

August 26, 1997

Billy C. Bellamy  
Jefferson County Commissioner  
Jefferson County Courthouse  
75 SE C Street  
Madras, Oregon 97741

Dear Commissioner Bellamy:

This letter is in response to correspondence from Paul L. Hathaway III, Jefferson County Counsel, dated August 15, 1997, concerning a conflict of interest issue in which you may become involved.

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION STAFF OPINION  
NO. 97S-024**

STATED FACTS: You have been a licensed real estate agent for over 15 years. You are also a Jefferson County Commissioner. There is a possibility you will be selling a parcel of real estate that may or will require county commission approval or denial of a building permit to construct a residence on the property.

You may write an offer on the property that includes a provision that the offer is contingent upon county approval to build a house. The offer may be written so that the client agrees to pay your part of the commission (your actual fee after the broker has taken the office share out) prior to the county commission taking official action. There would be no refund of the commission to the prospective buyer if the county did not approve the building permit.

RELEVANT STATUTES: The following Oregon Revised Statutes are applicable to the issues addressed herein:

ORS 244.020(1): Actual conflict of interest means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person's relative or any business with which the person or a relative of the person is associated unless the pecuniary benefit or detriment arises out of circumstances described in subsection (8)(a) to (c) of this section.

ORS 244.020(2): Business means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed individual and any other legal entity operated for economic gain but excluding any income-producing not-for-profit corporation that is tax exempt under section 501(c) of the Internal Revenue Code with which a public official is associated in a nonremunerative capacity.

ORS 244.020(3): Business with which the person is associated means any business of which the person or the person's relative is a director, officer, owner or employee, or agent or any corporation in which the person or the person's relative owns or has owned stock worth \$1,000 or more at any point in the preceding calendar year.

ORS 244.020(15): Public official means any person who, when an alleged violation of this chapter occurs, is serving the State of Oregon or any of its political subdivisions or any other public body of the state as an officer, employee, agent or otherwise, and irrespective of whether the person is compensated for such services.

ORS 244.040: Code of ethics; prohibited actions; honoraria. The following actions are prohibited regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed pursuant to ORS 244.120.

(1)(a) No public official shall use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment that would not otherwise be available but for the public official's holding of the official position or office, other than official salary, honoraria, except as prohibited in paragraphs (b) and (c) of this subsection, reimbursement of expenses or an unsolicited award for professional achievement for the public official or the public official's relative, or for any business with which the public official or a relative of the public official is associated.

ORS 244.120: Methods of handling conflicts; generally; application to elected officials or members of boards. (1) Except as provided in subsection (2) of this section, when met with an actual or potential conflict of interest, a public official shall:

ORS 244.120(2): An elected public official, other than a member of the Legislative Assembly, or an appointed public official serving on a board or commission, shall:

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(b) When met with an actual conflict of interest, announce publicly the nature of the actual conflict and:

(A) Except as provided in subparagraph (B) of this paragraph, refrain from participating as a public official in any discussion or debate on the issue out of which the actual conflict arises or from voting on the issue.

(B) If any public official's vote is necessary to meet a requirement of a minimum number of votes to take official action, be eligible to vote, but not to participate as a public official in any discussion or debate on the issue out of which the actual conflict arises.

QUESTION: Would payment of the sales commission for a piece of real property subject to official action by the board of county commissioners, to both the real estate agent/county commissioner and the agent's employing broker, as described in the stated facts, be permitted by Government Standards and Practices laws?

OPINION: ORS 244.040(1)(a) prohibits a public official from using official position for personal financial gain for the public official, a relative of the public official or a business with which the public official or a relative is associated.

ORS 244.020(1) defines an actual conflict of interest as any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person's relative or any business with which the person or a relative is associated.

The stated facts are unclear as to whether the broker would retain the broker's sales commission if the county commission does not approve the building permit. Accordingly, it is assumed that both the agent/county commissioner and the broker will retain all commission fees paid by the prospective buyer. If both the agent/county commissioner and the real estate broker retain all fees and/or commissions associated with the real estate transaction, regardless of whether or not the building permit is approved by the county commission, it appears that the agent would be permitted to take official action as a county commissioner because neither the agent nor the broker would be financially impacted by the action. The GSPC staff believes that, while separating payment of commissions from the permit contingency may conform to the letter of the law, it would be a very obvious attempt to avoid compliance with the intent of the law and would create a strong perception of impropriety.

If the broker's commission depended upon the purchaser of the property obtaining the

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building permit from the county commission, the agent would then be faced with an actual conflict of interest and would be prohibited from taking any official action on the matter because the official action would have a financial impact on the broker, a business with which the agent is associated. If an actual conflict of interest arose and the agent's inability to vote resulted in a 1-1 tie between the two other commissioners, the agent would then be able to vote on the matter.

**THIS RESPONSE IS BASED SOLELY ON THE INFORMATION PROVIDED IN YOUR WRITTEN INQUIRY AND IS NOT A FORMAL ADVISORY OPINION PURSUANT TO ORS 244.280. IT IS MY PERSONAL ASSESSMENT AS THE EXECUTIVE DIRECTOR OF THE OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION.**

Sincerely,

L. Patrick Hearn  
Executive Director

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