


Theodore R. Kulongoski, Governor

November 3, 2003

Susan K. Wainwright
Netarts Oceanside Sanitary District
P.O. Box 95
Oceanside, Oregon 97134

Dear Ms. Wainwright:

This is in response to your correspondence dated October 28, 2003 regarding conflicts of interest that might arise for you as a member of the board of directors of a sanitary district.

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION STAFF
OPINION NO. 03S-020**

STATED FACTS: There is a sanitary district that serves 1200 residences. The district is 4 miles in length and one-half mile wide. About half of the residences are occupied on a part-time basis. A small portion of the property in the district is devoted to commercial use and there is little to no industrial or agricultural use of land.

The Oregon Department of Environmental Quality (DEQ) has recently approved a facilities plan for the district. The plan calls for the relocation and redesign of a sewage and wastewater treatment facility. The relocation calls for a remote site that has sufficient property to accommodate the facility and treatment. If the DEQ facilities plan is implemented some structures would remain at the existing site. A large pump facility and the terminus of the ocean outfall pipe would remain as above ground structures.

There is a potential for future development on portions of the land that would no longer be needed for sewage and wastewater treatment. The possibilities range from a park to high-density dwellings.

A member of the board of directors of the sanitary district owns and resides on property adjacent to the existing treatment facility. The elevation of the existing facility is about 150 feet below the board member's property. The facility is not visible from the board

member's residence, but a few area residents do have a view of the digesters at the current facility.

Noxious odors regularly emanate from the existing facility. There are over 100 properties within a 1,500 foot radius of the current operating facility. The residents, within this radius, experience the detrimental affects of the odor.

Some patrons in the district have expressed a view that the board member would be met with a potential conflict of interest when required to participate in the board action on the DEQ facility plan. The board member believes that a class exception to the conflict of interest disclosure requirements might apply.

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."

244.120 “**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”

QUESTION NO. 1: Would the member of the board of directors for the sanitary district be met with a conflict of interest when required to participate in board action on the proposed DEQ facility plan?

OPINION: It appears that the board member described in the stated facts would be met with a potential conflict of interest.

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. The benefit or detriment would 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. Such an impact is not certain.

The stated facts describe a board member who owns residential property uphill and adjacent to the current site of the district’s sewage and wastewater treatment facility. The proposed DEQ facility plan for the district calls for a relocation of the treatment facility. The sanitary district board will be required to take official actions to approve and implement the various phases of the plan.

According to the stated facts, noxious odors are constantly noticeable at the board member’s property and other properties within a 1,500-foot radius of the current facility. If the DEQ plan were implemented, it is anticipated that the noxious odors would be eliminated. This improvement in air quality could increase resale value of the property owned by the board member. It also appears that property from the existing site could be developed for other uses. These factors would cause the board member to be met

with a potential conflict of interest when required to participate in official actions on the plan proposed by DEQ.

QUESTION NO. 2: Would the board member for the sanitary district be a member of an identifiable group that would be deemed a “class” by the GSPC and have an exception to the conflict of interest disclosure requirements?

OPINION: ORS 244.020(7)(b) provides for the designation of a class exception. Public officials who qualify must be found to be members of an identifiable group, a “class”, who would experience the same economic impact as a result of official action taken by the public official. The GSPC is empowered to establish criteria for and to identify a group that would qualify for the designation of a “class.”

It does not appear that the value of the 100 plus properties within the 1,500 foot radius “odor zone” of the existing waste water treatment facility would be impacted to the same degree. There are several factors that contribute to this opinion. The stated facts and the supporting documents indicate that the board member’s property and other lots in the vicinity of the current facility differ in size. Unlike many other properties in the vicinity, the board member’s property is adjacent to the existing facility. The board member’s property is also uphill from the facility and apparently does not have a view of the current installations. Other property owners do have a view of the facilities and it does not appear that all owners would have their views impacted to the same degree. Finally, it is difficult to objectively determine if all of the owners, including the board member, regularly experience the noxious odors in similar frequency and strength.

These variables suggest, therefore, that affected property owners would not be financially impacted to the same degree and the board member would not have a class exception. The board member would be required to publicly disclose a potential conflict of interest prior to taking any official action relating to the relocation of the treatment facility on each occasion when the subject arises.

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.

Susan K. Wainwright
Staff Opinion 03-020
November 3, 2003
Page 5

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 03S-020