SEATTLE CITY COUNCIL
CENTRAL STAFF

November 15, 2019

M E M O R A N D U M

To: Seattle City Council
From: Eric McConaghy, Analyst
Subject: Appearance of Fairness regarding Waterfront Local Improvement District Legislation: Resolution 31915 and Council Bill 119697

The purpose of this memorandum is to disclose communications with Councilmembers that may be subject to the Appearance of Fairness Doctrine.[1] Attachment 1 to this memorandum discloses email correspondence addressed to all Councilmembers that referenced the Waterfront Local Improvement District (Waterfront LID). Similarly, Attachment 2 discloses related email correspondence in response to the email shown in Attachment 1.

On November 18, the Council is scheduled to vote on two pieces of legislation:

(1) Waterfront LID Notice of the Final Assessment Roll - Resolution 31915

Adopting Resolution 31915 would establish February 4, 2020 as the date of the public hearing for the final assessment roll for the Waterfront LID

(2) LID Code Revisions - Council Bill (C.B.) 119697

Passing C.B. 119697 would provide more flexibility to the City Clerk and the Hearing Examiner to fulfill their responsibilities dealing with a final assessment roll for a local improvement district.

Attachments:

1. Email from Darby DuComb to Councilmembers (November 10, 2019)
2. Email exchange between Councilmember Bagshaw and Darby DuComb, with email attachments (November 10, 2019)

cc: Kirstan Arestad, Exec Director
Dan Eder, Deputy Director

[1] Chapter 42.36 Revised Code of Washington, https://app.leg.wa.gov/RCW/default.aspx?cite=42.36. Last accessed November 12, 2019.

Attachment 1 - Email from DuComb to Councilmembers - Nov 10 2019

From: Darby DuComb <darbyducomb@msn.com>
Sent: Sunday, November 10, 2019 12:46:36 PM
To: LEG_CouncilMembers <council@seattle.gov>; Herbold, Lisa <Lisa.Herbold@seattle.gov>; Harrell, Bruce <Bruce.Harrell@seattle.gov>; Sawant, Kshama <Kshama.Sawant@seattle.gov>; Pacheco, Abel <Abel.Pacheco@seattle.gov>; Juarez, Debora <Debora.Juarez@seattle.gov>; O'Brien, Mike <Mike.OBrien@seattle.gov>; Bagshaw, Sally <Sally.Bagshaw@seattle.gov>; Mosqueda, Teresa <Teresa.Mosqueda@seattle.gov>; Gonzalez, Lorena <Lorena.Gonzalez@seattle.gov>
Subject: Defund the 6 Waterfront LID projects now

The City is trying to tax property owners over $176 million while it matches those funds with over $170 million of public money for six downtown projects. That money is better spent land banking for housing, buying the surplus WSDOT property in Pioneer Square, or building much more needed infrastructure in other neighborhoods or at City Hall.

New information from the City's independent appraiser shows the Waterfront LID should have been limited to 3-blocks from the six LID Improvements, but instead the City Council is taxing property owners almost 1.5 miles away. This is unfair and violates the law.

When the City Council voted to form the Waterfront LID, it had already spent $30 million of non-existent LID funds, and now it wants to spend another $19 million from unsecured LID funds, for six projects early in the design process and with uncertain construction costs. This is not appropriate without more certain construction details and a legal funding plan that will work.

In fact, world renown urban planner reports from Gehl Architects and HR&A Advisors show that the 8-lane roadway across the Central Waterfront will create a "poor" pedestrian environment and that downtown residents will not use the central waterfront any more than they did before. The six LID Improvement projects are not adding enough value to justify this $170 million opportunity cost.

It is time to defund the Waterfront LID Improvements.

Thank you.

Attachment 2 - Email exchange between Councilmember Bagshaw and Darby DuComb, with email attachments, November 10, 2019

This attachment is a copy of the email message exchange between Councilmember Bagshaw and Darby DuComb on November 10, 2019, with following email attachments:

- Letter from Anthony Gibbons to John C. McCullough and Catherine Stanford, May 2, 2018
- Letter from Waterfront Coalition to Councilmembers, May 2, 2018
- Plaintiff's Motion for Partial Summary Judgement, King County Superior Court, No. 19-2-05733-5 SEA

From: Darby DuComb <darbyducomb@msn.com>
Date: November 10, 2019 at 4:29:51 PM PST
To: "Bagshaw, Sally" <Sally.Bagshaw@seattle.gov>, LEG_CouncilMembers <council@seattle.gov>, "Herbold, Lisa" <Lisa.Herbold@seattle.gov>, "Harrell, Bruce" <Bruce.Harrell@seattle.gov>, "Sawant, Kshama" <Kshama.Sawant@seattle.gov>, "Pacheco, Abel" <Abel.Pacheco@seattle.gov>, "Juarez, Debora" <Debora.Juarez@seattle.gov>, "O'Brien, Mike" <Mike.OBrien@seattle.gov>, "Mosqueda, Teresa" <Teresa.Mosqueda@seattle.gov>, "Gonzalez, Lorena" <Lorena.Gonzalez@seattle.gov>
Cc: "Foster, Marshall" <Marshall.Foster@seattle.gov>, "Strauss, Daniel" <Daniel.Strauss@seattle.gov>, Gene Burrus <geneburrus@live.com>, "ttanase@ensocare.com" <ttanase@ensocare.com>
Subject: Re: Defund the 6 Waterfront LID projects now

Hi Sally,

Thank you for the quick response. I can appreciate that you are sad. I am very sad too and do not take this lightly. But I feel I must express my thoughts and feelings with so much at stake for our city.

Attached are three documents circulating among downtown property owners. The Waterfront LID is fundamentally flawed, as was the process that got us here.

Imagine what Rainer Beach or White Center could do with $170 million. Imagine what Crown Hill or Lake City Way could do with $170 million. Imagine land banking 17 city blocks for housing. Using the WSDOT surplus property for open space was part of the original vision. Let's realize that. I am begging you all to do the right thing.

Our waterfront is fabulous and always will be, even without these 6 (overrated) LID projects.

Your faithful servant,

Darby

Attachment 2 - Email exchange between Councilmember Bagshaw and Darby DuComb, with email attachments, November 10, 2019

From: Bagshaw, Sally <Sally.Bagshaw@seattle.gov>
Sent: Sunday, November 10, 2019 1:24 PM
To: Darby DuComb <darbyducomb@msn.com>; LEG_CouncilMembers <council@seattle.gov>; Herbold, Lisa <Lisa.Herbold@seattle.gov>; Harrell, Bruce <Bruce.Harrell@seattle.gov>; Sawant, Kshama <Kshama.Sawant@seattle.gov>; Pacheco, Abel <Abel.Pacheco@seattle.gov>; Juarez, Debora <Debora.Juarez@seattle.gov>; O'Brien, Mike <Mike.OBrien@seattle.gov>; Mosqueda, Teresa <Teresa.Mosqueda@seattle.gov>; Gonzalez, Lorena <Lorena.Gonzalez@seattle.gov>
Cc: Foster, Marshall <Marshall.Foster@seattle.gov>; Strauss, Daniel <Daniel.Strauss@seattle.gov>
Subject: Re: Defund the 6 Waterfront LID projects now

Darby, Sally here.

I am saddened by your position. As a downtown Waterfront resident, current Councilmember, your former client and your friend, please please know we have been working on this project since 2004 and we want this LID to succeed. The decision was thoughtfully made.

Not only for this project but for the future Magnolia Bridge we need the LIDs to fund major capital projects. Those of us who benefit greatly should pay our share. I am one who will benefit and I will have more to pay. It is fair.

The Council has worked hard to fund the Waterfront projects, we do not want to keep revisiting decisions made, and I will urge the Council to stay the course.

Sally

RE•SOLVE

GIBBONS & RIELY, PLLC
Real Estate Appraisal, Counseling & Mediation
261 Madison Ave S, Suite 102
Bainbridge, WA 98110-2579

Anthony Gibbons, MAI, CRE
Direct Dial 206 909-1046
Email: agibbons@realestatesolve.com

May 2, 2018

John C. McCullough
Attorney at Law
McCullough Hill Leary, PS
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104

Catherine Stanford
CA Stanford Public Affairs
Principal
1904 3rd Ave, Suite 828
Seattle, WA 98101

RE: **Waterfront Seattle LID Special Benefits Report – File Ref: 17-0291 – May 19, 2018**
Authored by Valbridge.

Dear Mr. McCullough and Ms. Stanford:

At your request, I have conducted this high-level review of the Valbridge mass appraisal study prepared for the purposes of documenting Special Benefit resulting from the city Waterfront Seattle project. The letter is intended as a consultation, and not as an appraisal review. At some point it may be appropriate to address individual valuations on a parcel by parcel basis, but that is not the concern of this letter. This consultation is largely conceptual in nature, and looks purely at the methodology employed and the general conclusions made in the presentation of the study. Please note, as a disclosure, I am part owner of a condominium located within the boundaries of the LID. I do not consider this to be a conflict in providing an objective review of the study methodology.

Valbridge Appraisal

Valbridge presents several conclusions, which briefly may be re-stated as:

1. LID Boundaries. Valbridge identifies a total of 6,130 properties with potential special benefits within an LID boundary that generally comprises the entire downtown area lying between Puget Sound, I-5, Denny Way, and S. Massachusetts Street.
2. Property Valuation. The value of property within this area is concluded to be approximately $48.8-billion.
3. Special Benefit Lift. The appraisal concludes with incremental increases in individual property values (which are presented numerically in the report) summarized as follows:

	Percentage of Property Value Increase	
Property Class	**High**	**Low**
Land value	<4.00%	<0.50%
Office/Retail	<3.50%	<0.50%
Hotel	<3.50%	<1.00%
Apartment/Subsidized housing	3.00%	0.00%
Residential condominium	3.00%	<0.50%
Waterfront	<4.00%	<0.50%
Special purpose	<0.50%	<0.50%

4. Special Benefit Amount v. Cost. The total of the individual assignments approximates a $415-million special benefit over these properties. This is compared and contrasted to the LID cost of $320-million. Legally the cost of the LID cannot exceed the benefit provided.
5. After Valuation. The incremental increases in value calculated are added to the Before value to create an After value, which in aggregate comes to $49.2-billion.

Conceptual and Methodological Issues

1. The basic construct of the LID and its application to Waterfront Seattle

LIDs are typically reserved for the funding of utility improvements and infrastructure within a specific neighborhood or market, and represent a means by which a group of property owners can receive and pay for improvements that might otherwise be avoided by a municipality; perhaps the project in question is/has been deemed too specific, or not a priority, to cover with general funding. The mechanism essentially allows property owners to pay for the LID with the obvious value lift associated with, say, the provision of sewer or a road. Under RCW 34.44.010, "*The cost and expense* [of improvements made through an LID] *shall be assessed upon all the property* [within the boundaries of the LID] *in accordance with the special benefits conferred thereon.*" (bracketed language added). The value lift associated with provision of the infrastructure (say water, power or sewer) is typically easily measured, and *special benefits*[1] are not hard to prove and calculate.

The current proposal, to fund a regional park through this mechanism, represents a special challenge for an appraiser, as the special benefit associated with an amenity such as a publicly-owned park is not obviously beneficial in the same fashion as a utility extension, representing more of an aesthetic, and widely dependent upon factors unrelated to the mere presence of the project (such as operations, public use, etc.). The project becomes even more challenging, when the park is to be located in a regional economic center, and funding requirements require benefit assessment across several downtown blocks that lie uphill from the amenity.

2. Special Benefit

Background

A successful LID is based on the correct identification of the *Special Benefit* created. The term Special Benefit is both a legal term and a term of art in the appraisal industry. The most succinct definition of Special Benefit is provided as a WPI instruction:

> "*Special benefits are those that add value to the remaining property as distinguished from those arising incidentally and enjoyed by the public generally.* WPI 150.07.01

The distinction between Special and General benefits is then a key consideration for an appraiser in the application of benefit deemed special. Eaton stresses the importance of the proper identification of special benefit, and the necessity for also identifying general benefit for the simple purposes of appropriate benefit allocation; if a project creates both special and general benefits, only the special increment that accrues to certain properties can be part of the assessment:

> *It should be noted that project enhancement...may be composed of general benefits, special benefits, or a combination of the two. Thus it may be necessary...to allocate the beneficial effects of project enhancement between special and general benefits and to consider only the special benefits in estimating the value of the property in the after situation."*
> Real Estate Valuation in Litigation, Page 326, by Jim Eaton MAI.

[1] See subsequent discussion on the definition of a special as opposed to general benefit.

The standard dictionary definition of special, an adjective, is *better, greater, or otherwise different from what is usual.* Synonyms include *exceptional, unusual, singular, uncommon, notable, noteworthy, remarkable, outstanding, unique, more.* In practical application though, the precise meaning of Special Benefit has been debated in the courts, particularly in eminent domain cases, with the same principles applying to LIDs. One of the clearest and oft-cited distinctions of special and general benefit is found in the following court decision:

> *"The most satisfactory distinction between general and special benefit is that general benefits are those which arise from the fulfillment of the public object..., and special benefits are those which arise from the peculiar relation of the land in question to the public improvement"*
> United States v. 2,477.79 Acres of Land, as quoted in Nicols

There are various common sense applications of special benefits. They cannot be "*remote, speculative or imaginary*" (WPI). In addition the appraiser should consider when the benefits will actually be received.

> *The fair market value of the remainder, as of the date of valuation, shall reflect the time when the damage or benefit caused by the proposed improvement or project will be actually realized.* Uniform Eminent Domain Code 1974, §1006, p.10.11. as quoted in Real Estate Valuation in Litigation by Jim Eaton, MAI

3. The Valbridge Study

The Valbridge study presented on behalf the city fails to meet key tests of credibility in the application of Special Benefit. At issue are the following general categories of analysis:

a. Special Benefit Definition and Distinction from General Benefits

The appraisal:

- Makes no attempt to assess General Benefit, and does not offset the apparent measure of special benefits with general benefits. The appraisal ignores the basic equation:
  - Total Benefit minus General Benefit = Special Benefit.

  If the evidence of benefit presented by the appraiser is to be believed, it is apparent that General Benefits have been included in the Special Benefit Study.

Beyond the lack of recognition of General Benefits, it is noted that the very nature of the public improvement – a regional park - and the wide LID boundaries described in the report, suggests that entire project could be described as offering almost entirely general benefit. Almost by definition, if $48.1B of real estate is impacted by the project, the benefits provided would seem very general and widespread in nature.

b. Method of Assessment

The method of assessment used – an application of a percentage to a concluded before value – does not represent a true measure of benefit. This is considered a short-cut, akin to a "strip-take" analysis, typically reserved for projects with minor damages - small easements or takes of strips of land. Its application to a special benefit study represents an improper method of analysis as the value lift should be calculated, not applied. The appraiser should evaluate the value of the properties without the project, and then with it, and measure the difference. Here the appraiser has not met the burden of proof of a value lift, as the latter is concluded and added, not measured as a difference.

c. Before & After Descriptions

There is very little clarity in the appraisal as to the precise difference between the Before and After. The appraisal acknowledges that the viaduct is down in the before, but it is not clear how the value lift associated

with the viaduct removal is built into the before value estimates. Further the level of improvement that would be undertaken by the city, but for the LID, is not described in detail. With no side-by-side comparison of images, it is not possible to know what was in the mind of the appraiser making an assessment for provision of an "extra" amenity. Since the entire analysis relates to an aesthetic difference, appropriate renderings of the aesthetic difference created would seem to be critical for proper analysis.

The issue also extends to cost. The LID is noted as a $320,000,000 project. Yet the increment associated with the LID cost verses the investment that would occur anyway is not presented. The impression – that $320,000,000 would be invested but for the LID – would appear to be an inaccurate presentation. It would appear that the appraiser incorrectly measures the benefits resulting from a $320,000,000 investment, as opposed to those accruing from a smaller investment, representing the LID extra.

There is also no value discussion pertaining to timing; do assessments consider when the actual park will be complete, and therefore when the benefits, if present, will accrue? The interim condition and associated construction is likely to be disruptive: some properties will be "specially" as opposed to "generally" impacted by construction activity in terms of noise, dust, etc. Proximity, which is stressed as a special benefit, would represent a special negative as concerns related and proximate construction activity.

d. Assessments are not supported by empirical data

The evidence presented for special benefit is almost entirely anecdotal. The appraisal does not provide discrete and empirical before and after analyses of purportedly similar public projects across a wide-range of property takes. Anecdotal opinions of before and after, without apparent adjustment for general benefits, correction of blight issues and the passage of time, do not provide a convincing case for the assignment of a 0.5 to 4% value increase to a full spectrum of property types across a wide downtown area, many blocks away from the improvement.

Moreover, the level of assignment applied is largely immeasurable from an appraisal perspective. Application of a 0.5-4% value change on a general mass appraisal basis falls well below the standard of error already present in such an analysis – in effect the analysis reveals the benefit is immeasurable at this level. Even if individual "MAI appraisals" were completed on every individual property, it would be difficult if not impossible to measure the benefit of a park improvement a few blocks away to say, for instance, a downtown office tower. Take for example the 1201 Third Avenue office tower, valued at $716,942,500 - it would be hard to rationalize discrete adjustments of the magnitude presented here amid the myriad impacts on value such as market conditions, tenant sizes and rollovers, and different views and floor levels. The majority of the tower has no view of the park and no special access to it; a lease decision here would not logically include serious "special" consideration of a park three blocks away, and at a different elevation. Suggesting the property increased to $721,442,000 (a $4,500,000 or 0.6277% difference) on account of park proximity would seem to define a "*remote, speculative or imaginary*" adjustment.

e. Assessments include percentage assignments to improvement value

The assessments are based on a percentage assignment to total property value, in place in 2018. However, the project presented relates, purportedly, to a proximity benefit; this is a location factor, which is a land characteristic. Benefits from proximity do not accrue to improvement value, as the "bricks and mortar" are unchanged. This creates an inequity in the side-by-side comparison of improved and vacant land parcels, and one that is particular well illustrated in case of development properties that will imminently be developed. This methodological error is essentially a function of relying upon an across-the-board percentage adjustment, as compared to truly measuring before and after differences. Two examples are presented below:

Example 1: 1201 Third high-rise office v. 1206 Third across the street, high-rise under construction.

Property	Land Size	Building Size	Assessment	$/sf land	$/sf building
1201 Third	56,400sf	1,130,000sf	$4,500,000	$80/sf	$3.98/sf
1206 Third	43,680sf	720,000sf*	$1,023,000	$23/sf	$1.42/sf

* under construction; will be complete by 2023

1201 Third is located one block further from the park than 1206, and at a higher elevation. The higher assessment here is inequitable.

Example 2: Cyrene Apartments at Alaskan and University v. Woldson parking lot at 1100 Alaskan (with proposed development).

Property	Land Size	Units	Assessment	$/sf land	$/unit
50 University	17,333sf	169-units	$2,923,000	$169/sf	$17,296/unit
1100 Alaskan	35,233sf	256-units*	$1,233,000	$35/sf	$4,816/unit

* proposed; will probably be complete by 2023

Both properties have the same orientation to the park and lie at the same elevation. The higher assessment to the Cyrene Apartments at 50 University is thus inequitable.

Conclusion

In conclusion, the Special Benefits study presents several major issues. These include:

- The before condition is not adequately described; side-by-side illustrations of the before and after are not presented. This kind of descriptive detail would appear necessary for the purposes of evaluating an amenity or aesthetic difference to be specifically created through funding.
- Special benefits are merely assigned, not measured. The study does not provide a measurement of after value, with the project in place, that is independent of the before value, and takes into consideration delay until receipt.
- Purportedly measured benefits are not allocated into "general" and "special" benefits. Labelling all benefits as special does not appear credible for a regional park.
- Benefits associated with proximity should be evaluated in the form of a lift in land value. The methodology used (a broad percentage assessment applied to total property value) results in inequitable assignments between properties.

The more general issue is the difficulty of trying to forecast a benefit that is special to a park that has regional appeal. The more common application of an LID is for extension of infrastructure; and here special benefits can be practically and incrementally assessed to unserved property brought to a development condition through the provision of infrastructure. However, the application of the special benefit methodology to a downtown area for a park amenity, represents a challenging and potential impossible assignment, if it is to be free of speculation and imagination.

Respectfully submitted,

Anthony Gibbons, MAI, CRE

Ref: 181121-Waterfront LID

THE WATERFRONT COALITION

May 2, 2018

Hon. Bruce Harrell, President
Hon. Sally Bagshaw
Hon. Lorena Gonzalez
Hon. Lisa Herbold
Hon. Rob Johnson
Hon. Debra Juarez
Hon. Teresa Mosqueda
Hon. Mike O'Brien
Hon. Kshama Sawant
Seattle City Council
City Hall, 601 Fifth Avenue
Seattle, Washington 98104

Re: Waterfront LID Resolution of Intent

Honorable Councilmembers:

The Waterfront Coalition is a group of dozens of downtown property owners, including owners of office buildings, apartment houses, hotels, retail establishments and downtown residents. We have previously written regarding the proposed Waterfront Local Improvement District (LID), expressing a variety of concerns about the improvement project. We are writing today concerning the City Council's consideration of a resolution of intent (the "Resolution") to form the LID.

Of the more than 6000 property owners proposed to be assessed under the LID, only a small fraction have been deeply involved in the process prior to the last month. The City has conducted various outreach exercises in the last several years, but there are limits to what early outreach can achieve: the single most important issue for any owner in evaluating an LID is the proposed assessment for his or her property, and in the absence of that information, it is simply

not possible for an owner to reach conclusions about the fairness or acceptability of this financing vehicle.

Unfortunately, this assessment information only first became available three weeks ago on the LID website and the Special Benefit Study remains unfinished. Therefore, it has only been in these last three weeks that many owners have begun to focus on the LID, and even those who have followed it for years only now have the critical information that allows them to form opinions about their support of the LID. We expect more owners will continue to become engaged in the weeks ahead and you are likely to hear from many owners in this time.

For this reason, prior silence should not be deemed consent. We know some supporters of the LID have recently touted the absence of vocal opposition to the LID as an indicator of its endorsement by property owners. This is an inaccurate view. We urge the City Council not to indulge in this fiction.

Here is the truth:

- The LID was selected years ago as a major component of Waterfront funding, but without consultation with the downtown property owners to be assessed.
- We have not identified any significant base of support for the LID among property owners at this time.
- The publication of proposed assessments has caused most property owners to begin to evaluate their level of support for the LID. This process has only begun in the last three weeks and we are still awaiting release of the Special Benefit Study, which will explain the assessment methodology.
- Dozens of owners have identified a list of key questions about the LID, the answers to which will help them to determine their level of support for the LID. A preliminary list of those questions is attached.
- We are reaching out to the Office of the Waterfront to initiate a process to address these questions, and to ensure that the thousands of property owners who remain unaware of this impending assessment become engaged.

We know that you are now considering adoption of the Resolution. We recommend that you consider postponing this action until you have had an opportunity to conduct your own outreach to the property owners and a factfinding process as to their concerns. Once you adopt the Resolution, you will be legally barred from discussing the LID with any of the owners who will be assessed. You will not be able to understand firsthand their issues or concerns, but instead will be left to distill these issues from hearing testimony alone. In other words, the time before the adoption of the Resolution is your last and only chance to speak directly to the owners who will be assessed. We think that the chances for success of the LID would be enhanced by such a dialogue between the Council and the affected parties, and we therefore urge you to consider such an approach.

We recognize that some will argue that scheduling requirements demand that action on the Resolution occur immediately. You are aware, however, that over-focus on scheduling can often impair the success of an enterprise, a risk present before us now. The owners paying for the LID have only just received their bills, and they now have many questions. It would be better to take the time to answer them now, before initiating the LID formation process. Ultimately, LID formation is dependent upon the consent of those being assessed, a fact that will be critical in the months ahead.

We appreciate your attention to these comments.

Sincerely,

THE WATERFRONT COALITION

John C. McCullough

LID Questions

- **Special Benefit Study**
  - Is the base site valuation appropriate for each parcel?
  - What does the No-LID scenario look like?
    - No Viaduct
    - WSDOT surface improvements
  - Is the amount of special benefit appropriate?
    - Does it represent the amount of benefit the owner will realize?
    - Is it fair and proportional in comparison to other owners?
    - Are the benefits to each property special or general?

- **Improvements**
  - Is the plan of improvements appropriate?
    - Promenade
    - Overlook Walk
    - Pike/Pine
    - Pioneer Square
    - Aquarium
  - Is the cost of the improvements appropriate?

- **Operations & Maintenance**
  - Is an O&M Plan necessary for upkeep and to enforce a code of conduct?
  - What is the O&M Plan?
  - How important is the O&M Plan to the benefit equation?
  - Will the O&M Plan ensure benefits are realized?
  - Is the O&M Plan properly funded?
  - Will the O&M Plan have adequate oversight?
  - Will the O&M Plan be effective?

- **Financing Plan**
  - Is the multi-part financing plan appropriate?
    - Is the plan properly weighted among LID/Philanthropy/City funds?
    - Can assessments increase in the future without owners' consent?
    - If so, can this be prevented?
  - Is the financing plan adequate to complete the improvements?
    - Is the base budget adequate?
    - Are cost overruns likely?

The Honorable John R. Ruhl
Hearing Date: December 13, 2019
Hearing Time: 9:30 a.m.
With Oral Argument

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF

255 SOUTH KING STREET LIMITED PARTNERSHIP, a Washington limited partnership; 618 SECOND AVENUE LIMITED PARTNERSHIP, a Washington limited partnership; 1000 1ST AVENUE LIMITED PARTNERSHIP, a Washington limited partnership; and 1016 1st AVENUE LIMITED PARTNERSHIP, a Washington limited partnership, Plaintiffs, vs. CITY OF SEATTLE, a Washington municipal corporation, Defendant.	No. 19-2-05733-5 SEA (Consolidated with No. 19-2-08787-1 SEA) **PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING EX PARTE VIOLATIONS, VIOLATIONS OF THE QUASI-JUDICIAL RULES, AND FAILURE TO PROVIDE TIMELY NOTICE TO PROPERTY OWNERS**
EUGENE A. BURRUS and LEAH S. BURRUS, husband and wife and the marital community comprised thereof; WILLIAM J. JUSTEN and SANDRA L. JUSTEN, husband and wife and the marital community comprised thereof; THEODORE T. TANASE and PRISCILLA B. TANASE, husband and wife and the marital community comprised thereof; DAVID STARR, an individual; VASANTH PHILOMIN and KARIN PHILOMIN, husband and wife and the marital community comprised thereof; DANIEL TUPPER and	No. 19-2-08787-1 SEA (Judge Ken Schubert)

SCHLEMLEIN FICK & SCRUGGS, PLLC
66 S. Hanford Street, Suite 300
Seattle, WA 98134
(206) 448-8100 Fax (206) 448-8514

PATRICIA TUPPER, husband and wife and the marital community comprised thereof; JOHN DRINKARD and JANET DRINKARD, husband and wife and the marital community comprised thereof; FRANK KATZ and ELISE KATZ, husband and wife and the marital community comprised thereof; DEBORAH BOGIN COHEN and RICHARD B. OSTERBERG, Trustees of the ZVI Cohen Family Trust; JOHN A. BATES and CAROLYN CORVI, husband and wife and the marital community comprised thereof; HARVEY ALLISON and MEI WENG ALLISON, husband and wife and the marital community comprised thereof; VICTOR C. MOSES and MARY K. MOSES, Trustees under the 2007 Moses Trust; NANCY E. DORN and CAROL A. VERGA, a married couple; ALEXANDER W. BRINDLE, SR., an individual; TOM H. PEYREE and SALLY L. PEYREE, Trustees of The Thomas H. Peyree and Sally L. Peyree Revocable Trust; ANTON P. GIELEN and KAREN N. GIELEN, husband and wife and the marital community comprised thereof; KEITH PAUL KLUGMAN and MAGDERIE KLUGMAN, husband and wife and the marital community comprised thereof; ANDREW P. MARIN and CYNTHIA J. MARIN, Trustees of The Andrew P. Marin and Cynthia J. Marin Family Revocable Trust; DANIEL S. FRIEDMAN and MYRA A. FRIEDMAN, husband and wife and the marital community comprised thereof; HOLLY MORRIS, an individual; and RONALD EVAN WALLACE, an individual,

Plaintiffs,

vs.

CITY OF SEATTLE, a Washington municipal corporation,

Defendant.

SCHLEMLEIN FICK & SCRUGGS, PLLC
66 S. Hanford Street, Suite 300
Seattle, WA 98134
(206) 448-8100 Fax (206) 448-8514

I. Table of Contents

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I. RELIEF REQUESTED

Plaintiffs seek partial summary judgment invalidating the Waterfront Local Improvement District ("Waterfront LID") and remanding the matter back to the decision-maker, the Seattle City Council ("City Council") for a proper public hearing and re-vote. Plaintiffs are tax assessed residential and commercial property owners within the City of Seattle's ("City") proposed Waterfront LID, which was created in violation of Washington State's Appearance of Fairness Doctrine. The Appearance of Fairness Doctrine and its corresponding Quasi-Judicial Rules apply to legislative bodies "when adjudicating an individual's rights and land and it prevents undue influence."[1] Under this Doctrine, evidence of prejudgment or ex parte communications may invalidate the action. Specifically, the decision-maker cannot communicate ex parte with opponents or proponents of the Waterfront LID unless during a public hearing. When a Councilmember engages in ex parte communications, he or she must disclose the "substance" of such violations and provide an opportunity for the affected parties to rebut the communications. Failure to properly disclose ex parte communications is fatal to the pending action.

Here, the City Council violated the Appearance of Fairness Doctrine when it: (i) prejudged the outcome of the Waterfront LID vote; (ii) failed to disclose all ex parte communications; (iii) failed to provide the "substance" of the ex parte violations; (iv) failed to provide Plaintiffs a meaningful opportunity to know of, analyze, or rebut those violations; and (iv) failed to follow its own Quasi-Judicial Rules.

While deliberating on the Waterfront LID, the City Council expressly adopted and used a "Quasi-Judicial" process. As explained above, the Quasi-Judicial process bars plaintiffs and the general public from communicating off-the-record with the City Council. This means the City Council intentionally prohibited itself from interacting with proponents or opponents of the Waterfront LID, unless at a public meeting. However, behind closed doors, the City Council

[1] *Decl. Werner*, Ex. 1, p. 3.

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frequently met with proponents from the Office of the Waterfront to receive private one-sided briefings about Waterfront LID "facts."[2] Just one day before the Waterfront LID vote, the City Council released an "Appearance of Fairness" Memorandum ("Ex Parte Memo"), attempting to disclose the nature and extent of its ex parte violations as required by applicable law. This disclosure fell short. In its last-minute Ex Parte Memo, the City Council only included a select few ex parte violations, did not provide any substance or meaningful detail about the violations as required by law, and refused Plaintiffs adequate notice and time to rebut the vaguely identified ex parte violations.

This Court should invalidate Ordinance 125760, which created the Waterfront LID, and remand the matter back to the City Council for proceedings consistent with the Appearance of Fairness Doctrine, including: (i) the preparation of a corrected Ex Parte Memo; (ii) a new public hearing before an independent Hearing Examiner to report recommendations; (iii) complete written findings, conclusions and recommendations; and (iv) conduct a new vote on the proposed Waterfront LID.

II. STATEMENT OF FACTS

A. The Waterfront LID finances six specific Central Waterfront projects.

The Waterfront LID is a funding source for six specific Central Waterfront projects ("LID Improvements"): the Promenade, Overlook Walk, Pioneer Square Street Improvements, Union Street Pedestrian Connection, Pike/Pine Streetscape Improvements, and Waterfront Park Pier 58 rebuild. Specifically, on the map below, the LID Improvements are represented by orange lines, while the City-proposed LID boundary ("Recommended Waterfront LID Boundary") is represented by the expansive, unshaded shape surrounding the orange line.[3] All Plaintiffs in this matter own property within the Recommended Waterfront LID Boundary.[4]

[2] *Id.*, pp. 12-16.
[3] *Decl. Lance*, Ex. 1, Exs. A and B.
[4] Plaintiffs ask the Court to take judicial notice of this fact, as proven by Plaintiffs' corresponding property records available at the King County Assessor's office.

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B. LIDs are created under RCW Chapter 35.43 and must generate "special benefit."

When a government creates a local improvement district under RCW Chapter 35.43, it may only assess properties that are "specially benefitted" by the implemented government improvements.[5] A "special benefit" is the increase in value of the properties appurtenant to the government improvement (above the baseline value of the properties without the government improvement).[6] An LID boundary is limited to those properties "specially benefitted." Where the special benefit ends, the LID boundaries also must end.[7] Further, the benefit to the land must be "actual, physical, and material."[8]

In this case, the Waterfront LID's "special benefit" must exclusively relate to the six specific LID Improvements. Currently, the Recommended Waterfront LID Boundary – the land alleged to be "specially benefitted" – extends nearly a mile and a half away from the LID Improvements. Notwithstanding the breadth of the Recommended Waterfront LID Boundary, in November 2016, the City's independent appraiser Valbridge Property Advisors ("Valbridge"),

[5] RCW § 35.43.050, .130; *United States v. 2,477.79 Acres of Land,* 259 F.2d 23, 28 (5th Cir. 1958).
[6] *Id.*
[7] *Heavens v. King Cty. Rural Library Dist.*, 66 Wn.2d 558, 564, 404 P.2d 453 (1965).
[8] *Id.* at 563.

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found that only properties "within a three-block radius of parks that offer views and public amenities" can create a "positive effect" and "measurable impacts" on "property values."[9] In analyzing the feasibility of the Waterfront LID, Valbridge wrote:

> ***Summary:***
>
> Based on our preliminary research discussed within this executive summary, it is clear that well-designed park and street improvement projects have a positive effect on their surrounding neighborhoods and property values. Many of the studies mentioned above can clearly define measurable impacts on property values within a three block radius of parks that offer views and public amenities. These projects are shown to increase

In addition, world renowned urban planners commented that the proposed surface roadway, an LID Improvement, would not only create a poor environment for pedestrians, but also not be used by downtown residents any more than previously used.[10] Gehl Architects, the firm engaged by the State of Washington, King County, and the City of Seattle to evaluate the deep bore tunnel option, a part of the LID Improvements, commented:

> **SUMMARY OF SCENARIO EVALUATIONS**
>
> • NONE OF THE SCENARIOS OFFER A STRATEGY THAT TAKES FULL ADVANTAGE OF SEATTLE'S KEY STRENGTHS.
>
> • NONE OF THE SCENARIOS PROPOSE AN OVERALL POSITIVE PEDESTRIAN ENVIRONMENT, TAKING BOTH WATERFRONT AND DOWNTOWN INTO ACCOUNT.
>
> • NONE OF THE SCENARIOS CREATE A NICE WATERFRONT AT A GOOD HUMAN SCALE THAT IS POSSIBLE TO ACTIVATE WITH HUMAN LIFE.

[9] *Decl. Lance*, Ex. 2, VB_LID_0000010.
[10] *Decl. Lance*, Ex. 28, pp. 37, 40; Ex. 29, p. 5.

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In 2013, HR&A Advisors conducted a Waterfront Downtown Visitation Study about the LID Improvements and wrote:

> ▪ Based on length of stay data from a comparable waterfront park (Brooklyn Bridge Park), HR&A assumes metropolitan residents from outside of downtown will spend two hours each in the park and park vicinity – 0.11 net new visitor days per resident. HR&A also assumes that downtown resident park visitors will spend no net new time in downtown; this assumption is conservative, as it assumes that downtown residents themselves will not spend additional time and money in their own neighborhood.

In sum, it is questionable whether the "special benefits," if any, extend nearly as far as the City Council plans to assess. These are critical facts of which the City Council must be aware, and of which Plaintiffs have a right to analyze.

C. The City Council spends money it does not have on waterfront planning for years.

As early as 2011, the City began spending against the still non-existent Waterfront LID funds, by internally loaning funds from the City's Transportation Master Fund.[11] In 2013, the City Council declared its intention to pay back this debt with the money collected from the Waterfront LID.[12] By 2017, the City Council re-declared its intent to form the Waterfront LID as part of the Waterfront Strategic Plan.[13] In the following year, the City Council passed the formal Resolution of Intent to form the Waterfront LID.[14] Today, according to 2020 budget documents recently released, the City Council plans to borrow another $19 million against Waterfront LID funds, escalating spending against the $160 million Waterfront LID to nearly $50 million.[15] For at least eight years, the City Council has anticipated and relied upon formation of the Waterfront LID to cover budget shortfalls. The Waterfront LID was pre-approved by the City Council for years prior to voting on Ordinance 125760. The City Council, as the decision maker, prohibited from meeting privately during the Quasi-Judicial process. Despite this, the City Council acts more like a proponent of the Waterfront LID.

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[11] *Id.*, Ex. 1, § 12.c; Ex. 3.
[12] *Id.*, Ex. 1, § 12.d.
[13] *Id.*, Ex. 4.
[14] *Id.*, Ex. 5.
[15] *Id.*, Exs. 6-7.

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D. Though it relied upon the Waterfront LID as a funding source for years, the City Council did not take adequate care in its planning and development.

The Waterfront LID planning falls short of a well-managed project – as evidenced by[16] Councilmembers who remained uninformed about basic elements of the plan. In 2016, the City completed part of its State Environmental Policy Act ("SEPA") review for four of the six LID Improvements with the publication of its Final Environmental Impact Statement regarding the Alaskan Way, Promenade, and Overlook Walk ("AWPOW FEIS"). [17] Three groups appealed the AWPOW FEIS to the Hearing Examiner, expressing significant concern with the eight-lane roadway, loss of parking, and building impacts from changed road designs.[18] The City settled out of court with them. According to the City's discovery answers, it had "no duty to inform City Councilmembers and their staff about the outcome of SEPA appeals."[19] This prevented Councilmembers from receiving information about the designs and their impacts.

Councilmembers that did not receive environmental review briefings apparently "had not expressed interest in the topic,"[20] despite unwavering support of the funding source, the Waterfront LID. This gap in knowledge is highlighted by Councilmembers Johnson and Bagshaw's testimony just prior to the vote that the new space would be "for pedestrians" "as opposed to a place . . . for cars."[21] It would be "green," not "gray."[22] In reality, the LID Improvements are adjacent to an eight-lane boulevard, not open green space.

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[16] Only Councilmember Gonzalez was absent on January 28, 2019.
[17] *Decl. Lance*, Ex. 8.
[18] *Id.*, Ex. 30.
[19] *Decl. Franklin,* Ex. 3, pp. 17, 19; *Compare* SMC 25.05.800.Q, which states that ordinances establishing "[l]ocal improvement districts and special purpose districts" are subject to SEPA review if "such formation constitutes a final agency decision to undertake construction of a structure or facility not exempted under §§ 25.05.800 and 25.05.880," such as minor construction and emergencies. Here, the LID Improvements are described as "major," Ordinance 125760 "orders" completion of the improvements, and "all budget and finance approvals . . . are complete." *Decl. Lance,* Ex. 23, AWPOW FEIS, p. 5 (Kubly-Foster cover letter); *Id.*, Ex. 1, Ordinance 125760, pp. 1, 5; *Decl. Franklin*, Ex. 3, Plaintiffs' Second Interrogatories to the City and Answers Thereto, p. 23.
[20] *Decl. Franklin,* Ex. 3, pp. 19 and 21.
[21] *Decl. Werner*, Ex. 2, pp. 18 and 21.
[22] *Id.*, p. 18.

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Additionally, major LID Improvements like the Pike/Pine Corridor and Waterfront Park Pier rebuild are not yet at 30% design and are just beginning what is expected to be a long, complex, multi-year permitting and approval process.[23] The Waterfront LID appears years away from most construction contracts and final assessments. As a result, there remains ample time to remand the matter to the City Council for proper proceedings.

E. An LID is created by property owner petition or by local government ordinance.

Local improvement districts are created in one of two ways: either by petition of property owners representing a majority of the value of the assessments, or by City Council resolution and ordinance.[24] A resolution-created LID and ordinance cannot proceed if property owners representing 60% of the assessed value protest its creation.[25] Without adequate support from property owners to petition the Waterfront LID's creation, the City Council was forced to compel the Waterfront LID through the resolution method and ordinance, or find another solution for its $30 million LID debt. It chose to press on with the Waterfront LID by resolution and ordinance.

To do so, the City Council follows this procedure: first, the passage of a Resolution of Intent to "initiate a legislative process and formal public discussion;" second, preliminary assessments and notice thereof; third, notice and formal public hearing and comment led by a Hearing Examiner ("HE Hearings"); fourth, a City Council Committee review of the Hearing Examiner's LID Report and Council Committee recommendation to the full City Council; fifth, full City Council vote and adoption of the ordinance ("Formation Hearing" and "Formation Ordinance"); and finally, a Final Assessment Hearing and adoption of the Final Assessment Roll. Today, the City Council has completed the fifth step, through the adoption of Waterfront LID Formation Ordinance 125760.

[23] *Decl. Lance*, Ex. 9.
[24] RCW §§ 35.43.070; 35.43.120.
[25] RCW § 35.43.180.

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F. The City Council chose a quasi-judicial process for its review of the City's proposed Waterfront LID.

In May 2018, prior to the first step, the Resolution of Intent, Jack McCullough wrote an open letter to the City Council, where he noted staff were incorrectly arguing that an "absence of vocal opposition to the LID" should be read as an endorsement and warned City Councilmembers not to interpret silence as an "endorsement."[26] Nevertheless, the City Council passed the Resolution of Intent to form the Waterfront LID. And in doing so, the City Council expressly elected to abide by the Appearance of Fairness Doctrine and comply with its Quasi-Judicial Rules.[27] The Quasi-Judicial Rules implement the Appearance of Fairness Doctrine and apply to City Council action's "adjudicating an individual's rights and land."[28] These laws and rules require that the City Council refrain from ex parte communications with opponents or proponents of the Waterfront LID.[29] In addition, both require that specific procedures be followed by the Hearing Examiner, Council Committee, and full City Council. Notably, these procedures require: that the Hearing Examiner "report recommendations" to the Council Committee; that the Council Committee make written findings of fact, conclusions of law, and recommendations to the full City Council.[30] After that, the full City Council must adopt these findings and conclusions at the formation vote, and then mail a copy of the decision to the affected parties.[31]

G. The Seattle City Council appoints the Seattle Hearing Examiner to conduct the initial Waterfront LID public hearings.

The HE Hearings occurred from July 13th to July 28th of 2018 and were conducted by the Seattle Hearing Examiner.[32] These HE Hearings provided the first formal opportunity for property owners and the general public to voice their opinions about the Waterfront LID. These

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[26] *Decl. Franklin,* Ex. 6.
[27] *Decl. Lance*, Ex. 5.
[28] *Decl. Werner*, Ex. 2, p. 3.
[29] *Decl. Lance*, Ex. 11, QJ Rules § I.A.
[30] *Id.*, Ex. 11, QJ Rules § IV.B.1-2.
[31] *Id.*, Ex. 11, QJ Rules §§ VII and VIII.D.
[32] http://clerk.seattle.gov/~CFS/CF_320972.pdf, Seattle Clerk's File (CF) 320972, Report of the Hearing Examiner.

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HE Hearings are for the Hearing Examiner to hear testimony and **"report recommendations on the resolution to the legislative authority for final action."**[33] As it turns out, the HE Hearings were rich with dialogue, where at least 284 distinct comments from concerned individuals created a 1,094 page record.[34]

Following the HE Hearings, the Hearing Examiner produced the "Report of the Hearing Examiner for the City of Seattle" regarding the Resolution 31812 of Intent to Form the Waterfront LID ("Hearing Examiner LID Report"). The Hearing Examiner LID Report summarizes and comments upon the public testimony.[35] However, the Hearing Examiner LID Report did not "report recommendations" as required by law.[36] Instead, it simply listed the public comments and passed them to the Council Committee.[37] Thereafter, without mailing notice to the affected property owners,[38] the City Council held at least four additional public meetings on the Waterfront LID: (1) September 17, 2018, (2) January 16, 2019, (3) January 24, 2019, and (4) January 28, 2019.[39] Surprisingly, and unknown to Plaintiffs, the City Council met with the Office of the Waterfront and other proponents several times behind closed doors prior to the vote approving the Waterfront LID.

H. The Friday and Sunday before the Monday vote, several ex parte violations come to light.

On Friday, January 25, 2019, the City Council released its Ex Parte Memo attempting to correct its clear violations of the Quasi-Judicial Rules.[40] The Ex Parte Memo disclosed 14 briefings and communications with the Office of the Waterfront, amounting to double the number of public meetings.[41] The Ex Parte Memo provided the topic of the communications,

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[33] *Id.,* p. 1 (citing RCW § 35.43.140 with emphasis by Hearing Examiner).
[34] *Id.,* p. 4.
[35] *Id.,* pp. 1-16.
[36] *Id.*
[37] *Decl. Lance*, Ex. 13.
[38] *Decl. of Larry Ice at ¶6.*
[39] *Decl. Lance,* Ex. 13.
[40] *Id.*
[41] *Id.*, Attachment 1.

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but no other detail, substance, or materials related to the content of the violations.[42] The inadequate disclosure of the topics with no substance, attendees or attached materials looked like this:

November 6 – 15, 2018

The following briefings to Councilmembers centered on the Waterfront Legislative Package, which includes the LID Formation ordinance; the Funding, Operations and Maintenance ordinance; and the LID Protest Waiver Agreement Ordinance. At the time, the LID Protest Waiver Agreement had not been completed and the briefings focused on the concept of the agreement, commitments from property owners, and potential commitments from the City.

Meeting Date	Councilmember
11/15/2018	CM Sawant's staff
11/6/2018	CM Gonzalez
11/6/2018	CM Bagshaw
11/6/2018	CM Mosqueda
11/6/2018	CM O'Brien/CM Johnson

December 20, 2018 – January 17, 2019

The following briefings to Councilmembers centered on the Waterfront Legislative Package, which includes the LID Formation ordinance; the Funding, Operations and Maintenance ordinance; and the LID Protest Waiver Agreement Ordinance. Specific topics included:

- The revision of the total LID amount from $200 million to $160 million and funding plan to address the additional $40 million not covered by the LID;
- Friends' new funding commitment, contribution schedule, and due date for Fundraising Plan;
- O&M framework, pilot agreement, long-term agreement, budget, and Oversight Committee;
- LID Protest Waiver Agreement commitments from City and property owners.

Meeting Date	Councilmember
1/17/2019	CM Gonzalez
1/15/2019	CM Mosqueda
1/11/2019	CM Johnson
1/11/2019	CM O'Brien
1/8/2019	CM Juarez
12/28/2018	CM Bagshaw

The City Council disclosed just one documents from these ex parte communications that consisted of one affected property owner's objection to the Waterfront LID.[44] Then, only one day before the final vote, attorney Jack McCullough sent an email to some affected property owners evidencing the City Council's prejudged decision to create the Waterfront LID, and to reduce the assessment from the original $200 million to $160 million to prevent a protest by certain property owners.[45]

[42] *Id.*
[43] *Id.*, Attachment 2.
[44] *Id.*
[45] *Decl. Franklin,* Ex. 1.

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This email said: [46]

From: Jack McCullough <jack@mhseattle.com>
Date: January 27, 2019 at 12:28:49 PM PST
To: Jack McCullough <jack@mhseattle.com>
Cc: Alex Brenner <abrenner@mhseattle.com>
Subject: Waterfront LID Update

Here is an update on the LID:

- The City Council is scheduled to vote on the ordinances on Monday. It appears that we have the necessary favorable votes and that the Council will not be monkeying with the deal.

Plaintiffs are still seeking the details about what specific communication occurred with City Council members behind closed doors to count their votes,[47] but it is obvious that more ex parte violations transpired, involving all Councilmembers.

I. The City Council cut off public comment at the January 28, 2019 Formation Ordinance hearing prior to disclosure of even more ex parte violations and did not reopen it.

On January 28, 2019, only one business day after the Ex Parte Memo was disclosed, the full City Council voted to form the Waterfront LID.[48] Plaintiffs objected during the proceedings and requested that the City Councilmembers recuse themselves as a result of the ex parte violations.[49] Council Central Staff read Plaintiff Ted Tanase's objections[50] into the record:

> Ladies and Gentlemen,
> I recently reviewed the following document which shows violations to the ex-parte communication limitation of the LID: http://seattle.legistar.com/View.ashx?M=F&ID=7005885&GUID=FEB1EBE6-5D09-4BB0-8B27-60907E88512A.
> **Based on this violation, I request that the City Council members who had ex-parte communications immediately disqualify themselves from LID discussions and voting. The two members not mentioned in the article are Harrell and Herbold; therefore they are permitted to participate.**
> Two points:

[46] *Id.*
[47] *Id.*, Ex. 2.
[48] *Decl. Lance,* Ex. 1.
[49] *Decl. Franklin,* Exs. 4 and Ex. 5.
[50] *Id.*, Ex. 5.

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1. It is illegal and irresponsible for Council members to receive lobbying from the City (Office of the Waterfront) but not from property owners included in the LID.
2. If I had been allowed to lobby the Council members, I would have made these two points:
a. From the perspective of the city, this deal is the worst of all worlds. While they get $160 million of LID money, they legally obligate the city to build what is now estimated to be an almost $1 billion park. They handcuff themselves and future city budget priorities as they cannot significantly deviate from the design upon which the special benefit assessment was based. By using a LID, they cannot reprioritize or downsize. They are on the hook to finish it as designed, regardless of cost. There are already a lot of iffy sources for the money, and any budget overruns haven't yet been taken into account. It will crush future budgets
b. The $160 million in LID funds can/should be raised by alternative means; for example, Naming rights for the Waterfront and/or Park (similar to what T-Mobile has completed for the baseball park), landing fees for cruise ships, one-time fees for new buildings constructed in the LID area, one-time fees for new businesses starting in the LID area, Sunday parking fees, small (2-1/2%) increase in private parking fees, etc.
Respectfully,
Ted Tanase

No one recused themselves. Councilmembers were instructed on the record that "the cure [for ex parte violations] is disclosure,"[51] and they were briefed on the Appearance of Fairness Doctrine "for those folks who [we] are not familiar with it." [52] President Harrell provided Councilmembers with an internal June 8, 2015, Memorandum by Martha Lester "that cites the Appearance of Fairness Doctrine," because he "[did]n't think anyone else ha[d] it." [53] Yet, before allowing Councilmembers to disclose their ex parte violations,[54] President Harrell set aside the ex parte issues and proceeded to public comment.[55] He stated, "Sorry to bore everyone with that technicality, but we are going to move to public comment now."[56] President Harrell planned a set number of minutes for public comment and ran over time.[57] Thereafter,

[51] *Decl. Werner*, Ex. 2, p. 4.
[52] *Id.*, p. 3.
[53] *Id.*, p. 6; Ex. 1, p. 5.
[54] *Id.*, Ex. 2, p. 4.
[55] *Id.*, p. 9.
[56] *Id.*, p. 7.
[57] *Id.*, p. 9.

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comments were limited to only one minute.[58] In objection, a constituent commented: "I think that is a breach of contract Bruce Harrell against the people. We pay you."[59] President Harrell threatened to have someone removed because he was "disruptive" and further encouraged him to "just chill for a minute."[60]

J. Three downtown residential condominium owners objected in person to the Waterfront LID.

During the short public comment, "Karen" testified that she "will pay more than the value of a years' worth of property taxes."[61] She asked each Councilmember "to consider how the voters in their district would feel if the rest of the Council decided to tax you and only you for a project meant to benefit the entire city."[62] "The issues of affordability and unfairness of penalizing downtown residents were never addressed." In addition, she reminded them that as they considered their ex parte disclosures:

> The deal made with as few as 100 of the large downtown property owners . . . make up a majority of the value of the LID property but are less than two percent of the actual property owners. By making this deal you have blocked all other property owners including 4600 condo owners from having a voice in the decision. Renters and business tenants were never even considered in the process.[63]

Next, "Robin" testified that,

> This Seattle Waterfront LID is an unwanted levy of involuntary taxes against a minority of downtown condo owners . . ., [and] directly after you approved the start of the LID, sales have gone downhill for prices for my "small retirement condo three blocks from the freeway, far from the waterfront that I bought many years ago to afford Seattle after 37 years of being a Seattleite. Your LID has forced me to search for a lower cost . . . more welcoming place to live in Nevada, Texas, even outside the USA or even considering doing the mobile camper tent situation. I will be forced to move out and either charge the high rent necessary or otherwise sell my small old condo. . . . Please finally listen. . . .

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[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.,* p. 7.
[62] *Id.*
[63] *Id.*, pp. 7-8.

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> [T]he unfair LID that is levying this unwanted tax across a wide swath of a small number of downtown condo owners such as myself.[64]

Plaintiff Debra Cohen asked the City Council to tax the new cruise ships coming to the Central Waterfront.[65]

Thereafter, President Harrell concluded public comment stating,

> We are going to conclude public comment, we extended it once again so we had some speakers that didn't make it and we didn't make it because we ran out of time we have to get on with our agenda. We are proceeding and I'm sorry we couldn't hear your testimony today sir. It's not a conspiracy sir, its my discretionary call. We are going to proceed, if you are going to be disruptive I'm going to have you removed.[66]

Thereafter, President Harrell encouraged the clerk to call the next agenda item, stating, "the more we wait the more I have to listen to this."[67]

K. After public comment concluded, and before the final vote, Councilmembers revealed even more ex parte violations.

Only *after* the public comment period was terminated did President Harrell ask each Councilmember to disclose their ex parte communications and bias on the record.[68] Six councilmembers disclosed additional ex parte contacts to get "facts"[69] from interested parties, including legislative staff, the Office of the Waterfront, constituents, and labor organizers. Plaintiffs were and are currently unable to know of, analyze, or rebut these one-sided presentations about the "facts." At the same time, Councilmembers never provided the legally required detail of their ex parte violations.

Specifically, Councilmember Johnson admitted he received private briefings from the Office of the Waterfront that consisted of "facts" and "technical information that [he] felt was necessary in order to make an informed decision." He also admitted to receiving a complaint about the Waterfront LID from a constituent which he hand wrote and attached to the Ex Parte

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[64] *Id.*, pp. 8-9.
[65] *Id.*, p. 10.
[66] *Id.*
[67] *Id.*
[68] *Id.,* Ex. 1, p. 18.
[69] *Id.,* Ex. 2, pp. 12-14 and 16.

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Memo.[70] Councilmember Johnson also admitted to meeting with legal counsel and staff about the ex parte violations prior to the hearing.[71] Councilmember Bagshaw admitted that "like Council Member Johnson" she was "briefed by our city staff," and she received "a number of " emails, [72] but unlike Councilmember Johnson the Bagshaw emails were never attached to the Ex Parte Memo or otherwise disclosed. And Councilmember O'Brien stated that "similar to the first point that Council Member Johnson made, I did take meetings with city staff," and "was gathering information and asking questions," but the substance of the questions and information were never disclosed.[73] Councilmember Sawant admitted that her legislative "staff" had meetings with the Office of the Waterfront.[74] Councilmember Mosqueda admitted that she had ex parte "conversations relating to aspects of [her] support for the legislation to include language around inclusive representation across the City on the Board, the role labor should have, [and] the ability to have childcare subsidies for those who are serving on the Board."[75] She asserted that none of the conversations related to the preliminary assessments. Rather, it was communications she "had with members of the community because [she] is a labor advocate."[76] Councilmember Juarez denied having private meetings, then she reversed and stated she "had meetings with city staff regarding just the facts."[77] Councilmembers Herbold and Harrell disclosed no ex parte communications in the Ex Parte Memo or at the hearing prior to the vote. Councilmember Gonzalez was absent and did not vote on the Waterfront LID.

These meager disclosures provided no substance and left Plaintiffs and the other affected property owners no opportunity to know of, analyze, or rebut the violations. City Councilmembers then stated the purpose of the Waterfront LID Formation ordinance was "to serve all of Seattle" a "shared waterfront." The Waterfront LID was declared to be a

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[70] *Id.,* pp. 12-13.
[71] *Id.*
[72] *Id.*, pp. 13-14.
[73] *Id.*, p. 14.
[74] *Id.*
[75] *Id.*
[76] *Id.*, p. 15.
[77] *Id.*, p. 16.

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"regional," and "national and international" asset that creates "union jobs." Thereafter the City Council voted to approve the Waterfront LID Formation Ordinance, 8-0.

L. More ex parte violations are disclosed only after discovery.

Plaintiffs brought suit for, among other things, Violation of the Appearance of Fairness Doctrine.[78] To date, discovery is ongoing, and already Plaintiffs have discovered several more ex parte violations not disclosed on the record or included in the Ex Parte Memo. In addition to the 14 ex parte meetings disclosed by the City Council one business day before the hearing, and the McCullough email evidencing another nine or more ex parte meetings, the following ex parte communications were never disclosed:

1. On July 24, 2018, Office of the Waterfront staff met ex parte with City Councilmembers Juarez and Bagshaw in Councilmember Bagshaw's office.[79]

CM Bagshaw/CM Juarez: LID and O&M briefing

Where:	CM Bagshaw's office
When:	Tue Jul 24 12:30:00 2018 (America/New_York)
Until:	Tue Jul 24 13:15:00 2018 (America/New_York)
Organisers	"Foster, Marshall" <"/o=exchangelabs/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=3cc24c9136dc4013abed4aefe184bdd3-fosterm">
Required Attendees:	"Curtis, Joshua" <joshua.curtis@seattle.gov> "Costa, Dorinda" <dorinda.costa@seattle.gov> "Tebeau, Lena" <lena.tebeau@seattle.gov> "Emsky, Tyler" <tyler.emsky@seattle.gov> "Bagshaw, Sally" <sally.bagshaw@seattle.gov> "Juarez, Debora" <debora.juarez@seattle.gov> "Foster, Marshall" <marshall.foster@seattle.gov>

2. On August 15, 2018, Councilmember O'Brien received a "Waterfront LID and O & M Briefing." [80]

3. On August 31, 2018, the Seattle Hearing Examiner solicited City Clerk Monica Simmons's "review" of his draft report and offered to "update/modify the report prior to submittal to Council," which email was then forwarded to the Office of the Waterfront and Department of Finance and Administrative Services.[81]

[78] Residents Amended Complaint, Section 5.8; Commercial Second Amended Complaint, Section 5.5.
[79] *Decl. Lance*, Exs. 14 and 15.
[80] *Id.*, Ex. 16.
[81] *Id.*, Ex. 17.

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From: Vancil, Ryan
Sent: Friday, August 31, 2018 8:45 AM
To: Simmons, Monica M <Monica.Simmons@seattle.gov>
Cc: Samuels, Jennifer <Jennifer.Samuels@seattle.gov>
Subject: LID report scan

Monica – Please see attached a scan of the LID Hearing Examiner Report. The Report references "Attachment A" the comments. I am assuming those will be included with the copy of the report submitted to Council and have not included the Attachment/comments here. Please feel free to review, and if there are any comments questions following this I am happy to update/modify the report prior to submittal to Council if necessary. Thank your incredible efforts, and the efforts of your team in this process.

Ryan Vancil
Hearing Examiner

RE: Hearing Examiner's Report

From: "Foster, Marshall" <marshall.foster@seattle.gov>
To: "Curtis, Joshua" <joshua.curtis@seattle.gov>, "Costa, Dorinda" <dorinda.costa@seattle.gov>
Date: Wed, 05 Sep 2018 14:37:09 -0700

Thanks. I read it. Looks pretty fair and reasonable!

From: Curtis, Joshua
Sent: Wednesday, September 5, 2018 12:04 PM
To: Foster, Marshall <Marshall.Foster@seattle.gov>; Costa, Dorinda <Dorinda.Costa@seattle.gov>
Subject: FW: Hearing Examiner's Report

Here's the hearing examiner report. Am going to print out and review on my vacation for some fun reading.

4. On September 10, 2019, at Councilmember Juarez's request, Office of the Waterfront Director Marshall Foster met ex parte with Councilmember Juarez to discuss the Hearing Examiner LID Report.[82]

5. On September 18, 2018, Councilmember Juarez staff rejected a meeting with a constituent regarding the Waterfront LID.[83]

6. On September 19, 2018, Office of the Waterfront staff Joshua Curtis planned to brief Councilmember Juarez regarding "O & M."[84]

[82] *Id.*, Ex. 18.
[83] *Id.*, Ex. 19.
[84] *Id.*, Ex. 20.

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7. On November 7, 2018, staff members from the Office of the Waterfront met ex parte with Councilmember Juarez.[85]

Meeting Forward Notification: CM Juarez: Waterfront LID+O&M legislation briefing

Where:	CM Jaurez's office
When:	Wed Nov 07 17:00:00 2018 (America/New_York)
Until:	Wed Nov 07 17:45:00 2018 (America/New_York)
Organisers	"McConaghy, Eric" <"/o=exchangelabs/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=f4eeab8ff7564082baa957f2dfa2bda1-mcconae">
Required Attendees:	"Foster, Marshall" <marshall.foster@seattle.gov>

8. On November 15, 2018, Councilmember Harrell received an ex parte briefing on the "Waterfront LID+O&M legislation."[86]

9. On December 3, 2018, the City Council planned a briefing regarding the "LID O&M."[87]

10. On January 7, 2019, the Office of the Waterfront circulated to the City Council ex parte its LID presentation.[88]

From: Ratzliff, Traci <Traci.Ratzliff@seattle.gov>
Sent: Monday, January 07, 2019 4:39 PM
To: Kamkar, Negheen <Negheen.Kamkar@seattle.gov>; McConaghy, Eric <Eric.McConaghy@seattle.gov>
Subject: RE: Draft LID presentation

o.k. we will look at it and get it back to you by tomorrow..

TR

11. On January 10, 2019, Councilmember Legislative Assistants all met ex parte to learn from Councilmember Juarez staff and Central Staff "what you (and your CM) need to know on the Waterfront LID."[89]

12. On January 23, 2019, Councilmembers received an ex parte letter of support from Seattle Art Museum Director Kimerly Rorschach.[90]

[85] *Id.*, Ex. 21.
[86] *Id.*, Ex. 22.
[87] *Id.*, Ex. 23.
[88] *Id.*, Ex. 24.
[89] *Id.*, Ex. 25.
[90] *Id.*, Ex. 26.

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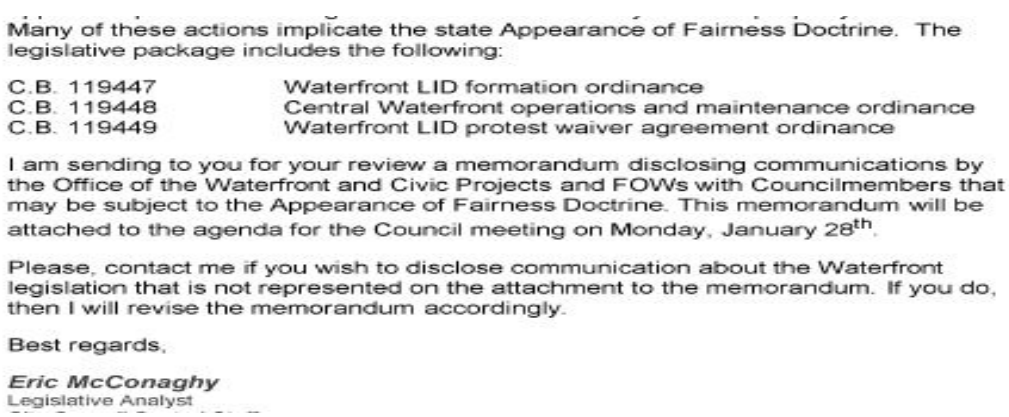
13. On January 24, 2019, Councilmember Central Staff member Eric McConaghy asked all Legislative Assistants to disclose all ex parte contacts.[91]



Many of these actions implicate the state Appearance of Fairness Doctrine. The legislative package includes the following:

C.B. 119447	Waterfront LID formation ordinance
C.B. 119448	Central Waterfront operations and maintenance ordinance
C.B. 119449	Waterfront LID protest waiver agreement ordinance

I am sending to you for your review a memorandum disclosing communications by the Office of the Waterfront and Civic Projects and FOWs with Councilmembers that may be subject to the Appearance of Fairness Doctrine. This memorandum will be attached to the agenda for the Council meeting on Monday, January 28th.

Please, contact me if you wish to disclose communication about the Waterfront legislation that is not represented on the attachment to the memorandum. If you do, then I will revise the memorandum accordingly.

Best regards,

Eric McConaghy
Legislative Analyst

14. Councilmember Bagshaw apparently continues to meet ex parte on Waterfront LID budget issues.[92]

III. ISSUES PRESENTED

A. Whether the Seattle Hearing Examiner violated the Appearance of Fairness Doctrine and Quasi-Judicial Rules when he privately sought review of and comment on his report from City staff and offered to make changes, but he did not do the same for the hundreds of protesters who participated in the HE Hearings.

B. Whether the Seattle City Council violated the Appearance of Fairness Doctrine when it failed to disclose multiple ex parte violations that occurred during the quasi-judicial process.

C. Whether the Seattle City Council violated the Appearance of Fairness Doctrine when it failed to adequately disclose the "substance" of its ex parte violations.

D. Whether the Seattle City Council violated the Appearance of Fairness Doctrine when it failed to release its Ex Parte Memo in a timely manner and provide an opportunity to know of, analyze, or rebut the ex parte violations.

[91] *Id.*, Ex. 27.
[92] *Id.*, Exs. 6 and 7.

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E. Whether the Hearing Examiner, Council Committee, and full City Council violated state LID law and the Quasi-Judicial Rules when they made no written findings, conclusions, and recommendations.

F. Whether this Court should invalidate Ordinance 125760, and remand for:

1. full disclosure of all ex parte communications;

2. notice and an opportunity to refute the substance of the ex parte information at a new public hearing before an independent hearing examiner;

3. the entry of written findings, conclusions, and recommendations by all reviewers; and

4. a new vote on Waterfront LID Ordinance 125760.

IV. EVIDENCE RELIED UPON

This motion is based on:

1. Declaration of Jesse O. Franklin and the exhibits attached thereto;

2. Declaration of Benjamin W. Lance and the exhibits attached thereto;

3. Declaration of Lisa Werner and the exhibits attached thereto;

4. Declaration of Larry Ice; and

5. All other records and documents on file with the Court in this matter.

V. LEGAL AUTHORITY

A. The timing, substance, and complete lack of ex parte disclosures violated the Appearance of Fairness Doctrine as a matter of law.

Summary judgment is proper when there exists no dispute of material fact, and the moving party is entitled to judgment as a matter of law. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1980 (2015). Here, there is no dispute that the City Council : (1) prejudged the outcome of the Waterfront LID vote due to budget issues; (2) failed to disclose a number of ex parte violations; (3) inadequately disclosed the ex parte violations it did reveal; and (4) failed to provide an opportunity to rebut the ex parte violations. The City Council's vote to form the

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Waterfront LID violated the Appearance of Fairness Doctrine as a matter of law, and Ordinance 125760 should be invalidated.

B. Quasi-Judicial action must be free from actual bias and the appearance of bias.

Quasi-judicial action must be free from both actual bias and the appearance of bias. *Clausing v. State*, 90 Wn. App. 863, 955 P.2d 394 (1998). Specifically, *Chrobuck v. Snohomish Cty*., holds quasi-judicial actions must:

> [B]e scrutinized with care and with the view that the evil sought to be remedied lies not only in the elimination of actual bias, prejudice, improper influence or favoritism, but also in the curbing of conditions which… tend to create suspicion, generate misinterpretation, and cast a pall of partiality, impropriety, conflict of interest or prejudgment over the proceedings to which they relate.

78 Wash.2d 858, 868, 480 P.2d 489 (1971) (emphasis added). Actions that create an appearance of bias, improper influence, and/or prejudgment are invalid as a matter of law. *Olympic Healthcare Services II LLC v. Dept. of Social and Health Servs.*, 175 Wn. App. 174, 185, 304 P.3d 491 (2013).

C. Evidence of prejudgment violates the Appearance of Fairness Doctrine.

The Appearance of Fairness Doctrine invalidates any quasi-judicial action that appears to be prejudged. *Clausing*, 90 Wn. App. at 876. After spending $30 million of Waterfront LID funds since 2011, the City Council had no choice but to approve the Waterfront LID or solve a $30 million budget deficit. With so much pressure, not surprisingly, the City Council approved the Waterfront LID despite a troubling appraiser report, no designs, construction documents or budgets, and a "poor" overall design for pedestrians (due to the eight-lane surface roadway).[93] Psychologists sometimes refer to the phenomena as "escalation bias" where "negative consequences may actually cause decision makers to increase commitment of resources and undergo the risk of further negative consequences."[94] This phenomena is clearly acted out in the City Council's commitment to spending against the Waterfront LID, and continued actions to approve it. As a consequence, the decision to form the Waterfront LID was prejudged for years

[93] *Decl. Lance*, Ex. 28.
[94] http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.470.3668&rep=rep1&type=pdf

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and violates the Appearance of Fairness Doctrine, as did this celebration by the Waterfront LID's sponsor, Councilmember Juarez after the vote:[95]

D. The nondisclosure of numerous ex parte communications violated the Appearance of Fairness Doctrine.

During a quasi-judicial matter, ex parte contacts are forbidden. RCW § 42.36.060; Quasi-Judicial Rules § III.A. An ex parte contact is any communication between a decision-maker and opponents or proponents of the proposal, about the proposal, and "outside of a Council hearing or meeting." RCW § 42.36.060 ("During the pendency of any quasi-judicial proceeding, no member of a decision-making body may engage in ex parte communications with opponents or proponents with respect to the proposal which is the subject of that proceeding…"); Quasi-Judicial Rules § II.E.[96] Should a member engage in ex parte contacts, that member must: (1) place "in the procedural record" the "substance of any ex parte communications"; and (2) "make a public announcement" of the "substance of each communication" at each subsequent hearing, and provide interested parties the opportunity to refute the communications. RCW § 42.36.060; Quasi-Judicial Rules § III.B. Under the Appearance of Fairness Doctrine, undisclosed ex parte communications may invalidate the action taken by the City Council. *Organization to Preserve Agricultural Lands v. Adams Cty.*, 128 Wn.2d 869, 886-87, 913 P.3d 793 (1993); *West Main Associates v. City of Bellevue*, 49 Wn. App. 513, 528-29, 742 P.2d 1266 (1987).

On Friday January 25, 2019, just one business day before the Waterfront LID vote, the City released its Ex Parte Memo.[97] The Ex Parte Memo disclosed 14 private meetings with

[95] http://www.seattlechannel.org/FullCouncil?videoid=x101756 at elapsed time 1:56:16.
[96] *Decl. Lance*, Ex. 11, Quasi-Judicial Rules §§ II.E and III.A.
[97] *Decl. Lance*, Ex. 13.

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Councilmembers, Friends of the Waterfront, and Office of the Waterfront staff, but just seven public meetings with the City Council.[98] Then, on the Sunday before the Monday vote, attorney Jack McCullough revealed at least nine additional ex parte violations, where the Councilmembers all communicated behind closed doors to approve the Waterfront LID.[99] These ex parte violations are not contained in the Ex Parte Memo and were never disclosed by the City Council. Subsequently, on the day of the vote, after public comment was cut off, and without opportunity to respond whatsoever, Councilmembers admitted to more ex parte communications with staff, key constituents, and others where they received a one-sided version of the "facts" over and over again.[100]

With formal discovery in this matter still incomplete, even a cursory review of Defendant's document production evidences at least 14 undisclosed ex parte violations.[101] *Supra*, pp. 19-21. Here, Councilmember meetings with the Office of the Waterfront are specifically about the Waterfront LID and labelled as "RE: LID," as was the Hearing Examiner's ex parte violation. These violations related to the Waterfront LID and were never disclosed. These undisclosed ex parte violations require the Court to invalidate Ordinance 125760.

In addition to the undisclosed number of ex parte violations, the number of ex parte meetings compared to the public meetings is simply unconscionable. The City Council admitted to 14 violations in the Ex Parte Memo, plus nine or more violations were revealed by the McCullough email, and plus 14 more ex parte violations found to date during discovery. This means the City Council had as many as 37 or more ex parte meetings, compared to just the seven public meetings. More than five times the amount of private meetings occurred versus public meetings, leaving Plaintiffs with no opportunity to fairly and concretely rebut any private conversations. As a result, the City Council violated the Appearance of Fairness Doctrine.

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[98] *Id.*
[99] *Decl. Franklin*, Ex. 1.
[100] *Decl. Werner,* Ex. 2, pp. 11-16.
[101] *Decl. Lance,* Exs. 14-27.

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E. The disclosure contained insufficient information and did not satisfy the Appearance of Fairness Doctrine.

The "cure for [ex parte communications] is disclosure."[102] And proper disclosure requires that the decision-maker place the "substance" of the ex-parte communications on the record. *Organization to Preserve Agricultural Lands* 128 Wn.2d at 887. Under RCW § 42.36.060, a quasi-judicial body may cure its ex parte violations when it: "(1) [p]laces on the record the substance of any written or oral ex parte communications concerning the decision of action; and (2) [p]rovides a public announcement of the content of the communication and of the parties' rights to rebut the substance of the communication . . . at each hearing where action is considered." RCW § 42.36.060 (emphasis added.); Quasi-Judicial Rules § III.B. The purpose of this requirement is to provide the affected parties equal access to the decision-maker, and an opportunity to rebut the ex parte communication. *Organization to Preserve Agricultural Lands v. Adams Cty*., 128 Wn.2d at 890 (requiring that the "substance" of ex-parte communications be disclosed). The City Council's disclosure statement does not provide a fair opportunity for Plaintiffs to rebut discussions because: (i) the topics disclosed lack "substance" and any meaningful detail; and (ii) the City Council's last-minute Ex Parte Memo, along with the brief oral disclosure of more ex parte violators *after* public comment, prevented Plaintiffs from knowing, analyzing, and rebutting the ex parte violations.

F. The City's disclosures lacked "substance."

Specifically, the Ex Parte Memo reveals *14* private discussions held ex parte between the Office of the Waterfront and Councilmembers. And while the disclosure provides the *topic* of the discussion, it does not provide the "substance." Lacking in the City's disclosure includes: the individuals present, any material used or created as part of the ex parte violations about the "facts," and the actual "facts" that the City Councilmembers admitted they gathered during the ex parte communications.[103] Without more detail, property owners and other interested parties cannot meaningfully rebut the ex parte violation.

[102] *Decl. Werner*, Ex. 2, p. 5.
[103] *Decl. Werner*, Ex. 2, pp. 12-14 and 16.

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For example, in creating a local improvement district for public spaces, there is no special benefit if the area is not "properly kept and maintained." *Heavens*, 66 Wn.2d at 566. But it is impossible to rebut a private conversation about the "City's operations and management plans and capital costs"[104] without more information about the area to be maintained, the level of maintenance, and the financial needs of such maintenance. In addition, the purpose of the ex parte disclosures is to allow interested parties to rebut the one-sided "facts" presented ex parte, a necessary component of such disclosure must be the identity of the individuals that presented the ex parte facts, along with all the materials related to the ex parte communication.

Similarly, the last-minute email from Jack McCullough and additional oral disclosures at the end of Formation Ordinance hearing did not provide any "substance" that would allow Plaintiffs to know of, analyze, or rebut the ex parte communications. For example, Councilmember Bagshaw admitted to receiving "a number of emails" that were not placed on the record.[105] Councilmembers admitted to briefings on the "facts," and yet none of those "facts" were placed on the record.[106] The City Council's disclosures evade the purpose and requirements of the Appearance of Fairness Doctrine and Quasi-Judicial Rules, and the City denied property owners of their right to notice and an opportunity to be heard. These actions are unlawful and unfair. As a result, the City Council's actions violated the Appearance of Fairness Doctrine, and this Court should invalidate Ordinance 125760.

G. The City Council's late disclosure and refusal to allow comment prevented any rebuttal.

The last-minute disclosures violate the Appearance of Fairness Doctrine because Plaintiffs had no time to adequately learn of, analyze, or rebut the violations. On January 25, 2019, just one business day before the LID vote, the City released its Ex Parte Memo.[107] Evidence of additional ex-parte violations surfaced in the McCullough email just one day before

[104] *Decl. Lance*, Ex. 13.
[105] *Decl. Werner*, Ex. 2, pp. 13-14.
[106] *Id.*, pp. 12-14 and 16.
[107] *Decl. Lance*, Ex. 13, p. 1.

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the vote.[108] More concerning, however, were the several constituent emails and meetings about the "facts" that came to light after public comment concluded and just before the Waterfront LID Formation Ordinance vote. The timing of the City's half-hearted disclosure is not consistent with the Appearance of Fairness Doctrine: to provide constituents a meaningful opportunity to rebut the communications. *Organization to Preserve Agricultural Lands v. Adams Cty*., 128 Wn.2d at 890. Nor is it consistent with the Quasi-Judicial Rules, which require notice to affected parties at least 7 day-notice prior to any meeting on the matter. QJ Rules § VI.B. Plaintiffs, and the general public, were not provided with adequate time to know of, analyze or rebut the ex parte communications. The insufficient timing of the disclosures also requires this Court to invalidate Waterfront LID Ordinance 125760.

H. Waterfront LID Ordinance 125760 should be invalidated and remanded to the City Council.

City Councilmembers can avoid an Appearance of Fairness violation if they take action to neutralize the effects of the violation – for example, removing themselves from the proceeding. *Bjarnson v. Kitsap Cty*., 78 Wn. App. 840, 848, 899 P.2d 1290 (1995) (holding that no Appearance of Fairness Violation existed when the affected Councilmember removed himself from further proceedings). Unlike *Bjarnson*, the City Council did not neutralize the ex parte violations. Only Councilmember Gonzales did not vote, because she was absent. The six Councilmembers with admitted violations persisted in forming the Waterfront LID and did not even allow comment. The City Councilmember's failure to recuse themselves did not cure the ex parte violations.

In addition, where the totality of the circumstances demonstrates an appearance of unfairness, the actions violate the Appearance of Fairness Doctrine. *Chrobuck v. Snohomish Cty*., 78 Wn.2d 858, 870, 480 P.2d 489 (1971) ("[W]e…are driven to the conclusion that the unfortunate combination of circumstances heretofore outlined and the cumulative impact thereof inescapably cast an aura of improper influence, partiality, and prejudgment over the

[108] *Decl. Franklin*, Ex. 1.

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proceedings thereby creating and erecting the appearance of unfairness…"). Here, the City Council held over five times as many private meetings as it did public meetings; the Hearing Examiner committed ex parte violations; and the City Council prejudged the Waterfront LID for years, and then cut a backroom deal with Jack McCullough to reduce the Waterfront LID from $200 million to $160 million, preventing a successful protest by property owners. As evidenced by Councilmember Johnson's admissions to meetings the day of the vote,[109] the City Council's ex parte contacts continued to occur up until the January 28, 2019 Formation Ordinance hearing, and today Councilmember Bagshaw apparently continues to be meeting ex parte on the Waterfront LID during the budget process.[110] Without providing property owners, constituents, the general public, and media with an opportunity to meaningfully rebut the ongoing and pervasive ex parte violations, the City Council's quasi-judicial vote is void.

I. The City Council's Failure to follow its own Quasi-Judicial Rules violated the Appearance of Fairness Doctrine.

In addition to the above ex parte violations, the City's failure to follow other specific procedures within state LID law and the Quasi-Judicial Rules, violated the Appearance of Fairness Doctrine. The Quasi-Judicial Rules implement the Appearance of Fairness Doctrine. QJ Rules, § I ("The purpose of these rules is to establish procedures for quasi-judicial actions before the Council and to implement the Appearance of Fairness Doctrine."). Specifically, the Hearing Examiner, the Council Committee, and the full City Council (i) failed to create findings of fact, conclusions of law, and recommendations, and (ii) failed to provide mailed notice to affected property owners, including Plaintiffs.

1. The Hearing Examiner, City Council Committee, and full City Council did not create Findings, Conclusions, and Recommendations as required.

Pursuant to state LID law, the Hearing Examiner is required to "report

[109] *Decl. Werner*, Ex. 2, pp. 12-13.
[110] *Decl. Lance*, Exs. 6 and 7.

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recommendations" for the proposed local improvement district to the City Council.[111] This report is then referred to the Council Committee for review and adoption of findings, conclusions, and a recommendation to the full City Council. Under City Council's Quasi-Judicial Rules § VII.A, "after the committee votes on a recommendation, Council staff shall prepare proposed findings of fact and conclusions of law and a proposed decision for Council based on the committee's recommendation."[112]And then the full City Council "shall adopt written findings of fact and conclusions to support its decision."[113] Following that, the City Council sends the findings, conclusions, and decisions to the property owners and other interested parties.[114]

Here, the Hearing Examiner failed to "report recommendations" from the City Council Resolution of Intent to form the Waterfront LID, instead just choosing to pass public comments through to the City Council Committee. Once the Hearing Examiner LID Report was referred to the Council Committee, the Council Committee never made written findings and conclusions recommending the Waterfront LID to the full City Council. And the full City Council never adopted any written findings and conclusions in support of its decision and vote to form the Waterfront LID. By rushing the applicable procedure, it becomes clear that the City Council violated the Appearance of Fairness Doctrine, and this Court should remand this matter back.

2. Notice was never provided to affected property owners.

The City is required to mail notice of the HE Hearings to all affected property owners "at least 15 days" before the hearings. RCW § 35.43.150. In addition, the Quasi-Judicial Rules state: "Council staff shall mail notice of the committee meetings(s) at which the quasi-judicial action is considered to the parties of record . . . at least twenty-one (21) calendar days prior to the first meeting[,] and at least seven (7) calendar days prior to any subsequent meeting."[115]

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[111] RCW § 35.43.140.
[112] QJ Rules § VII.A.
[113] QJ Rules § VIII.D.
[114] QJ Rules §§ VIII.D and IXA.1.
[115] QS Rules § IV.B.1-2.

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Affected property owners never got notice of the Hearing Examiner's July 2018 Public Hearings,[116] let alone the subsequent City Council Committee, as well as full City Council hearings and meetings discussing the Waterfront LID. As a result, the City violated state LID law and the Appearance of Fairness Doctrine, and this Court should invalidate Ordinance 125760.

J. This Court should invalidate Waterfront LID Ordinance 125760 and remand to the City Council.

Quite honestly, the City Council made a half-hearted attempt to neutralize the ex parte violations pertaining to the Waterfront LID vote and did so in a manner to avoid sharing the pertinent facts with Plaintiffs - all to the detriment of the thousands of affected property owners. Whether it was prejudging the Waterfront LID for years by promising itself it would finance a growing $30 million budget deficit, failing to disclose multiple ex parte violations, having over five times more ex parte meetings than public meetings, inadequately describing the "substance" of the ex parte violations, failing to provide an opportunity to rebut the ex parte violations, and refusing to follow the procedures for handling an LID and quasi-judicial action by failing to make findings, conclusions, and report recommendations at each step in the process, the City Council's failure to abide by the Appearance of Fairness Doctrine and Quasi-Judicial Rules obliterated any appearance of fairness.

VI. CONCLUSION

Democracy dies in the dark, and it is time to daylight the Waterfront LID. Plaintiffs were left in the dark about numerous ex parte violations, intentionally prohibited from communicating with the City Council, and not presented with an opportunity to know of, analyze, or rebut important ex parte communications about the "facts." Ironically, the City Council itself also remained uninformed about the designs, impacts, and the limited amount of special benefits to be conferred. Even more troubling, Councilmembers prejudged the Waterfront LID years before the January 28, 2019 vote by spending Waterfront LID funds long

[116] *Decl. Ice*.

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before they were secured. In 2020, the City Council proposes to increase spending against the Waterfront LID from $30 million to $50 million.

The City Council intentionally refused tax assessed property owners notice and an opportunity to be heard and violated the Appearance of Fairness Doctrine and Quasi-Judicial Rules. As a result, the vote taken at the January 28, 2019 Formation Hearing must be voided. Plaintiffs request this Court invalidate Waterfront LID Ordinance 125760, remand to the Seattle City Council to prepare an updated ex parte disclosure memorandum, conduct a new public hearing before an independent Hearing Examiner, and perform a new vote as to whether to form the Waterfront LID.

I certify that this memorandum contains 8,276 words or less, in compliance with the Local Civil Rules.

DATED this 29th day of October, 2019.

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