

March 5, 1997

Mary Jane Koelle  
Phoenix City Councilor  
PO Box 897  
Phoenix, OR 97535

Dear Ms. Koelle:

This is in response to your correspondence dated February 5, 1997, concerning conflicts of interest which may arise in your attempt to obtain a refund of business license fees for your private business.

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION STAFF**  
**OPINION NO. 97S-005**

**STATED FACTS:** You own a business in the City of Phoenix. Prior to May, 1994, a city ordinance required businesses to pay an annual business license fee of \$20.00 per business plus \$2.00 for each employee over two. In May 1994, the city council voted on a motion to increase business license fees to \$40.00 per business plus \$4.00 for each employee over two, effective July 1, 1994. The city collected the increased fee for two years based upon the motion. You believe the City of Phoenix had no authority to collect the increased fee because an ordinance was not enacted.

You became a member of the Phoenix city council in February, 1996. In August, 1996, the city council passed an ordinance to increase the business license fee commensurate with the fee increase approved in May, 1994. You do not believe business licensees are aware the increased fee was collected without the benefit of an ordinance. You are one of the 261 business license holders in the city this fiscal year. You would like to seek a refund of the increased fee you paid prior to an ordinance being adopted and/or promote a refund for all who overpaid.

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**RELEVANT STATUTES:** The following Oregon Revised Statutes are applicable to the issues addressed herein:

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 (8)(a) to (c) 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 is associated in a nonremunerative capacity.

ORS 244.020(3): Business with which the person is associated means any business of which the person or the person's relative is a director, officer, owner or employee, or agent or any corporation in which the person or the person's relative owns or has owned stock worth \$1,000 or more at any point in the preceding calendar year.

ORS 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:

(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 classes that qualify under this exception.

ORS 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,

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employee, agent or otherwise, and irrespective of whether the person is compensated for such services.

ORS 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.

(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.

ORS 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:

(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.

QUESTION#1: Does a city councilor, who has one of 261 business licenses issued by the city, have a conflict of interest in relation to taking official action affecting business owners in the city?

OPINION: Oregon Government Standards and Practices laws define actual conflict of interest [ORS 244.020(1)] and potential conflict of interest [ORS 244.020(7)]. For certain officials, the law prescribes different actions depending on whether a conflict of interest is potential or actual. The difference between a potential and actual conflict of interest is determined by the words could and would. A potential conflict of interest exists when an 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. Such possible financial impact is not certain. An actual conflict of interest occurs when the action is reasonably 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 or the official's relative or a business with which the official or the official's relative is associated.

ORS 244.020(7)(b) provides an exception to conflicts of interest when an official action affects all members of a class to the same degree. Sometimes a public official may take action that would have a financial effect on that official, a relative of that official or a business with which the official or the official's relative is associated. If other people or business entities are also affected to the same degree by that action, the official would be exempt from conflict of interest requirements on the basis of a class exception.

According to the stated facts, you are one of 261 business licensees operating in the city. If the city council were to consider whether or not to refund any business license fees paid by all businesses operating in the city, it would appear that your business would not be affected to any greater degree than any other business that was operating within the city and paid a business license fee. It would therefore appear that you, as a member of the city council, would come within the class exception and you would not need to declare a conflict nor refrain from taking action.

It should be noted that only the Government Standards and Practices Commission is authorized by law to determine the existence of a class for the purpose of compliance with ORS Chapter 244.

QUESTION#2: Would you be using your public office for personal financial gain if you asked for a refund for your business?

OPINION: ORS 244.040(1)(a) prohibits a public official from using, or attempting to use, official position or office to obtain financial gain or avoidance of financial detriment for the official, the official's relative or a business with which the official or the official's relative is associated. This prohibition exists regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed pursuant to ORS

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244.120. This prohibition prevents public officials from gaining personal financial advantage through the use of their public office or position.

It would appear that if the city was not authorized to increase business license fees without first passing an ordinance, all business owners who paid the increased fees could seek a refund. In addition, you, as a business owner, could seek a refund from the city without using your position as a city councilor.

The issue of whether the city had the authority to collect the higher assessment after the May, 1994 action is not within the GSPC s jurisdiction.

**THIS RESPONSE IS BASED SOLELY ON THE INFORMATION PROVIDED IN YOUR WRITTEN INQUIRY AND IS NOT A FORMAL ADVISORY OPINION PURSUANT TO ORS 244.280. IT IS MY PERSONAL ASSESSMENT AS THE EXECUTIVE DIRECTOR OF THE OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION.**

Sincerely,

L. Patrick Hearn  
Executive Director

LPH:aip/koelle.so