


Theodore R. Kulongoski, Governor

June 18, 2003

Marnie Allen
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222 S.W. Columbia Street, Suite 1400
Portland, Oregon 97201-6632

Dear Ms. Allen:

This is in response to your correspondence dated, June 6, 2003 regarding conflict of interest implications for a city's council members when voting on a city resolution to adjust rates assessed a building permit applicant when the funds are designated for parks and recreation system development.

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION STAFF
OPINION NO. 03S-013**

STATED FACTS: A city council has considered means of acquiring additional funds to meet increasing demand for park and recreation facilities. Population growth and increases in housing developments are seen as the cause for the increased demand.

The city council has asked the city staff to prepare a resolution for council action. The purpose of the resolution, if adopted, is to insure that parks and recreation system development charges levied on future developments will represent an equitable share of the park system costs that result from the completed development.

The park system development charges would be based on the size of proposed developments and assessed at the time applications for building permits are submitted. The revenue generated from these charges would not be the only source of funding for the park and recreation system.

The Community Development Director will administer the funds from these charges. The director might use these or other funds to improve or expand existing parks or purchase land and develop new park facilities.

Five of Seven members of the council own property in the vicinity of established parks or property that could be acquired by the city and developed as parks:

Councilor No. 1:

Owens approximately one acre that abuts existing and potential park property. There are 25 other residences next to the existing park. A portion of the councilor's property that abuts the existing park has a steep slope which makes development unlikely.

Councilor No. 2:

Owens a 5,100 square foot single-family lot across the street from an existing mini/neighborhood park. There are seven residences located across the street from the park and another that abuts the park.

Councilor No. 3:

Owens 2.9 acres across the street from potential park property. A portion of the councilor's property could be sold to expand the potential park. There are approximately 20 other residences across the street from the potential park and approximately nine homes abut the potential park.

The councilor is also a trustee for an established trust. The trust owns 21.1 acres of farmland that has been identified as potential parkland. Approximately 30 homes abut this potential park.

Councilor No. 4:

Owens 2.5 acres of potential parkland. The land is along a river and creek and has no potential for development. The councilor's property is also adjacent to an existing park and has been identified by the city as land that could be used for park expansion. Five other residences in the area are separated from the existing park property by a street and a creek.

This councilor also owns an 8,000 square foot lot that abuts some potential park property. This property has no potential for being developed due to slope or other reasons. Two other residences abut this potential park property.

Councilor No. 5:

Owns an 8,700 square foot lot that abuts potential park property. A portion of this lot is currently being considered for purchase by the city for use as a park. In past public meetings the councilor has offered testimony as a citizen and landowner in support of the city's purchase of this land. The city council may acquire this property with or without the revenue that may result from the passage of the resolution.

Currently there are four residences abutting this potential park property and there is a potential for five additional to be established in the vicinity.

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)(b) "Any action in the person's official capacity which would affect to the same degree a class consisting of all inhabitants of the state, or a smaller class consisting of an industry, occupation or other group including one of which or in which the person, or the person's relative or business with which the person or the person's relative is associated, is a member or is engaged. The commission may by rule limit the minimum size of or otherwise establish criteria for or identify the smaller class that qualify under this exception."

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 NO. 1: When the city council is required to take official action on the resolution adjusting the parks and recreation system development charges, would the provisions of ORS Chapter 244 require Councilor No. 1 to announce the nature of a conflict of interest?

OPINION: Yes. Oregon Government Standards and Practices laws define actual conflict of interest [ORS 244.020(1)] and potential conflict of interest [ORS 244.020(7)]. The difference between an actual conflict of interest and a potential conflict of interest is determined by the words would and could. An actual conflict of interest occurs when the action is reasonably certain to result in a financial benefit or detriment. It occurs when an action taken by the official would directly and specifically affect the financial interest of the official. A potential conflict of interest exists when an official takes action that could possibly have a financial impact on that official. Such an impact would not be certain.

Relevant to determining if Councilor No. 1 would have a conflict of interest is the steep slopes on the councilor's existing property. The stated facts indicate the sloped terrain reduce the potential for land development. It also appears that this portion of the councilor's land is next to the existing and potential park property. While the councilor might not be able to develop or profit from the sloped portion of the property, the stated facts indicate this portion of the councilor's land could be acquired to expand the existing park. While there is no certainty of this occurring, such an acquisition by the city could have a financial impact on the councilor. Accordingly, it appears that Councilor No. 1 would have a potential conflict of interest when met with participating in official action on the proposed resolution.

QUESTION NO. 2: When the city council is required to take official action on the resolution adjusting the parks and recreation system development charges, would the provisions of ORS Chapter 244 require Councilor No. 2 to announce the nature of a conflict of interest?

OPINION: No. ORS 244.020(7)(b) provides an exception to conflicts of interest when an official action affects all members of a class to the same degree. Sometimes a public official may take action that would have a financial effect on that official, a relative of that official or a business with which the official or a relative of that official is associated. If other persons or entities were also affected to the same degree by that action, the official would be exempt from conflict of interest requirements on the basis of a class exception.

Only the Oregon Government Standards and Practices Commission (GSPC) is authorized by law to determine the existence of a class or the size of a class for the purpose of compliance with ORS Chapter 244.

The stated facts describe Councilor No. 2 as one of nine owners of single-family residential property in the vicinity of an existing city park. The park is described as a mini/neighborhood park. It appears that any financial impact from the action taken on the proposed resolution would be the same to each of these nine property owners. Accordingly, the councilor would appear to be the member of a class of nine property owners and exempt from the requirement to announce the nature of a conflict of interest when this issue comes before the council for action.

QUESTION NO. 3: When the city council is required to take official action on the resolution adjusting the parks and recreation system development charges, would the provisions of ORS Chapter 244 require Councilor No. 3 to announce the nature of a conflict of interest?

OPINION: Yes. The definitions of potential and actual conflicts of interest were presented in the response to question number one. It appears that Councilor No. 3 would be required, under the provisions of ORS Chapter 244, to announce the nature of a potential conflict of interest when the city council considers the resolution.

Relevant to this determination is that, in the stated facts, the councilor owns property that could be acquired by the city for parkland. While there is no certainty of this occurring, such an acquisition by the city could have a financial impact on the councilor. Accordingly, it appears that Councilor No. 3 would have a potential conflict of interest when met with participating in official action on the proposed resolution.

QUESTION NO. 4: When the city council is required to take official action on the resolution adjusting the parks and recreation system development charges, would the provisions of ORS Chapter 244 require Councilor No. 4 to announce the nature of a conflict of interest?

OPINION: Yes. Refer again to the definitions of potential and actual conflicts of interest presented in the response to question number one. It appears that Councilor No. 4 would be required under the provisions of ORS Chapter 244 to announce the nature of a potential conflict of interest when the city council considers the resolution.

Relevant to this determination is that, in the stated facts, the councilor owns two pieces of property that could be acquired by the city for parkland. One is 2.5 acres located adjacent to an existing park. This property is described in the stated facts as a vegetation corridor without development potential. The other property is an 8,000 square foot lot beside potential parkland. This lot is also described as not having development potential due to the slope. While there is no certainty that the city might acquire either or both of these properties, such an acquisition by the city could have a financial impact on the councilor. Accordingly, it appears that Councilor No. 4 would

have a potential conflict of interest when met with participating in official action on the proposed resolution.

QUESTION NO. 5: When the city council is required to take official action on the resolution adjusting the parks and recreation system development charges, would the provisions of ORS Chapter 244 require Councilor No. 5 to announce the nature of a conflict of interest?

OPINION: Yes. Refer again to the definitions of potential and actual conflicts of interest presented in the response to question number one. It appears that Councilor No. 5 would be required, under the provisions of ORS Chapter 244, to announce the nature of an potential conflict of interest when the city council considers the resolution.

Relevant to this determination is that, in the stated facts, the councilor owns an 8,700 square foot lot. The city council has expressed an interest in acquiring about two-thirds of an acre from Councilor No. 5 for parkland. The stated facts indicate that the council is currently evaluating the potential cost for this property and trying to identify a source for funds to make the purchase. While there is no certainty that the city might use the funds generated upon passage of the proposed resolution, such an acquisition by the city could have a financial impact on the councilor. Accordingly, it appears that Councilor No. 5 would have a potential conflict of interest when met with participating in official action on the proposed resolution.

The stated facts describe a degree of uncertainty over the likelihood of the city council choosing to use funds generated from the passage of this resolution to purchase Councilor No. 5's property. If such a purchase becomes certain before the resolution is presented to the council for action, the councilor would then have an actual conflict of interest. In that event, the councilor must announce the nature of the actual conflict of interest and refrain from participating as a public official in the discussion, debate or vote.

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.

Marnie Allen
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Please contact this office again if you would like this opinion submitted to the Government Standards and Practices Commission for adoption as a formal advisory opinion pursuant to ORS 244.280.

Sincerely,

L. Patrick Hearn
Executive Director

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