

February 23, 2005

Michael W. Franell  
Legal Department  
City of Ashland  
20 East Main Street  
Ashland, Oregon 97520

Dear Mr. Franell:

This is in response to your correspondence dated January 25, 2005 regarding whether or not city board, commission and committee members may receive fees to represent clients before the various governing bodies of the city.

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION STAFF  
OPINION NO. 05S-004**

**STATED FACTS:** A city has formed and is served by fifteen different boards, committees and commissions. Many of the members who have been appointed to serve on these governing bodies work as sole proprietors or partners in small consulting companies in the area.

The city legal department has formulated several questions as to the propriety of members of the various boards, commissions and committees appearing for a fee before the governing bodies of the city on which they may or may not serve.

**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(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(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(6) "No person shall attempt to represent or represent a client for a fee before the governing body of a public body of which the person is a member. This subsection does not apply to the person's employer, business partner or other associate."

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."

NOTE: To simplify the formulation of questions and the discussion that follows, the term "governing body" will be used to represent all city governing bodies with elected or appointed members, such as the city council, city planning commission or any other city board, commission or committee.

QUESTION NO. 1: Would the member of a city governing body violate Government Standards and Practices laws if that member represented a client for a fee before the governing body on which the member serves?

OPINION: This would be a violation. The language in ORS 244.040(6) is straightforward. It prohibits a person from attempting to represent or actually representing a client for a fee before the governing body of which the person is a member. This prohibition only applies to the member of the governing body and not to the member's employer, business partner, employee or other associate. For example, the member of a city planning commission is prohibited from appearing before that same city planning commission to represent a client for a fee, but a business partner could represent the same client for a fee.

QUESTION NO. 2: Would the member of one city governing body violate Government Standards and Practices laws if that member represented a client for a fee before a different city governing body, one on which the member does not serve?

OPINION: This would not be a violation. ORS 244.040(6) only prohibits the member of a city governing body from appearing before that same governing body to represent a client for a fee. That prohibition does not apply to the member of a city governing body, who wishes to represent a client for a fee before a different governing body. For example, a member of the city planning commission is not prohibited from appearing before the city council to represent a client for a fee.

QUESTION NO. 3: If the member of one city governing body participated in making a recommendation to another city governing body, would the member violate Government Standards and Practices laws if that member represented a client for a fee before the city governing body that must act on that same recommendation?

OPINION: No, it would not be a violation. The application of ORS 244.040(6) is explained in the opinion given for QUESTION NO. 2. In this situation, the risk to the member of a city governing body of violating Government Standards and Practices laws presents itself when the member participates in the action by the governing body that makes the recommendation.

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 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.

In the premise of this question, the member of the city governing body might participate in action, which forwards a recommendation to another city governing body. When participating in the action to forward a recommendation, if the member knows that the recommendation could or would result in an opportunity to represent a client for a fee before the other governing body, the member would be met with a conflict of interest. If forwarding a recommendation would, with certainty, create an opportunity for a fee it would be an actual conflict of interest. If the opportunity for a fee were only a possibility, it would be a potential conflict of interest. In either case, a public disclosure as to the nature of the conflict of interest, business relationship with the client, would be required before acting to approve the recommendation. In the case of a potential conflict of interest the member could then participate in forwarding the recommendation. If an actual conflict of interest arose, the member would be required to refrain from participation following the disclosure. Once the recommendation was passed to another governing body of the city, representing the client for a fee would not be prohibited.

QUESTION NO. 4: Does ORS 244.040(6), which prohibits members of a governing body from representing a client for a fee before that same governing body, make any exception for governing body members who are the only person available or qualified to represent the members business and the client for a fee?

OPINION: No. The only exception would be if the representation was made and no fee was levied, paid or accepted.

QUESTION NO. 5: If the member of a city governing body represented a client for a fee before the governing body on which they serve, would a violation of Government Standards and Practices laws be avoided if the member recused himself/herself from participating in any subsequent action taken by the governing body on the issue?

OPINION: No. Whether the member of a city governing body planned to recuse himself/herself from any subsequent action taken on an issue makes no difference. A member of the city governing body cannot represent a client for a fee before the same governing body on which he/she serves.

Actions taken by public officials in regard to conflicts of interest are sometimes referred to in different forms of the words "recuse" and "abstain." In using these familiar terms one must be careful to understand that a public official does not avoid the risk of violating the provision of ORS Chapter 244 as to conflicts of interest by mere abstention or recusal. ORS 244.120 provides the methods to be used when met with a conflict of interest. Depending on the public position held, a public official is required to make a written or public disclosure of the "nature" of the conflict of interest before action is taken on the issue that gives rise to the conflict. Then depending on the type of conflict of interest, the public official may participate in the subsequent action or the public official must refrain from participation.

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**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.**

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

LPH/dc 05S-004