

September 18, 2001

Darrin J. Fleener  
281 North Main Street  
Falls City, Oregon 97344

Dear Mr. Fleener:

This letter is in response to your correspondence dated August 29, 2001 concerning conflicts of interest that might arise as a result of you participating in official actions in your capacity as a city councilor relating to reconstruction of the street on which your residence is located.

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION STAFF**  
**OPINION 01S-020**

STATED FACTS: In October 1998 the citizens of Falls City determined, by the adoption of a publicly created strategic plan, the reconstruction of North Main Street, including curbs, gutters and sidewalks as a high priority for the community. The streets committee, a standing committee of the city council, determined the project to be the number one priority of the committee. This priority was reconfirmed via a mail survey in the spring of 1999.

A newly appointed city councilor owns and lives in a residence on North Main Street. The new councilor was named by the mayor to be chair of the streets committee.

In the spring/summer of 1999 Polk County informed the city that the county intended to reconstruct North Main Street in 2001 or 2002. To take advantage of the work the county would be doing on North Main Street, the city applied for a grant for the reconstruction of curbs, gutters and sidewalks for the same section of North Main Street. The city received a \$300,000 grant for this reconstruction project. The committee is now going to begin the design phase of the project and has scheduled construction for spring of 2002.

There are nine residential dwellings, nine businesses, one school, three churches, one fire station and two mixed use residential/commercial buildings located in the project area of North Main Street.

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

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.

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:

244.020(7)(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 class that qualify under this exception.

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.

**244.120 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.

244.120(2)(b)(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:** Would conflicts of interest arise for the city councilor as a result of taking official action on matters relating to the North Main Street project because the councilor owns and lives in a residence on that street?

**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)]. 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 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 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 financial impact is not certain.

ORS 244.040(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 a relative of that official is associated. If other persons or 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.

Only the Oregon Government Standards and Practices Commission (GSPC) is authorized by law to determine the existence of a class or the size of a class for the purpose of compliance with ORS Chapter 244.

The stated facts indicate that there are at least 20 properties that would appear to be impacted by the street reconstruction project. It appears that none of the owners of the 20 properties would be financially impacted to any greater or lesser degree than another. It appears, therefore, that a class exception would exist. Accordingly, it appears that the city councilor would not have a conflict of interest and would be exempt from the conflict of interest disclosure requirements in ORS 244.120.

**THIS RESPONSE ADDRESSES ONLY THE APPLICATION OF ORS CHAPTER 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 STANDARDS AND PRACTICES COMMISSION.**

Please do not hesitate to call or write again if you have additional questions or desire clarification of other areas of Oregon Government Standards and Practices law.

Sincerely,

L. Patrick Hearn  
Executive Director