

February 23, 2005

Keith A. Pitt
Hoffman Hart Wagner, LLP
1000 S.W. Broadway, 20th Flr.
Portland, Oregon 97205

Dear Mr. Pitt:

This is in response to your correspondence dated February 10, 2005 regarding the possible conflict of interest issues, which might arise for a new member of the city council.

OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION
STAFF OPINION NO. 05S-005

STATED FACTS: A city will soon seat a new member of the city council. This new councilor was selected following an election in which the results were met with controversy. Before issues surrounding the election were resolved the new city councilor initiated a suit in U.S. District Court against the city government and city officials.

In brief, the plaintiff and new councilor alleges that the city government and city officials have acted in various ways to devalue commercial property owned by the plaintiff. It was also alleged that the city and city officials denied the plaintiff equal treatment and access to public records. Monetary damages and fees are sought.

Once on the city council, it is anticipated that the new councilor will be in a position to participate in both closed and open meetings wherein issues and information related to the city's defense in the lawsuit would be discussed or subject to official action.

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

192.660 "Executive sessions permitted on certain matters; procedures; news media representatives' attendance; limits. (1) ORS 192.610 to 192.690 do not prevent the governing body of a public body from holding executive session during a regular, special or emergency

meeting, after the presiding officer has identified the authorization under ORS 192.610 to ORS 192.690 for holding the executive session.”

192.660(2) “The governing body of a public body may hold an executive session:”

192.660(2)(h) “To consult with counsel concerning the legal rights and duties of a public body with regard to current litigation or litigation likely to be filed.”

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:”

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.”

244.040(4) “No public official shall attempt to further or further the personal gain of the public official through the use of confidential information gained in the course of or by reason of the official position or activities of the public official in any way.”

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.”

[NOTE: The opinion request contained six specific questions. The laws under the jurisdiction of the Government Standards and Practices Commission (GSPC) either do not address or only partly address some of the issues raised. Accordingly, the GSPC staff cannot prepare a written opinion on some of the issues. They included, restricting access to confidential information, restrictions on a city councilor's participation or requirements for the city to provide an incoming councilor with information on ethical requirements. The following questions are presented and answered to address the issues within GSPC jurisdiction.]

QUESTION NO. 1: If a city councilor is a plaintiff in a lawsuit against the city and city officials, could the councilor violate the conflict of interest provisions of Government Standards and Practices laws by participating in discussions or actions related to issues in the lawsuit?

OPINION: The city councilor, who is the plaintiff, would clearly have personal and business financial interests in legal strategies and the outcome of the litigation. Accordingly, each time the city council convenes and issues related to the lawsuit arise, it appears that the councilor would be met with at least a potential and perhaps an actual conflict of interest.

Oregon Government Standards and Practices laws define actual conflict of interest [ORS 244.020(1)] and potential conflict of interest [ORS 244.020(14)]. 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 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, the official's relative or a business with which the official or a relative of the official is associated. A potential conflict of interest exists when an official takes action that could 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. The possible financial impact of action on an issue that gives rise to a potential conflict of interest is not certain.

When met with either kind of a conflict of interest, the councilor would be required by ORS 244.120(2)(a) and (b) to publicly disclose the nature of the conflict of interest. Following the public disclosure, a public official with a potential conflict of interest may participate in subsequent action on the issue. If there is an actual conflict of interest, ORS 244.120(2)(b)(A) requires the public official to refrain from further participation on the issue.

The councilor/plaintiff described in the stated facts would be required to publicly disclose the nature of the conflict of interest once during each meeting in which the issue is raised. Once the declaration is recorded in the meeting record, depending on the type of conflict of interest, the councilor would either participate or refrain from participation. These methods of handling a conflict of interest would apply in either open or closed meetings of the city council.

QUESTION NO. 2: If a city councilor is a plaintiff in a lawsuit against the city and city officials, could the councilor violate the prohibitions regarding the use of public office for financial gain by using official position to somehow obtain an advantage in the outcome of the lawsuit?

OPINION: ORS 244.040 describes the restraints placed on public officials in the use of a public position to gain financial benefits. The restraints apply to personal financial gain and financial gain to relatives or businesses, with which either the relative or official are associated. The provisions of this section of ORS Chapter 244 apply to actions by a public official regardless of whether or not a public disclosure has been made in accordance with ORS 244.120 and as discussed in the preceding question.

ORS 244.040(1)(a) prohibits a public official from using or attempting to use an official position or office to obtain financial gain or to avoid a financial detriment that would not otherwise be available but for the public official's holding of the official position or office. The only exceptions are official salary, honoraria, reimbursed of expenses or unsolicited awards for professional achievement. This prohibition includes the use of office to benefit the public official's relative, or for any business with which the public official or a relative of the public official is associated.

The councilor/plaintiff described in the stated facts would be prohibited, by ORS 244.040(1)(a), from using the powers of city councilor to impact or influence the outcome of the lawsuit.

ORS 244.040(4) prohibits a public official from attempting to further or furthering the personal gain of the public official through the use of confidential information gained in the course of or by reason of the official position or activities of the public official in any way.

If confidential information was gained regarding the pending lawsuit, the councilor/plaintiff could not use the information to further any gain to be realized from the outcome of the lawsuit. If the council was to hold an executive session to meet with legal counsel concerning the lawsuit, the plaintiff/councilor should be

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excluded. This is because the assumed purpose for such an executive session is to not reveal legal strategy, etc, to the other side of litigation.

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 05S-005