


Theodore R. Kulongoski, Governor

April 23 2004

Katie Hammer
General Manager
Central Oregon Park and Recreation District (COPRD)
P.O. Box 843
Redmond, Oregon 97756

Dear Ms. Hammer:

This is in response to your correspondence dated April 9, 2004 regarding conflict of interest issues.

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION STAFF
OPINION NO. 04S-004**

STATED FACTS: There is a park and recreation special district in central Oregon. There are five elected members of the governing board of directors. An affirmative vote of a majority (3) of the board members is required to approve any proposed action.

Two of the current board members are homebuilders and may have some affiliation with the Central Oregon Builders Association (COBA). One is retired and now builds about one home per year. The other is a full time homebuilder.

It is anticipated that the board will be discussing and acting upon a proposal for the COPRD to begin assessing system development charges (SDC). These charges would be collected from any owner, builder or developer that applies for a permit to build, expand or modify a structure within the district.

The special district is in Deschutes County and covers the area around Redmond, Terrebonne and a short distance toward Bend. The Central Oregon Builders Association has approximately 175 members, 27 of which have provided Redmond or Terrebonne addresses.

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

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 (14) of this section."

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."

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

(a) Any 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;

244.020(14) " '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(14)(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.”

244.120 “**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.”

QUESTION: When a member of the COPRD board of directors, whose vocation is homebuilding, is required to participate in official action on system development charges, would the board member be met with a conflict of interest?

OPINION: Yes. It appears that a board member who derives income from homebuilding would experience a financial detriment if the COPRD enacted the collection of system development charges described in the stated facts. Accordingly, such a board member would be met with an actual conflict of interest.

Oregon Government Standards and Practices laws define actual conflict of interest [ORS 244.020(1)] and potential conflict of interest [ORS 244.020(14)]. 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 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. In this case the impact is not certain.

ORS 244.020(14)(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 were 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.

The stated facts indicate that there are 175 members in the Central Oregon Builders Association. While it is probable that not all of those members build homes in the area covered by the special district, it is likewise probable that not all of the area's homebuilders may be in the association. It appears that the district board members, who are also homebuilders, are members of a class. The class would be all homebuilders who build homes in the special district area.

It appears that all homebuilders would, in substance, be financially impacted to no greater or lesser degree by the district board taking action to impose system development charges. Accordingly, the board members who are also homebuilders would be exempt from the requirement of making a public declaration of an actual conflict of interest and could participate in action on the issue of system development charges.

It should be noted that 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 designation of class based on the stated facts in this opinion should not be applied to different circumstances.

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 STANDARDS AND PRACTICES COMMISSION.

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

Sincerely,

L. Patrick Hearn
Executive Director

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