



Oregon

John A. Kitzhaber, MD, Governor

Government Ethics Commission

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April 4, 2014

Megan K. Thornton
Assistant City Attorney
City of West Linn
22500 Salamo Road
West Linn, Oregon 97068

Dear Ms. Thornton:

At its April 4, 2014 meeting, the Oregon Government Ethics Commission (Commission) adopted the following advisory opinion:

OREGON GOVERNMENT ETHICS COMMISSION ADVISORY OPINION NO. 14A-1001

STATED FACTS: The City of West Linn (City) is considering a set of proposed amendments to chapter 32 of its Community Development Code (CDC). These amendments would revise and replace the entirety of the Water Resource Area (WRA) Protection chapter. WRAs include specifically identified wetlands, riparian areas, streams and creeks, and major or minor open channel drainageways, as well as the adjacent transition and setback areas around the water resource. The purpose of the WRA chapter is to minimize the impact of, or mitigate for, development on properties in the city that have been identified within the boundaries of a WRA for the protection of public health and the preservation of vulnerable fish and wildlife habitat.

In advance of a January 15, 2014 public meeting of the West Linn Planning Commission, approximately 1700 Measure 56 notifications were mailed to property owners within or adjacent to the City's WRAs, explaining that the City is considering changes to the WRA regulations that may affect their property. According to a staff report prepared by West Linn Associate Planner Peter Spir, changes to the chapter include the addition of various definitions, adoption of a WRA map, creation of an individualized WRA variance process, modification of existing setbacks, and allowance of greater sensitivity to identified hardship properties.



The Measure 56 notification also contained internet links to both the amendments and a City web page that explains the potential impacts to property owners in greater detail. The City's website asserts that the proposed changes will have little to no effect on most people, but that for property owners "who plan to expand the footprint of their homes or buildings, it will generally, but not always, increase their development options." Properties that lie entirely within a WRA, or undeveloped property over 17,000 square feet in size will also see the biggest increase to their development options. In the notification, the City also encourages affected residents to meet with Planning Department staff for full analysis of how the changes will affect their specific property.

QUESTION 1: Could a city councilor be met with a conflict of interest when participating in any action, decision or recommendation on the proposed amendments to the City's CDC? Does the answer depend on whether the public official was sent a Measure 56 notification?

ANSWER 1: Yes, a city councilor could be met with a conflict of interest if the action, decision or recommendation would or could be to the private pecuniary benefit or detriment of the public official, the public official's relative or any business with which the public official or a relative is associated. No, the answer does not depend on whether the public official was sent a Measure 56 notification.

Oregon Government Ethics law defines actual conflict of interest [ORS 244.020(1)] and potential conflict of interest [ORS 244.020(12)]. 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 a public official participates in an official action that would have a direct and specific financial impact on that official, the official's relative or any business with which the official or a relative is associated. A potential conflict of interest exists when a public 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.

Based on the stated facts, the proposed amendments to the WRA chapter of the CDC could have a financial impact on city councilors irrespective of whether they have been sent a Measure 56 notification. Whether or not the financial impact of the proposed amendments is certain and specific, however, is unclear, and may depend in whole or in part on the property location and the intended use of the property. Public officials are individually responsible for exercising their own good judgment in determining whether or not an action, decision or recommendation presents a conflict of interest. There may be property owners who were sent a Measure 56 notification, for instance, whose properties exist outside the WRA boundaries and may not experience any impact whatsoever. Alternatively, public officials who are not property owners, and were therefore not sent a Measure 56 notification, may still be affected by the proposed amendments and could be met with conflicts.

QUESTION 2: Would individuals affected by the proposed amendments constitute a “class” under ORS 244.020(12)(b)?

ANSWER 2: No. ORS 244.020(12)(b) provides an exception to compliance with the conflict of interest provisions of ORS 244.120 if an official action would financially impact the public official, a relative of the public official, or any business with which the public official or a relative of the public official to the same degree as a broader class of individuals. If a significant number of other persons or entities are also “affected to the same degree” by that action the official may be exempt from conflict of interest provisions on the basis of a “class exception.” Only the Commission may determine what group constitutes such a class.

The stated facts, however, indicate that the individualized variance process, hardship provisions, relaxed limitations on larger properties, and changes to required WRA setbacks mean that the financial impact of the proposed amendments will vary by property. Proximity to, and type of, a given water resource, as well as the size and slope of a property are all variables that affect the impact of the proposed amendments. Some properties will see a slight increase in their setbacks that could result in a smaller building envelope and potentially decrease the value of the property. Others, like vacant properties larger than 17,000 ft² or those located entirely within a WRA, would or could see a significant increase to their development opportunity. In some cases, property owners can also propose modified setbacks, balanced with mitigation, to potentially increase the development options on their land.

These factors demonstrate that the financial impact, positive or negative, of the proposed amendments will ultimately be determined at the tax lot level and will not affect all properties to the same degree.

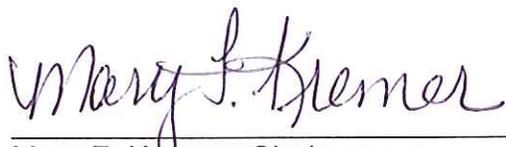
QUESTION 3: What procedures should councilors follow in the event their role as a public official gives rise to an actual or potential conflict of interest?

ANSWER 3: ORS 244.120(2) requires that, on each occasion they are met with a conflict, councilors publicly announce the nature of any conflict of interest before taking action on the matter. In the case of an actual conflict of interest, councilors would be required to refrain from further participation, including discussion and vote, in any official action on the issue that gave rise to the conflict. In the case of a potential conflict of interest, following the public announcement of the nature of their conflict, councilors may participate in official action on the issue that gave rise to the conflict. It is recommended that councilors confirm these public announcements are included in the official records of council meetings.

Further, councilors must understand that ORS 244.040(1) prohibits public officials from using or attempting to use an official position to obtain financial gain or to avoid 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, a relative or member of the household of the public official are associated, if the opportunity would not otherwise be available but for the public official's holding the position. This financial gain prohibition exists apart from the provisions regarding conflict of interest in ORS Chapter 244.

THIS OPINION IS ISSUED BY THE OREGON GOVERNMENT ETHICS COMMISSION PURSUANT TO ORS 244.280. A PUBLIC OFFICIAL OR BUSINESS WITH WHICH A PUBLIC OFFICIAL IS ASSOCIATED SHALL NOT BE LIABLE UNDER ORS CHAPTER 244 FOR ANY ACTION OR TRANSACTION CARRIED OUT IN ACCORDANCE WITH THIS OPINION. THIS OPINION IS LIMITED TO THE FACTS SET FORTH HEREIN. OTHER LAWS OR REGULATIONS NOT WITHIN THE JURISDICTION OF THE COMMISSION MAY ALSO APPLY.

Issued by Order of the Oregon Government Ethics Commission at Salem, Oregon on the 4th day of April 2014.



Mary F. Kremer, Chairperson



Lynn Rosik, Assistant Attorney General

ADDENDUM

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(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 or a relative of the public official is associated only as a member or board director or in a nonremunerative capacity.

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;

(b) Any publicly held corporation in which the person or the person's relative owns or has owned \$100,000 or more in stock or another form of equity interest, stock options or debt instruments at any point in the preceding calendar year;

(c) Any publicly held corporation of which the person or the person's relative is a director or officer; or

(d) For public officials required to file a statement of economic interest under ORS 244.050, any business listed as a source of income as required under ORS 244.060 (3).

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:

- (a) An interest or membership in a particular business, industry, occupation or other class required by law as a prerequisite to the holding by the person of the office or position.
- (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.

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 244.020(15) "Relative" means:

- (a) The spouse, parent, stepparent, child, sibling, stepsibling, son-in-law or daughter-in-law of the public official or candidate;
- (b) The parent, stepparent, child, sibling, stepsibling, son-in-law or daughter-in-law of the spouse of the public official or candidate;
- (c) Any individual for whom the public official or candidate has a legal support obligation;
- (d) Any individual for whom the public official provides benefits arising from the public official's public employment or from whom the public official receives benefits arising from that individual's employment; or
- (e) Any individual from whom the candidate receives benefits arising from that individual's employment.

244.040 Prohibited use of official position or office; exceptions; other prohibited actions. (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(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 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.