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BEFORE THE MERCER ISLAND ETHICS OFFICER

In the Matter of
December 7, 2023 Ethics Complaint
Against Councilmember Jake
Jacobson

DETERMINATION OF SUFFICIENCY

I. INTRODUCTION – AUTHORITY

Chapter 2.60 of the Mercer Island City Code (“MICC”) constitutes the “Code of Ethics” enacted to “strengthen the quality of government through ethical principles that shall govern the conduct of all officials.” *MICC 2.60.010.A*. The Code of Ethics applies to “all members of the city council, the city’s boards and commissions, and other council-appointed task groups or committees of the City of Mercer Island who are currently serving their positions.” *MICC 2.60.020*. The Code’s purpose is to ensure a “fair, ethical and accountable local government that has earned the public’s full confidence.” *Id.* To that purpose, the Code of Ethics contains a listing of prohibited conduct for city officials (*2.60.030*), creates the position of “ethics officer... responsible for the prompt and fair enforcement of this code of ethics when called upon to do so” (*2.60.050*), and generally outlines the manner in which the ethical rules are to be implemented and enforced (*2.60.060-.070*).

1 The Code establishes that “[a]ny person may submit a written complaint to the ethics
2 officer alleging one or more violations of this code of ethics by an official.” *MICC*
3 *2.60.070.A.1*. When such a complaint is received, the City Code requires it be submitted to
4 the ethics officer, who “shall make a determination of sufficiency within 30 days of receipt
5 of the complaint.” *MICC 2.60.070.A.2*. To be sufficient, the ethics officer must determine
6 the complaint “alleges and reasonably describes acts that constitute a prima facie showing of
7 a violation of *MICC 2.60.030*, including *RCW Chapter 4.23*.” *Id.* In making a determination
8 of sufficiency under the City Code, the ethics officer “shall consider the purpose and intent
9 section contained in *MICC 2.60.010* and the declaration of purpose in *RCW 42.23.010*.” *Id.*

11 **II. CURRENT COMPLAINT**

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13 On November 21, 2023, the undersigned ethics officer received a complaint filed by
14 Mercer Island resident Richard D. Erwin, Jr. *See Exh. 1*.¹ The complaint alleges that (1) Mr.
15 Erwin received a series of emails from City Councilmember Jake Jacobson’s city-issued
16 email address (jake.jacobson@mercergov.org), and (2) the signature line of these emails
17 include a link to Councilmember Jacobson’s campaign website, “www.jakeformi.com” *Id.*

18 Mr. Erwin alleges that inclusion of the link to Jacobson’s campaign website in emails
19 from Jacobson’s city-issued email address violates *MICC 2.60.030(D)*. Mr. Erwin further
20 alleges that inclusion of the link in Jacobson’s signature block “wasn’t a single-use mistake
21 but installed as a permanent feature of his signature block.” *Id.* Finally, Mr. Erwin’s
22 complaint refers to “the attention that has been given to ethics in the last several years,” and
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¹ The undersigned found that Mr. Erwin’s original complaint was not signed “under penalty of perjury” as required by *MICC 2.60.070*. City staff contact Mr. Erwin and informed him the complaint could only be accepted if it included that language. On December 7, 2023, Mr. Erwin resubmitted his complaint with the required language. The resubmission appears to be identical to the original in all other respects. Exhibit 1 is December 7, 2023 version.

1 submits what appears to be a printout of a September 19, 2019 newspaper article detailing an
2 ethics complaint against then-Mayor Bertlin “for using city email to conduct her personal
3 campaign business.” *See Exh. 2.*

4 **III. APPLICABLE LAW: MICC 2.60.030 and RCW 42.17A.555**

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6 MICC 2.60.030 broadly prohibits seven types of action by city officials: conflicts of
7 interest (§A), appearance of conflicts (§B), interest in contract (§C), misuse of public position
8 or resources, (§D), representation of third parties (§E), gifts and favors (§F), and misuse of
9 confidential information (§G). Subsection D, “misuse of public position or resources,” is the
10 only section alleged to have been violated here, and appears to be the only section of MICC
11 2.60.030 that applies to the facts alleged. It read as follows:
12

13 Misuse of public position or resources. Except for infrequent use at little or
14 no cost to the city, officials shall not use public resources that are not
15 available to the public in general, such as city staff time, equipment,
16 supplies or facilities, for other than a city purpose.

17 *MICC 2.60.030(D).*

18 In addition to the explicit prohibitions listed in MICC 2.60.030, the City’s Code of
19 Ethics incorporates “Washington State law... pertaining to conflicts of interests and elections
20 campaigns, and city ordinances.” *MICC 2.60.010.C.* Based on that language, two additional
21 statute/code sections appear to apply. First, RCW 42.17A.555 (“Use of public office or
22 agency facilities in campaigns – Prohibition – Exceptions”) states as follows:

23 No elective official nor any employee of his or her office nor any person
24 appointed to or employed by any public office or agency may use or
25 authorize the use of any of the facilities of a public office or agency, directly
26 or indirectly, for the purpose of assisting a campaign for election of any
27 person to any office or for the promotion of or opposition to any ballot
proposition. Facilities of a public office or agency include, but are not
limited to, use of stationery, postage, machines, and equipment, use of
employees of the office or agency during working hours, vehicles, office

1 space, publications of the office or agency, and clientele lists of persons
2 served by the office or agency.

3 *(applicable portions emphasized).*² Second, MICC 2.20.120, titled “Use of public
4 office facilities in campaign prohibited,” contains identical language:

5 No elective official, nor any employee of his office nor any person
6 appointed to or employed by any public office or agency may use or
7 authorize the use of any of the facilities of his public office or agency,
8 directly or indirectly, for the purpose of assisting a campaign for election of
9 any person to any office or for the promotion or opposition to any ballot
10 proposition. Facilities of public office or agency include but are not limited
11 to use of stationery, postage, machines and equipment, use of employees of
12 the office or agency during working hours, vehicles, office space,
13 publications of the office or agency and clientele lists of persons served by
14 the office or agency[.]

15 *(applicable portions emphasized).*³

16 IV. ANALYSIS

17 A. RCW 42.17A.555 and MICC 2.20.120

18 Addressing RCW 42.17A.555 and MICC 2.20.120 first, Councilmember Jacobson is
19 clearly an “elective official” for purposes of both sections, and the website
20 www.jakeformi.com⁴ appears to be maintained “for the purpose of assisting a campaign for
21 election.” For example, it includes the words “Re-Elect Jake for Mercer Island City Council”
22 on the main page, as well as a “Volunteer” tab that instructs readers on “adding your
23 endorsement to the list, making a donation, and of course volunteering to help or with a
24 campaign task.” Given those facts, the only remaining question appears to be whether
25 Councilmember Jacobson’s inclusion of a link to his campaign website in the signature line

26 ² This RCW contains a list of activities to which the prohibition “does not apply.” For purposes of this
27 Determination of Sufficiency, those exceptions are not analyzed here.

³ Again, the exceptions listed in the code are not analyzed for purposes of this Determination of Sufficiency.

⁴ To be clear, the web address “www.jakeformi.com” redirects the user to www.jake4mi.com. *I.e.*, the “for/4”
appear to be interchangeable, and both lead to the same web address.

1 of his official city email constitutes a *prima facie* “use of any of the facilities of his public
2 office or agency, directly or indirectly, for the purpose of assisting a campaign for election.”

3 Based on my review of relevant case law, it appears the answer is to that question is “YES.”
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5 For example, in *Herbert v. Washington State Pub. Disclosure Comm'n*, 136 Wash.
6 App. 249 (2006), the State Supreme Court concluded that a public school teacher’s district-
7 issued email address qualified as a “facilit[y] of his public office,” and that use of the email
8 to transmit political materials was therefore prohibited under RCW 42.17A.555. Under
9 *Herbert*, Councilmember Jacobson’s city-issued email address therefore appears to qualify
10 as a facility of his public office, and inclusion of a link to his campaign website appears to
11 constitute a *prima facie* use of that facility for purpose of assisting his campaign for election.
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13 Based on this analysis, I have determined that the complaint against Councilmember
14 Jacobson **IS SUFFICIENT** to allege a violation of RCW 42.17A.555 and MICC 2.20.120,
15 each of which are incorporated into the City’s Code of Ethics by MICC 2.60.010.C.

16 **B. MICC 2.60.030.D**

17 My conclusion regarding the prohibition against the misuse of public resources found
18 in MICC 2.60.030(D) is the same: (1) Councilmember Jacobson undoubtedly holds a “public
19 position,” (2) his city-issued email address is among the “public resources that are not
20 available to the public in general,” and (3) directing email recipients to a personal campaign
21 website is something “other than a public purpose.” As a result, I have determined that the
22 complaint against Councilmember Jacobson **IS SUFFICIENT** to allege a *prime facie*
23 violation of MICC 2.60.030.D.
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25 **C. NOTE AND CAUTION**

1 Finally, I would like to emphasize two points regarding my determination of
2 sufficiency in this matter. First, the City Code requires that my decision be based solely on
3 the allegations in the complaint, without regard to whether those allegations are accurate,
4 complete, or true. For purposes of this determination, I have presumed that (1) Mr. Erwin
5 did actually receive emails from Councilmember Jacobson’s city-issued email account, and
6 (2) those emails did actually include a link to Mr. Jacobson’s campaign website. Any dispute
7 regarding the accuracy, completeness, or truth of those and any other relevant facts must be
8 resolved by the Hearing Examiner in any subsequent proceeding under MICC 2.60.070.B.
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10 Similarly, my determination of sufficiency makes no conclusion or suggestion as to
11 whether any violation of the above-listed statutes/codes *actually* occurred, or to what extent
12 any such violation might be material. For example, MICC 2.60.030.D contemplates that
13 “infrequent use at little or no cost to the city” is allowed. Similarly, both RCW 42.17A.555
14 and MICC 2.20.120 contain various exceptions that could potentially encompass the facts
15 and circumstances at issue here. Whether Councilmember Jacobson’s actions actually
16 constitute the type of “infrequent use” allowed by the City Code, whether any other exception
17 or mitigating circumstance apply, or whether a violation is material to any legitimate ethical
18 concerns in the first place, are again questions left to the Hearing Examiner in any subsequent
19 proceeding under MICC 2.60.070.B.
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22 V. CONCLUSION

23 Based on the foregoing, and pursuant to my authority as Ethics Officer for the City of
24 Mercer Island, I conclude as follows:
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1 **The December 7, 2023 complaint against Councilmember Jake Jacobson IS**
2 **SUFFICIENT to allege a *prime facie* violation of the following sections of the Mercer**

3 **Island Code of Ethics:**

- 4
- 5 - **MICC 2.60.030.D**
 - 6 - **MICC 2.20.120 (incorporated via MICC 2.60.010.C); and**
 - 7 - **RCW 42.17A.555 (incorporated via MICC 2.60.010.C)**

8 **DATED this 14th day of December, 2023.**

9 

10 By: _____
11 Jeremy W. Culumber, WSBA #35423
12 Mercer Island Ethics Officer

EXHIBIT 1

7 December 2023

Jeremy Culumber
City Attorney's Office
9611 SE 36th Street
Mercer Island, WA 98040

Dear Mr. Culumber,

Details of my ethics complaint regarding Jake Jacobson of the Mercer Island City Council are hereby submitted for your investigation.

This complaint documents a violation of the Mercer Island ethics code section 2.60.030 paragraph D which merits your attention. Specifically, Mr. Jacobson misused city resources by using his official city email account to further his political campaign.

On April 10th, 2023, Mr. Jacobson filed with the PDC to be a candidate for his seat in the November 2023 general election. After that filing, Mr. Jacobson used an email signature in his city email account "jake.jacobson@mercergov.org" to direct citizens to his www.jake4mi.com campaign website. Three example emails are included, but all composed emails had either signature block:

Jake Jacobson
MI City Council/7
206-280-5303 (Cell Preferred)
jake.jacobson@mercergov.org
www.jakeformi.com

Jake Jacobson
MI City Council/7
206-280-5303 (Cell Preferred)
206-275-7995 (City Voice Mail)
jake.jacobson@mercergov.org
www.jakeformi.com

Per the ethics code, "Except for infrequent use at little or no cost to the city, officials shall not use resources that are not available to the general public..." The fact that this wasn't a single-use mistake but installed as a permanent feature of his signature block negates the exception for infrequent use, and this was not available to all candidates or the general public. Confusingly, Mr. Jacobson substituted "for" instead of "4" in the URL but the intent was the same.

I am particularly troubled that Mr. Jacobson is an attorney and had an active role in drafting the very revised 2021 version of the code of ethics that I believe he has violated.

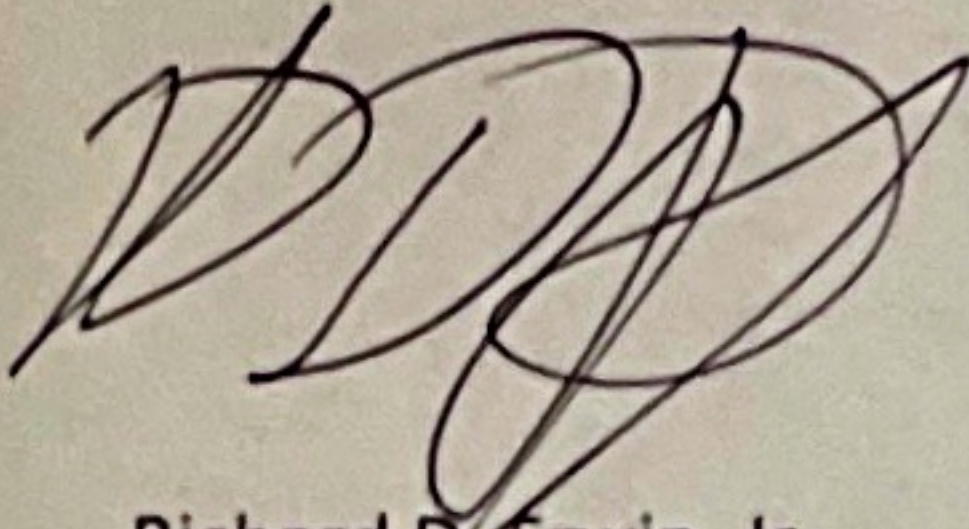
Further, if this complaint is found to be sufficient, I request that final adjudication shall be made by the Hearing Examiner and not by the City Council, since Mr. Jacobson is a sitting member of the council and neither a fair determination, nor a quorum, would be possible. Mr. Jacobson was endorsed by Councilmembers Anderl, Nice, Rosenbaum and Weiker who would all need to recuse themselves.

Finally, given the attention that has been given to ethics in the last several years, I am disappointed that Mayor Nice and City Manager Bonn failed to detect and correct this ongoing and open violation.

Thank you for your efforts in thoroughly investigating this serious charge.

I declare this under penalty of perjury under the law of Washington that the foregoing is true and correct.

Signed on the 7th day of December 2023
at Mercer Island, Washington

A handwritten signature in black ink, appearing to be 'RDE', written in a cursive style.

Richard D. Erwin, Jr.