

  
Theodore R. Kulongoski, Governor

September 29, 2004

Scott K. Warner  
Yturri Rose, LLP  
P.O. box S  
Ontario, Oregon 97914

Dear Mr. Warner:

This is in response to your correspondence dated September 14, 2004 regarding the application of Oregon Government Standards and Practices laws to issues that might arise for a local surveyor who might serve on a city council.

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION STAFF  
OPINION NO. 04S-008**

**STATED FACTS:** A city resident operates a surveying business and is a candidate for a position on the city council. Currently, the surveyor represents paying clients before the city staff and the planning commission.

The city council appoints the planning commissioners and approves the hiring of city staff.

The surveyor wishes to understand how compliance with the provisions of ORS Chapter 244 could impact his practices as a surveyor if he should be elected to the city council.

**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 (14) of this section."

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."

244.020(3) " 'Business with which the person is associated' means:"

(a) "Any business or closely held corporation of which the person or the person's relative is a director, officer, owner or employee, or agent or any private business or closely held corporation in which the person or the person's relative owns or has owned stock, another form of equity interest, stock options or debt instruments worth \$1,000 or more at any point in the preceding calendar year;"

244.020(14) " '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(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:"

(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."

244.040(6) "No person shall attempt to represent or represent a client for a fee before the governing body of a public body of which the person is a member.

This subsection does not apply to the person's employer, business partner or other associate."

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:"

(1)(c) "If the public official is any other appointed official subject to this chapter, notify in writing the person who appointed the public official to office of the nature of the conflict, and request that the appointing authority dispose of the matter giving rise to the conflict. Upon receipt of the request, the appointing authority shall designate within a reasonable time an alternate to dispose of the matter, or shall direct the official to dispose of the matter in a manner specified by the appointing authority."

(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:"

(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"

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

QUESTION NO. 1: If the surveyor is a member of the city council, could the surveyor personally represent a paying client before a member of the city staff or the city planning commission without violating Oregon Government Standards and Practices laws?

OPINION: Yes. While the surveyor would be a public official, private activities and the pursuit of livelihood remain and can be engaged in without violating the provisions of ORS Chapter 244. However, if the surveyor used, or attempted to use, his position as a city counselor to somehow persuade or influence a staff person to take a favorable action toward a paying client it might constitute a violation of ORS 244.040(1)(a). This subparagraph of the statute prohibits the use of public position to gain a financial benefit that would not otherwise be available.

QUESTION NO. 2: If the surveyor is a member of the city council, could the surveyor personally represent a paying client before the city council without violating Oregon Government Standards and Practices laws?

OPINION: No. ORS 244.040(6) prohibits a public official from attempting to represent a paying client before the governing body on which the public official serves. In the stated facts the surveyor would be serving as a member of the city council. Accordingly, the surveyor would be prohibited from representing a paying client before the city council.

QUESTION NO. 3: If the surveyor is a member of the city council, could a member of the surveyor's firm personally represent a paying client before a member of the city staff or the city planning commission without causing the surveyor to be in violation of Oregon Government Standards and Practices laws?

OPINION: Yes. ORS 244.040(6) restricts only a public official from appearing before the body of which the official is a member.

QUESTION NO. 4: If the surveyor is a member of the city council and a member of the surveyor's firm represented a paying client before the city council, must the surveyor disclose the nature of a conflict of interest? Can the surveyor participate in the decision?

OPINION: The circumstances presented in this question represent one in which the surveyor/councilor would be met with a conflict of interest when the council considers an issue related to the survey firm's paying client. Even though the surveyor/councilor is not personally representing a client, the issue may have a financial impact on either the business with which the surveyor/councilor is associated or the client.

In such circumstances, the surveyor/councilor would be required to publicly declare the nature of the conflict of interest to avoid violating the provisions of ORS 244.120. Following the declaration, the surveyor/councilor's participation would be governed by whether the issue presented a potential or an actual conflict of interest.

An actual conflict of interest would arise if there were a certainty that the surveyor/councilor, the surveying firm or the client would be impacted financially by the council's action on the issue. In the case of an actual conflict of interest, once the public declaration is made, the surveyor/councilor must refrain from further participation on that issue.

A potential conflict of interest would arise if the financial impact of the council's action on the surveyor/councilor, the surveying firm or the client was only a possibility and without the certainty required for an actual conflict of interest. In the case of a potential conflict of interest, once the public declaration is made, the surveyor/councilor could participate in any subsequent action taken by the council on the issue.

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**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.**

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

LPH/dc 04S-008