

Memo

To: Heather Burgess, Port of Olympia Counsel
From: Thomas McPhee
Date: October 31, 2018
Re: Resolution 2008-16 investigation and report

This report follows my appointment as independent investigator to investigate and report on the allegation of conflict of interest by Commissioner Zita contained in the document dated August 13, 2018. The appointment is to investigate the allegation and report to the Port Counsel pursuant to Resolution 2008-16.

Resolution 2008-16 does not define investigation, but a fair reading of Resolution 2008-16 as a whole, including the section titled Enforcement / Administration, compels the conclusion that the investigation focus on the allegation delivered in writing to Port Counsel; the investigator is not empowered to search for or consider possible violations of Resolution 2008-16 that are not evident in the written allegation. In other respects, the investigator is not constrained except by the usual and customary interpretation of the word “investigate”. Conversely, Resolution 2008-16 specifically defines the scope of the obligation to report; it is to sustain the allegation, find no basis for the allegation, find the allegation trivial, or a fourth category not relevant here.¹

In undertaking the investigation aspect of this assignment, I invited the complainant and Commissioner Zita to:

- submit any evidence either felt was relevant to the allegation,
- identify and discuss pertinent legal authorities, and
- argue the merits of the allegation.

All responses were to be in writing; either could respond through private legal counsel. I received written submissions from both principals. I listened to the recording of relevant parts of the Port Commission meeting on August 13, 2018. I also initiated a telephone conversation with Commissioner Zita to confirm the location and use of the real estate identified in the charge.

¹ The language of the fourth category, “cannot make a valid determination on the basis of undisputed facts”, is ambiguous; it is susceptible to several interpretations.

Complainant alleges a conflict of interest in violation of Resolution 2008-16 with respect to the proposed New Market Industrial Campus (NMIC). The conflict alleged is that (1) Commissioner Zita owns property “in that area” of the NMIC and located within the Salmon Creek Neighborhood Association; and (2) that then-citizen Zita served, as representative of the Salmon Creek Neighborhood Association, on a twelve-member citizen advisory panel to the Thurston Regional Planning Council, the lead agency for planning the NMIC.

My investigation did not reveal any disputes about the material facts of this charge. I find:

- The NMIC plan is for an area (campus) located on Port of Olympia property. The established south boundary of the campus is 83rd Avenue SW.
- Commissioner Zita is the owner of two parcels of residential property, both fronting on the south side of 88th Avenue SW. These properties are located within the boundaries of the Salmon Creek Neighborhood Association.
- Planning for the NMIC was led by the Thurston regional planning Council, as the lead agency. In that process a twelve-member citizen advisory panel was created.
- During 2014 and a portion of 2015 citizen Zita served on the citizen advisory panel as the representative of the Salmon Creek Neighborhood Association.
- When Commissioner Zita was elected to the Port Commission in November 2015, she resigned from the citizen advisory panel.

These facts are the framework for reporting on the allegation of conflict of interest.

The portion of Resolution 2008-16 recited in the allegation is titled Conflict of Interest, and provides:

Port Commissioners may not have interests, financial or otherwise, direct or indirect, or engage in a business or transaction or professional activity, or incur an obligation of any nature, that is in conflict with the proper discharge of the Commissioner's official duties as a Port Commissioner. (RCW 42.52.020) Nor shall the Port Commissioners adopt policy or other decisions to gain or convey financial or other benefits for themselves or their immediate family, friends or business associates.

This statement broadly identifies four prohibitions:

1. Commissioners may not have interests, financial or otherwise, direct or indirect, that [are] in conflict with the proper discharge of the Commissioner's official duties
2. Commissioners may not engage in a business or transaction or professional activity that is in conflict with the proper discharge of the Commissioner's official duties.
3. Commissioners may not incur an obligation of any nature that is in conflict with the proper discharge of the Commissioner's official duties.

4. Commissioners may not adopt policy or other decisions to gain or convey financial or other benefits for themselves or their immediate family, friends or business associates.

I conclude that the two facts alleged to constitute conflict of interest by Commissioner Zita (ownership of nearby property, participation on the citizen advisory panel) do not violate any of the four prohibitions. Of the four prohibitions, the second and third clearly do not apply either allegation – there is no basis for finding that she engaged in a business or transaction or professional activity, and no evidence that she incurred an obligation of any sort.

I also conclude that Commissioner Zita’s ownership of property on 88th Avenue SW does not violate either the first or fourth prohibition. It is perhaps possible to imagine that market value of Commissioner Zita’s property might be changed by a Commission decision that advanced the plan to develop Port property with the NMIC, but there is no contention of that in complainant’s allegation and there is no evidence to support a finding of fact on that subject. The legal standard for declaring a benefit that constitutes a conflict of interest requires some clear or quantifiable evidence of benefit to the elected official. Court decisions from our courts of appeal and the Washington Supreme Court are consistent with my conclusion. The standard identified by the courts is “undeniable major benefit.” C.f., *Narrowview Pres. Ass’n v. City of Tacoma*, 84 Wn.2d 416, 420 (1974); *Hayden v. City of Port Townsend*, 28 Wn. App. 192, 196 (1981). I could find no Washington appellate decisions declaring a conflict of interest on any issue as remote as the property ownership alleged here.

I conclude that Commissioner Zita’s participation in the planning process for NMIC, as a member of the citizen advisory panel, prior to her election as Port Commissioner is not a conflict of interest. Resolution 2008-16 is a code of conduct for persons serving as Port Commissioners. It does not look backward to disqualify commissioners for activities before election.² Her activity prior to her election does not violate either the first or fourth prohibition.

² An exception to this declaration is when the elected official is acting in a quasi-judicial role (e.g., hearing a zoning or environmental appeal); in those cases the appearance of fairness doctrine applies and permits a look backward in some instances.