

# Memo

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TO: Mayor and City Councilors  
FROM: David Lohman, City Attorney  
RE: Councilmember Recusals  
DATE: November 19, 2019

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A question arises periodically, and has arisen again recently, about when a member of the City Council should decline to participate and vote on an agenda item before Council. This memo is intended to provide clearer guidelines for Councilmembers to use in deciding how to answer that question in particular, necessarily fact-specific situations. This memo addresses guidelines for recusals in legislative decisions only. It is important to distinguish the guidelines that apply for recusals in quasi-judicial decisions on land use matters from the guidelines for legislative decisions, especially since the two are easily confused.

Short summary: In legislative decisions, recusals by public officials are to be based on potential or actual conflicts of interest; in judicial or quasi-judicial decisions, recusal by public officials are to be based on both conflicts of interest and potential personal bias.

State ethics law concerning conflicts of interest (ORS 244.020) is stated concisely in this quote from a powerpoint presentation provided by the Oregon Government Ethics Commission: "Public officials should not be receiving any significant *economic* benefit by virtue of their position beyond what is available to the general public" (emphasis added).

The City code of ethics says no public official shall "engage in any business or participate in any proposed or current City transaction, contract, purchase or sale... which would tend to impair independence of judgment or action in the performance of that public official's official duties without first disclosing such potential or actual incompatibility or impairment of independent judgment or action to the proper authority." AMC 3.08.020E.

While the City code provision does refer to personal bias ("impairment of independent judgment"), it is apparently limited to bias resulting from economic benefits, as the statutory provision expressly does.

When potential personal economic benefits or detriments are in the picture, it is relatively easy for a Councilmember to figure out whether to declare a potential conflict and participate in deliberation and voting on a matter or whether to decline to participate at all.



It can be more difficult to decide how to proceed when personal economic issues are not involved at all in a legislative matter before the Council. If you have reached a fairly definitive, perhaps thoughtfully-researched conclusion, or have a preconceived notion, or even have a political philosophy that might well affect how you would vote on a particular agenda item coming before Council -- but have no financial stake in the outcome --should you nevertheless excuse yourself from participating with respect to that item?

A non-profit national Institute for Local Government analyzed this question as follows:

**Institute for Local Government**

***Everyday Ethics for Local Officials***

***Deciding when Not to Participate in an Agency Decision***

***December 2002***

What if there is no foreseeable material financial effect on your economic interests from a particular matter, and you are confident in your ability to make a fair and public-minded decision, but others are questioning your ability to do so?

“As with many ethical dilemmas, this is an example of conflicting and important values.”

“One value is fulfilling your responsibility as an officeholder to make decisions – which, of course, is what your constituents elected you to do. Related to this value is the benefit of having as many decision-makers as possible participate in decisions to reflect the full range of community perspectives.

“The other value is preserving the public’s trust that the agency’s actions are based on principles of fairness and what best promotes the public’s interests – as opposed to decision-makers’ self interests or those of their friends and family.”

“Adopting the approach of avoiding even the appearance of bias or impropriety may mean not participating in an important decision. Perhaps even more difficult is the fact that those who do participate may make what you consider to be the “wrong” decision, in terms of the long-term interests of the community, and one with which your constituents disagree. Some of your constituents may feel disappointed and angry if you step aside and let others make a decision with which they disagree.”

As suggested in the analysis above, the question of what to do becomes even more difficult to answer when one has been accused of prejudging an issue. The question becomes, “Should a Councilmember abstain or recuse oneself from voting on a matter because the Councilmember has already decided how he or she probably will vote or because someone has alleged that the Councilor has prejudged the matter, even when the Councilor has no financial conflict of interest and believes his or her views on the matter are based on the best interests of the community?” Four factors seem relevant to answering that question.



1. Persons holding elective legislative offices, including city councilors, are elected to exercise their judgment as to the best interests of their constituents. Their offices are inherently political, not judicial. Outside of land use cases and situations in which *actual* personal conflicts of economic interest are involved, holders of such political offices are not obligated to set aside their political values or their views of the long-term interests the constituents they serve. They are typically elected *because* they have well-considered political views and are willing to publicly articulate them and stand up for them.
2. If a Councilmember has reached a viewpoint on a particular matter in advance of the meeting at which it will be voted upon, stating that viewpoint ahead of time would aid transparency and provide useful advance notice to all concerned. Waiting until the meeting to reveal one's thinking is certainly acceptable, but certainly not required. Recusing oneself when you happen to have already developed a viewpoint negates the elective investment of those who voted for you to exercise your best judgment.
3. If having been accused of bias or of having prejudged a matter were relevant to a Councilmember's decision whether to refrain from participating in a decision about a controversial matter, unelected advocates for or against a particular decision could try to influence the outcome merely by making an accusation of bias against Councilors whose views they oppose.
4. Our code provides a pretty clear response to the question by (1) permitting a Councilmember to participate and vote on a matter after making an appropriate public disclosure even when he or she has concern that his or her independence of judgment might be compromised; and (2) requiring that "each Councilor present must vote for or against the motion unless a majority of the Council excuses that Councilor for doing so." AMC 2.04.040C(6).

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