



Oregon

John A. Kitzhaber, MD, Governor

Government Ethics Commission
3218 Pringle Rd SE Ste 220
Salem, OR 97302-1544
503-378-5105

E-mail: ogec.mail@state.or.us
Web Site: www.oregon.gov/ogec

October 21, 2013

John M. Junkin, Attorney at Law
Garvey Schubert Barer
121 SW Morrison Street, 11th Floor
Portland, OR 97204-3141

Dear Mr. Junkin:

This is in response to your correspondence dated September 23, 2013 regarding the application of ORS 244.040(6).

OREGON GOVERNMENT ETHICS COMMISSION STAFF ADVISORY OPINION NO. 13S-002

STATED FACTS: A land management and development firm (Firm) employs a number of individuals, including an in-house planner (employee). The Firm represents only its own interests and does not have clients. The employee is also a member of a County Planning Commission. The Planning Commission makes recommendations to the Board of County Commissioners (Board) on various land use issues and the Board makes final decisions on those matters.

An issue that would impact the development potential of Firm property came before the Planning Commission. The employee announced that he was refraining from participation in the discussions and decisions of the Planning Commission concerning this matter. The in-house planner is a salaried employee as opposed to a consultant or contractor. As part of his duties as an employee of the Firm, he was asked by the Firm to appear before the Planning Commission to present the Firm's position on the issue. The employee would not receive a financial benefit or fee for making this presentation beyond his regular salary from the Firm and the employee's salary would not change as a result of any decision of the Planning Commission.

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

ORS 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 (12) of this section."

ORS 244.020(3) "Business with which the person is associated" means:

(a) Any private 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;..."

ORS 244.020(12) "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:..."

ORS 244.020(14) "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 as defined in ORS 174.109 as an elected official, appointed official, employee or agent, irrespective of whether the person is compensated for the services."

ORS 244.040(1) "Except as provided in subsection (2) of this section, a public official may not use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment for the public official, a relative or member of the household of the public official, or any business with which the public official or a relative or member of the household of the public official is associated, if the financial gain or avoidance of financial detriment would not otherwise be available but for the public official's holding of the official position or office."

ORS 244.040(6) "A person may not 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."

ORS 244.040(7) "The provisions of this section apply regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed under ORS 244.120."

ORS 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:"

(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 "

(b) "When met with an actual conflict of interest, announce publicly the nature of the actual conflict and:"

(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."

(B) "If the 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."

ORS 244.135(1) "A member of a city or county Planning Commission shall not participate in any commission proceeding or action in which any of the following has a direct or substantial financial interest:

(a) The member or the spouse, brother, sister, child, parent, father-in-law, mother-in-law of the member;

(b) Any business in which the member is then serving or has served within the previous two years; or

(c) Any business with which the member is negotiating for or has an arrangement or understanding concerning prospective partnership or employment."

ORS 244.135(2) "Any actual or potential interest shall be disclosed at the meeting of the commission where the action is being taken."

QUESTION: This question assumes that the public official has taken appropriate actions required by ORS 244.120 and has recused himself from acting in his official capacity as a Planning Commissioner with respect to the issue. Does ORS 244.040(6) prohibit a member of a Planning Commission who is also a salaried employee of a land development firm from appearing before the Planning Commission during a public comment period to present his employer's position on an issue before that Planning Commission?

ANSWER: No. ORS 244.040(6) prohibits persons from representing a client for a fee before the governing body of a public body of which the person is a member. The Oregon Government Ethics Commission (Commission) adopted a Guide for Public Officials (Guide) in October 2010 which contains the following discussion of this statute:

"ORS 244.040(6) also has a single provision to address circumstances created when public officials, who are members of the governing body of a public body, own or are associated with a specific type of business. The type of business is one that may occasionally send a representative of the business who appears before the governing body on behalf of a client for a fee. Public officials who are members of governing bodies and own or are employed by businesses, such as a law, engineering or architectural firm, may encounter circumstances in which this provision may apply. For example, a member of a city council who is an architect has a developer as a client of the architect's business. If the developer has a proposed subdivision to be approved by the city council, the architect may not appear before the city council on behalf of the client developer. Another person representing the client developer on behalf of the architect's business may appear, but not the councilor/architect."

In this instance the Firm employee is not collecting a client fee for his appearance before the Planning Commission nor is his employer Firm collecting a fee from any client. Therefore, this situation is distinguishable from the discussion in the Guide concerning the application of ORS 244.040(6).

As described in the scenario presented, the Firm employee has publicly announced that he is refraining from participation in a discussion or decision on the issue before the Planning Commission. However, to fully comply with the conflict of interest provisions found in ORS 244.120(2), the Planning Commissioner must also publicly disclose the nature of his conflict of interest as it relates to a business with which he is associated, whether met with an actual or a potential conflict of interest, at each Planning Commission meeting at which a conflict arises. If met with an actual conflict of interest, he must also comply with the other applicable statutory requirements such as refraining from participating as a public official in any discussion or debate on the issue out of which the conflict arises or from voting on the issue. If the Planning Commissioner complies with the applicable requirements of ORS 244.120(2) each time he is met with

a conflict, he fulfills his duties as a public official as they pertain to the conflict of interest provisions of Oregon Government Ethics law. Compliance with the provisions of ORS 244.120 would also satisfy ORS 244.135 and meet the Planning Commissioner's duties as described in this situation.

Once the Firm employee/Planning Commissioner has complied with the conflict of interest statutes, the Firm employee may address the Planning Commission on behalf of his employer on the same basis as other citizens as long as he observes a strict separation between his roles as Planning Commissioner and citizen.

After the Planning Commissioner has publicly declared the nature of his conflict of interest and complied with any other applicable provisions of ORS 244.120(2), he may follow the same procedures as any other member of the public who wishes to present public commentary to the Planning Commission. Some of the usual procedures for taking public input include such things as signing up to give public comment, adhering to a specific time limit for presentation, waiting in line at the microphone, etc. In other words, the Firm employee must address the Planning Commission as a citizen and not as a Planning Commissioner.

ORS 244.040(1) addresses the legal obligations of the Planning Commissioner when it comes to the use of his office for personal financial gain. However, the application of that statute to the situation described in this case would not result in a different outcome from the analysis as outlined above.

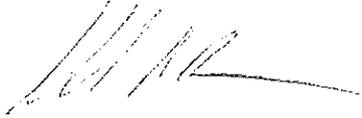
In conclusion, if the Planning Commissioner is acting as a private citizen rather than in his official capacity and he is not representing a client for a fee as prohibited in ORS 244.040(6), he may appear before the Planning Commission of which he is a member to give public testimony under the same conditions and circumstances as other members of the public so long as he complies with the conflict of interest provisions of ORS 244.120 and ORS 244.135 and strictly observes the separation of his roles as public official and private citizen/employee.

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 GOVERNMENT ETHICS COMMISSION.

John Junkin
Commission Staff Advisory Opinion 13S-002
October 21, 2013
Page 6

Please contact this office again if you would like this opinion submitted to the Oregon Government Ethics Commission for adoption as a formal advisory opinion pursuant to ORS 244.280.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Bersin', with a long horizontal flourish extending to the right.

Ronald A. Bersin
Executive Director

RAB/dg 13S-002