


Theodore R. Kulongoski, Governor

January 16, 2004

Lloyd Whaley
P.O. Box 310
Brookings, Oregon 97415

Dear Mr. Whaley:

This is in response to your correspondence dated December 18, 2003 regarding a port commission and the issue of a potential conflict of interest.

OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION
STAFF OPINION NO. 04S-002

STATED FACTS: An Oregon Port Commission has five elected commissioners. One of the commissioners owns commercial property beside port owned property.

The commissioner/property owner had a commercial building constructed on the property about nine years ago. A propane tank was installed near and connected to the building. The building became a restaurant

Approximately three years after the initial construction, it was determined that the commercial building and propane tank encroached on the adjacent port property.

In 2002, the commissioner/property owner hired another commissioner, who worked as a contractor, to build a motel, which was added to the property beside the port property.

The commissioner/property owner asked the port commission to enter into a property lease agreement. The request resulted from a need to lease port property so as to meet the parking space requirements for the restaurant and motel. Neither of the commissioners, owner or contractor, participated when the port commission approved the requested lease.

The commissioner/property owner has requested a lot line adjustment so ownership of the port property, which was originally encroached upon, can be transferred to the commissioner/owner.

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(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."

244.120 "**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.”

QUESTION: Would the port commissioner, who was the general contractor, be met with a conflict of interest when participating in port commission action on issues related to the encroachment on port property by buildings constructed by the commissioner?

OPINION: No. Government Standards and Practices laws define actual conflicts of interest [ORS 244.020(1)] and potential conflicts of interest [ORS 244.020(14)]. A public official is met with a conflict of interest when required to participate in action that would (actual conflict of interest) or could (potential conflict of interest) result in a financial benefit or a financial detriment. The benefit may be to the official personally, a relative of the official or a business with which they are associated.

From the stated facts, the commissioner/contractor does not appear to have a financial interest in the outcome of any of the anticipated actions by the port commission on issues related to the building’s encroachment on port property. The commissioner may have been the general contractor, but there is no information that indicates that the contractor/commissioner would be financially impacted in any manner by the outcome of the lot line adjustment.

The commissioner/owner would certainly have a financial interest in the outcome of such issues and would be met with an actual conflict of interest. The commissioner/owner would be required to publicly disclose the actual conflict and would be required to refrain from taking any official action.

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