May 21, 2010

John N. Morgan
The MorganCPS Group, Inc.
1308 Marigold Street NE
Keizer, Oregon 97303

Dear Mr. Morgan:

This is in response to your correspondence dated April 20, 2010 regarding how Oregon Government Ethics law may apply to a person who has a contract to provide services as a city planner and has been offered an ownership or employment opportunity by a property development business.

OREGON GOVERNMENT ETHICS COMMISSION STAFF ADVISORY OPINION NO. 10S-001

STATED FACTS: The stated facts refer to a private consultant that owns and operates a private business, MorganCPS Group, Inc. (MorganCPS). MorganCPS is a consulting firm that offers planning and other services to government agencies throughout Oregon. MorganCPS has a contractual agreement with a city to provide a city planner and the owner, John N. Morgan, performs the duties of that position. Mr. Morgan is both the consultant and the city planner when those terms are used in this opinion.

The city planner was approached by a representative of a private property development business to inquire about development opportunities. The city planner apparently discussed industrial park and downtown area development opportunities based on the city planner's knowledge of the city's participation in planning or advocating on behalf of these developments. The city planner suggested or recommended that the property development business contact the general manager of the local port district, the owner of the industrial park, to discuss development opportunities. The city planner also contacted the port district advising the general manager of this suggestion or recommendation. Subsequent interaction between the port district and the property development business resulted in a contractual agreement between the two parties allowing the property development business to develop the industrial park property owned by the port district.

The property development business apparently proposed that the city planner should annul the contractual agreement between MorganCPS and the city so the city planner could join their business as an owner or contractor. If the offer were accepted, Mr. Morgan would then assume a significant role in the development of the industrial park property.

QUESTION: Is Mr. Morgan a "public official", as defined in ORS 244.040(14), in his capacity as a contract city planner?

ANSWER: Yes. Oregon Attorney General Opinion Number 8214, dated April 9, 1990, addressed the application of the definition of "public official" to contractors with government bodies. The opinion states that a private sector contractor does not become a "public official" merely by entering into a contract with government, but the nature of the services provided is a key factor in this opinion. The determination of whether or not a contractor to government is a "public official" depends upon if the contractor **performs services to** the government or **performs services on behalf of** the government. The opinion concludes that a contractor who provides a service **on behalf of** government is a "public official."

Consistent with the Attorney General's opinion, if a contractor performs government functions or responsibilities on behalf of the governing body, the contractor is a "public official as defined in ORS 244.040(14). However, if a contractor simply performs services for the government that are not governmental in nature, the contractor is not a "public official." The stated facts indicate that Mr. Morgan's business, MorganCPS, has a contractual agreement with a city to serve as the city planner and Mr. Morgan performs the duties of that position. Since Mr. Morgan's services are apparently **performed on behalf of** the city and **would otherwise** be provided by the city, Mr. Morgan is a "public official", as defined in ORS 244.040(14).

QUESTION: Would Mr. Morgan violate Oregon Government Ethics law by annulling the contractual agreement between MorganCPS and the city and joining the property development business as an owner or contractor assuming a significant role of the development of the industrial park?

ANSWER: ORS 244.040(1) prohibits a public official from using or attempting to use an official position to obtain financial gain or to avoid financial detriment for the public official, a relative of the public official or a business with which either are associated, if the opportunity would not otherwise be available but for the public official's holding the position.

The stated facts appear to indicate that the opportunity for Mr. Morgan to accept the proposal from the property development business, including potential ownership or employment contingencies, may be an opportunity that would not otherwise be available but for the city planning position he currently holds. ORS 244.040(1) prohibits

a public official from using or attempting to use an official position to create or accept an opportunity that would not otherwise be available but for holding the official position. If Mr. Morgan were to accept the proposal as described, a violation of ORS 244.040(1) may occur because it is not apparent in the stated facts that the possibility to engage in the proposed ownership or employment opportunity was available to him apart from his position held as a public official.

ORS 244.040(1) does not prohibit public officials from pursing or engaging in personal private income producing activities on their personal time and with the use of personal resources. Public officials may seek opportunities and accept offers related to private income producing activities based on the skills and abilities gained or demonstrated in their public positions, but those occasions must be separate and distinct from the public position and pursued on personal time. Based on the facts and circumstances presented in the request for this opinion it appears that the opportunity offered to the city planner stemmed from actions the city planner took while in an official capacity.

The Commission has long recognized that there are officials that have and will continue to pursue private income producing activities. To assist public officials who wish to pursue such activities the Commission has developed guidelines for public officials to follow so as to avoid violating Oregon Government Ethics law:

GUIDELINES FOR OUTSIDE EMPLOYMENT OF PUBLIC OFFICIALS

1. Public officials are not to engage in private business interests or other employment activities on their governmental agency's time.

2. A governmental agency's supplies, facilities, equipment, employees, records or any other public resources are not to be used to engage in private business interests.

3. The position as a public official is not to be used to take official action that could have a financial impact on a private business with which you, a relative or member of your household are associated.

4. Confidential information gained as a public official is not to be used to obtain a financial benefit for the public official, a relative or member of the public official's household or a business with which any are associated.

5. When participating in an official capacity and met with a potential or actual conflict of interest related to a business, associated with the public official, relative or household member, the public official must disclose the nature of the conflict of interest using one of the following methods:

> Employees of governmental agencies must give written notice to their appointing authority.
>
> Elected or appointed public officials must publicly disclose once during each meeting convened by the governing body they serve.

Although it is not apparent in the stated facts, ORS 244.040(3) prohibits a public official from, directly or indirectly, soliciting or accepting the promise of future employment based on the understanding that the offer is influenced by the public official's vote, official action or judgment. Any employer who may directly or indirectly offer employment under these conditions may also violate this provision.

The statutes relevant to issues addressed in this opinion are provided as an addendum to this Staff Advisory Opinion.

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 GOVERNMENT ETHICS COMMISSION.

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

Sincerely,

Ronald A. Bersin
Executive Director

RAB/dt 10S-001

ADDENDUM

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

> 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 or a relative of the public official is associated only as a member or board director or in a nonremunerative capacity.
>
> 244.020(3) "Business with which the person is associated" means:
>
> > (a) Any private 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;
> >
> > (b) Any publicly held corporation in which the person or the person's relative owns or has owned $100,000 or more in stock or another form of equity interest, stock options or debt instruments at any point in the preceding calendar year;
> >
> > (c) Any publicly held corporation of which the person or the person's relative is a director or officer; or
> >
> > (d) For public officials required to file a statement of economic interest under ORS 244.050, any business listed as a source of income as required under ORS 244.060 (3).
>
> 244.020(14) "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 as defined in ORS 174.109 as an elected official, appointed official, employee, agent or otherwise, irrespective of whether the person is compensated for the services.

244.040 Prohibited use of official position or office; exceptions; other prohibited actions. (1) Except as provided in subsection (2) of this section, a public official may not use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment for the public official, a relative or member of the household of the public official, or any business with which the public official or a relative or member of the household of the public official is associated, if the financial gain or avoidance of financial detriment would not otherwise be available but for the public official's holding of the official position or office.

244.040(2) Subsection (1) of this section does not apply to:

(a) Any part of an official compensation package as determined by the public body that the public official serves.

(b) The receipt by a public official or a relative or member of the household of the public official of an honorarium or any other item allowed under ORS 244.042.

(c) Reimbursement of expenses.

(d) An unsolicited award for professional achievement.

(e) Gifts that do not exceed the limits specified in ORS 244.025 received by a public official or a relative or member of the household of the public official from a source that could reasonably be known to have a legislative or administrative interest in a governmental agency in which the official holds any official position or over which the official exercises any authority.

(f) Gifts received by a public official or a relative or member of the household of the public official from a source that could not reasonably be known to have a legislative or administrative interest in a governmental agency in which the official holds any official position or over which the official exercises any authority.

(g) The receipt by a public official or a relative or member of the household of the public official of any item, regardless of value, that is expressly excluded from the definition of "gift" in ORS 244.020.

244.040(3) A public official may not solicit or receive, either directly or indirectly, and a person may not offer or give to any public official any pledge or promise of future employment, based on any understanding that the vote, official action or judgment of the public official would be influenced by the pledge or promise.