

May 24, 2000

Tom Wilczek, PE
Stuntzner Engineering & Forestry, LLC
705 South 4th, P.O. Box 118
Coos Bay, Oregon 97420

Dear Mr. Wilczek:

This Letter is in response to your correspondence dated May 11, 2000 concerning a possible conflict of interest regarding your employment with Stuntzner Engineering & Forestry, LLC and your work, as an employee of Stuntzner, on an as needed basis for the City of Port Orford.

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION STAFF OPINION
NO. 00S-012**

STATED FACTS: In June 1998, Stuntzner Engineering and Forestry, LLC (SEF) was sought out by the Port Orford Public Works director and asked to perform engineering services on an as needed basis. Engineer A is the civil engineering department head for SEF and manager for civil related services that SEF provides for the city. Engineer A has been the main contact between the city and SEF since SEF began working for the city.

SEF has offices in Coos Bay, Brookings and other locations within the state. Engineer A works out of the Coos Bay office.

In June 1999, SEF Engineer B, who works out of the SEF Brookings office, was retained by a couple to survey land in Port Orford and to prepare a tentative subdivision plat for submittal to the city planning commission. At some point later the couple retained Don Hoag and Associates, an engineering firm based in Brookings, to provide other engineering services for the subdivision.

In March 2000 the subdivision plat prepared by Engineer B and a street and utility plan prepared by Hoag were submitted to the city via the city planner. The subdivision street and utility plan was delivered to Engineer A at the Coos Bay office with a memo from the city planner soliciting comments from Engineer A regarding the plan. Engineer A did not receive, nor has Engineer A ever seen, the tentative plat prepared by Engineer B ..

Tom Wilczek
May 24, 2000
Page two

After receiving the subdivision street and utility plan, Engineer A called the city planner to clarify some items. It was at this time that Engineer A learned of the involvement of Engineer B. The city planner did not send the subdivision plat prepared by Engineer B knowing that no one from SEF could review the plat due to a conflict of interest which was confirmed by Engineer A. Engineer A told the city planner that the review of the subdivision plat was likely the responsibility of the county surveyor.

The subdivision street and utility plan was reviewed by Engineer A and Engineer A sent a letter to the city planner with comments, one of which the adequacy of a water supply and pump station to serve the subdivision. Engineer A received a pump station analysis from Hoag and was asked by the city public works director to review it prior to the next planning commission meeting. Prior to finishing the review letter on the pump station analysis, Engineer A received a memo from the city attorney expressing concern of a possible conflict of interest on the part of Engineer A. Engineer A completed the review letter without specific recommendations directed to the subdivision developer and mentioned the concern of the city attorney.

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 (7) 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.

Tom Wilczek

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:

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, 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:

(c) If the public official is any other appointed official subject to this chapter, notify in writing the person who appointed the public official to office of the nature of the conflict, and request that the appointing authority dispose of the matter giving rise to the conflict. Upon receipt of the request, the appointing authority shall designate within a reasonable time an alternate to dispose of the matter, or shall direct the official to dispose of the matter in a manner specified by the appointing authority.

Tom Wilczek
May 24, 2000
Page four

QUESTION: Did the work completed by Engineer A on this project give rise to either a potential conflict of Interest or an actual conflict of interest?

OPINION: The Oregon Government Standards and Practices laws define actual conflict of interest ORS 244.020(1) and potential conflict of interest ORS 244.020(7). 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 reasonably certain to result in a financial benefit or detriment. It will occur when an action taken by a public 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 possibly have a financial impact on the official, a relative of the official or a business with which the official or a relative of the official is associated. Such possible financial impact is not certain.

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 244.120.

The intent of Oregon Government Standards and Practices laws is not to prevent licensed professionals from receiving income by serving as a public official. Neither are these statutes intended to restrict the income of these same licensed professionals in a non-public capacity. The statutes are intended to regulate public officials and prevent them from using their office in a manner that would give the public official an unfair advantage over those who are not public officials.

The GSPC staff does not believe the stated facts indicate that, by reviewing the street and utility plan for the city, Engineer A was taking any official action that would have been to the private pecuniary benefit or detriment of Engineer A, the couple who retained SEF and Hoag for separate services or SEF. The couple are not relatives of Engineer A nor are they a business with which Engineer A is associated as defined by ORS 244.020(1). Neither would it appear that Engineer A was using, or attempting to use, official position or office for the financial gain of Engineer A, a relative or a business with which Engineer A or a relative is associated.

Tom Wilczek
May 24, 2000
Page five

It does not appear that Engineer A took any official action, in the capacity of a public official, which gave rise to either a potential conflict of interest or an actual conflict of interest.

THIS RESPONSE ADDRESSES ONLY THE APPLICATION OF ORS CHAPTER 244 TO THE FACTS STATED HEREIN. OTHER LAWS OR REQUIREMENTS MAY ALSO APPLY. THIS IS NOT A FORMAL ADVISORY OPINION PURSUANT TO ORS CHAPTER 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

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