

September 28, 2001

Barbara Leff  
115 Crescent — Box 1258  
Depoe Bay, Oregon 97341

Dear Ms. Leff:

This is in response to your correspondence dated, August 7, 2001 regarding city council members, who have been named as defendants in a federal lawsuit, who may be voting on issues that might impact the interests of the plaintiff.

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION**  
**STAFF OPINION NO. 01S-022**

**STATED FACTS:** The developer of a 140-acre housing project, which began in the 1970 s, became involved in a dispute with the City of Depoe Bay during 1999. The city sided with the position of some property owners in the development and opposed the developer s efforts to retain and maintain a real estate sales office in the development. One of the current city council members belongs to the homeowners association in the development and was active with a group of property owners who opposed the on site location of the sales office.

Following proceedings before the Land Use Board Of Appeals (LUBA) the developer was denied approval to retain a sales office. In June 2001, the developer and the city reached an agreement, which permitted a sales office in the development.

The developer then filed suit in federal court charging three former and three current city councilors with violating the developer s civil rights by denying the developer due process and equal protection. The developer is seeking recovery of legal fees estimated at about \$200,000 and imposition of a requirement for city officials to undergo remedial training on land use laws.

It is anticipated that before and during the litigation in this legal action the three current city councilors, one a resident in the development, may be asked to vote on issues before the council that may impact the developer and/or the development. The most immediate issue may be to approve amendments to Depoe Bay building regulations proposed by the city planning commission. If approved, the developer believes the amendments would prevent the removal of trees and the ability to proceed with current development plans.

RELEVANT STATUTES: The following Oregon Revised Statutes (ORS) are applicable to the issues that are addressed in this opinion:

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 (7) of this section.

244.020(7) " Potential 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 could be to the private pecuniary benefit or detriment of the person or the person's relative, or a business with which the person or the person's relative is associated, unless the pecuniary benefit or detriment arises out of the following:

244.020(7)(c) Membership in or membership on the board of directors of a nonprofit corporation that is tax-exempt under section 501(c) of the Internal Revenue Code.

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.

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:

244.040(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.

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:

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:

244.120(2)(a) When met with a potential conflict of interest, announce publicly the nature of the potential conflict prior to taking any action thereon in the capacity of a public official; or

244.120(2)(b) When met with an actual conflict of interest, announce publicly the nature of the actual conflict and:

244.120(2)(b)(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.

244.120(2)(b)(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 the three current city councilors violate Government Standards and Practices laws if they participate in official council action on the proposed amendments to the city building codes?

OPINION: No. The stated facts do not indicate that the councilors have a financial interest in whether the developer can proceed with plans for the project. This would even be true of the councilor who resides in the development and was active in the homeowner's opposition to the real estate office location that resulted in the pending litigation.

In addition, the litigation pending in federal court does not appear to have the potential of being impacted by any council action anticipated in the stated facts. Accordingly, it does not appear that any of the councilors would have either a potential or actual conflict of interest.

ORS 244.040(1)(a) prohibits a public official from using, or attempting to use, official position or office to obtain financial gain or avoidance of financial detriment for the official, the official's relative or a business with which the official or a relative of the official is associated, regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed pursuant to ORS 244.120. The stated facts do not indicate that any of the councilors would

financially benefit from any official action they might take on the proposed amendments to the building codes or related issues.

Oregon Government Standards and Practices laws define actual conflict of interest [ORS 244.020(1)] and potential conflict of interest [ORS 244.020(7)]. A **potential** conflict of interest exists when an official takes action that could possibly have a financial impact on that official, a relative of that official or a business with which the official or the relative of that official is associated. Such possible financial impact is not certain. An **actual** conflict of interest occurs when the action is reasonably certain to result in a financial benefit or detriment. It will occur when an action taken by the official would directly and specifically affect the financial interest of the official or the official's relative or a business with which the official or the official's relative is associated.

If a potential conflict of interest arises, the official may participate in the action, once a public disclosure has been made. In the case of an actual conflict of interest, the official must publicly disclose the actual conflict and refrain from taking any official action on the issue. If the official's vote is necessary for the public body to take action on the matter, the official may vote but may not discuss, debate or otherwise participate in the matter.

**THIS RESPONSE ADDRESSES ONLY THE APPLICATION OF ORS 244 TO THE FACTS STATED HEREIN. ANY RELEVANT INFORMATION, WHICH WAS NOT INCLUDED BY THE REQUESTER OF THIS OPINION IN THE STATED FACTS, COULD COMPLETELY CHANGE THE OUTCOME OF THIS OPINION. OTHER LAWS OR REQUIREMENTS MAY ALSO APPLY. THIS IS NOT A FORMAL ADVISORY OPINION PURSUANT TO ORS CHAPTER 244.280. THIS OPINION DOES NOT EXEMPT A PUBLIC OFFICIAL FROM LIABILITY UNDER ORS CHAPTER 244 FOR ANY ACTION OR TRANSACTION CARRIED OUT IN ACCORDANCE WITH THIS OPINION. THIS OPINION IS ONLY MY PERSONAL ASSESSMENT AS THE EXECUTIVE DIRECTOR OF THE OREGON STANDARDS AND PRACTICES COMMISSION.**

Do not hesitate to call or write if you have questions or would like additional clarification.

Sincerely,

L. Patrick Hearn  
Executive Director