not provide any particular mechanism for acquiring information arguably necessary to verify whether such binding agreement actually exists, verification is apparently left to the discretion of the Grantor (Richards) -- and conceivably to litigation if the City’s questions are not answered satisfactorily.

IV. Conclusion

As explained above, the legal conclusion reached is that, based on the data gathered and reviewed, state law and City strictures on conflict of interest/ethics have not been violated, including by Mayor Joshua Freed and Councilmember Mark Lamb.

21 Another comment has suggested that the fact that the staff’s executive session lack of funding premise was not questioned by any Councilmember is tantamount to “action through inaction” and therefore unlawful under the OPMA. This approach, positing an OPMA version of Catch 22, is not supported by the statute and case law.
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PROFESSIONAL PROFILE:

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"Ethics for the Environmental and Land Use Practitioner," King County Bar Association, Environmental & Land Use Law CLE, 2010.


"Large Lot Development Patterns in Urban Areas: Is Anything Left of the “Bright Line?”" WSBA Environmental and Land Use Law Section Midyear Meeting and CLE Seminar, 2008.

"Environmental & Land Use Law: What You Need to Know For 2008" King County Bar Association CLE, December 2007.


"Bright Line Fever: How I Learned to Stop Questioning Four Dwelling Units Per Acre and Love the Litowitz Test," Fall WSAMA (Washington Association of Municipal Attorneys) Conference, October, 2005.


"Trying and Settling Land Use Cases," The National Judicial College (course given to judges to enhance their familiarity with land use law), August 26-27, 1999.


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