

February 27, 2002

Douglas C. Thompson
790 Tenth Street
Astoria, Oregon 97103

Dear Mr. Thompson:

This is in response to your correspondence dated, February 4, 2002 regarding your concerns over official actions the mayor, a business owner, may take on issues affecting the possible relocation of another major business in the area.

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION STAFF
OPINION NO. 02S-008**

STATED FACTS: The mayor of a city owns a business. The business is the exclusive bottler and distributor of a nationally known family of soft drink beverage products.

Two grocery stores are believed to be among the more important retail outlets located in the city for the beverage products sold by this business; however, the distribution by the company goes beyond the city to other communities of the surrounding area.

One of the two grocery stores, part of a large national chain, is considering the acquisition of the other less known grocery store and its property. The property would then be used to build a new and larger store. This would result in the city having only one major grocery outlet and is described as being a planned "supercenter."

The mayor is described as having acted as the city's primary point of contact with the major grocery store management. The stated facts do not present details of the mayor's role and do not identify any official acts the mayor may have taken on behalf of the city. The city council has not been called upon to take any action to date.

The mayor may be called upon to take some action as a member of the city council relating to these plans. For example, the city currently holds options or rights of way on some small parcels of land in the area of the future site of the new store. The city

council may have to act to relinquish rights and claims to such lands for the development to occur.

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(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 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 \$1000 or more at any point in the preceding calendar year."

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(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)(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: Could the mayor violate Government Standards and Practices laws by representing the city in discussions, deliberations or negotiations with a business that is a major customer of his own business?

OPINION: Yes. ORS 244.040(1)(a) prohibits a public official from using, or attempting to use, their official position or office to obtain a 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 other than official salary, honoraria, the reimbursement of expenses or an unsolicited award for professional achievement for the public official.

In addition, ORS Chapter laws define an actual conflict of interest [ORS 244.020(1)] and a 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 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 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 impact is not certain.

The stated facts do not provide a description of any specific official acts engaged in by the mayor. Only a general description is given of the mayor acting as a representative of the city during contacts with representatives of the grocery store. In that role, the mayor must refrain from taking official actions that could result in personal financial gain or the avoidance of a financial detriment. Such actions are prohibited by ORS 244.040(1)(a) and include benefits or detriments to the business with which the mayor is associated. The opportunity and/or the requirement to take action as mayor may also present the mayor with conflicts of interest that must be publicly disclosed as required by ORS 244.120.

QUESTION NO. 2: Could the mayor violate Government Standards and Practices laws by participating in city council actions relating to any planned relocation, expansion or other development of a major customer of his business?

OPINION: Yes. Such actions by the mayor could violate ORS 244.040(1)(a) which prohibits a public official from using official position for financial gain. In addition, it appears that the mayor may be met with a potential conflict of interest when presented with the need for official action on issues relating to the relocation and/or expansion of the grocery store because it is a major customer of his business.

The stated facts indicate that the grocery store, one of a major chain, is a significant customer of a business, which the mayor owns. Sales by the mayor's business to the "supercenter" and a store of the same chain in a neighboring city could create the largest portion of market share for the mayor's family business.

Any official action by the city could advance or impede the plans of the major chain store. The mayor, when met with a requirement to take such official action would have a potential conflict of interest, the nature of which he would be required to declare.

Steps taken to properly declare and describe a potential conflict of interest do not eliminate the possibility of violating ORS 244.040(1)(a), which prohibits use of official position for financial gain. Use of office for financial gain is prohibited regardless of whether conflicts of interest are disclosed.

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

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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