

April 21, 2006

Joe T. Briscoe  
PO Box 1163  
Bandon OR 97411

Dear Mr. Briscoe:

This is in response to your correspondence dated February 28, 2006 regarding professional services you would like to provide to landowners and developers in relation to their development projects.

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION**  
**STAFF OPINION NO. 06S-009**

**STATED FACTS:** A city councilor would like to engage in a private business endeavor wherein the councilor would help landowners and developers “plan their developments by doing these tasks:”

- Assemble the teams of experts needed for a project, such as lawyers, architects, civil engineers, landscape engineers, traffic engineers, surveyors, et al
- Prepare the application required to be submitted to the appropriate land use body
- Help analyze financial implications
- Assist in the selection of contractors
- Prepare homeowner association documentation and CC&Rs
- Assist in the selection of marketing aids and real estate agents
- Represent the owner where authorized and necessary

The councilor was active in this field of endeavor for nearly 20 years in another state. The councilor became familiar with Oregon land use laws by having served as a member of the planning commission in the same city for approximately six years. The councilor proposes to represent clients before the planning commission; however, if any decision is to be made by the City Council, either quasi-judicial or legislative in nature, where the councilor "...may appear to have a personal interest,..." the councilor "...will step down and leave the Council chambers."

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(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(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:"

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 councilor be in violation of Government Standards and Practices laws by engaging in a business of providing land developers and property owners with the types of professional services described in the stated facts?

OPINION: 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 the official position or office. The only exceptions are that the public official may accept financial gain in the form of official salary, honoraria, reimbursement of expenses or an unsolicited award for professional achievement. A public official is also prohibited from using an official position to obtain a financial gain for a relative or to aid the relative in avoiding a financial detriment. Using official

position to obtain financial gain for a business with which either a public official or relative of a public official is associated is also prohibited.

Public officials may engage in personal interests on personal time. That would include establishing and operating a private business. The GSPC has developed the following guidelines for public officials to follow when engaged in outside employment or when operating a private business on their personal time:

### **GUIDELINES FOR OUTSIDE EMPLOYMENT OF PUBLIC OFFICIALS**

1. That private business not be conducted on public time.
2. That public supplies, facilities, equipment, personnel, records or any other public resources not be used to carry out private business.
3. That no official action toward a third party be conditioned on a private business relationship with that third party.
4. That no confidential information be used to obtain financial benefit for the employee.

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. In this case the impact is not certain.

If a client of the councilor had a matter before the city council, such as an appeal of a planning commission decision that was adverse to the client, and the result of council's action **could** financially impact the client, the councilor would have a **potential** conflict of interest. The councilor would be required to publicly announce the nature of the conflict, but would then be permitted by law [ORS 244.120(2)(a)] to take official action.

If a client of the councilor had a similar matter before the council and the result of the council's action **would** financially impact the client, the councilor would have

an **actual** conflict of interest. The councilor would be required to publicly announce the nature of the conflict, but would then be required by law [ORS 244.120(2)(b)(A)] to refrain from taking any official action on the matter giving rise to the conflict.

The stated facts indicate that the councilor would intend to represent clients before the city planning commission. Since the councilor is not a member of the planning commission, such representation would not be prohibited by Government Standards and Practices law. State law [ORS 244.040(6)] would, however, prohibit the councilor from representing a client before the city council.

**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