



Oregon

John A. Kitzhaber, MD, Governor

Government Ethics Commission

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September 7, 2012

Nancy Hirsch
Fire Protection Division Chief
Oregon Department of Forestry
2600 State Street
Salem, Oregon 97310-1336

Dear Division Chief Hirsch:

At its September 7, 2012 meeting, the Oregon Government Ethics Commission (Commission) adopted the following advisory opinion:

OREGON GOVERNMENT ETHICS COMMISSION ADVISORY OPINION NO. 12A-1003

STATED FACTS: ORS Chapter 526 authorizes the state forester to request the governing body of each county containing forestland establish a six-member forestland classification committee. Additionally, ORS 477 authorizes the state forester to request the governing body of each county establish a five-member forestland-urban interface classification committee. Committee members are appointed by state and local government authorities. The statutes require one of the members of each committee be an owner of forestland, forestland urban interface or grazing land, if the land to be classified includes grazing land.

The committees periodically investigate and study all land within the boundaries of the county and determine which of the land is forestland or forestland-urban interface based on the criteria set forth in administrative rule. Once the forestland classification committee determines which of the land within the county is inside a forest protection district the committee assigns one of three statutorily established classes: timber class, timber and grazing class, or agricultural class. Once the forestland-urban interface classification committee determines which of the land within the county is to be designated as forestland-urban interface the committee assigns one of five classifications: low, moderate, high, extreme or high density extreme.



The committees adopt preliminary classifications and provide public notice. Following one or more community meetings regarding the identification and preliminary classification process, the committees hold public hearings and thereafter adopt final classifications. The final classification information is developed by the Oregon Department of Forestry (ODF) at the tax lot level and a final order is prepared. The final order is reviewed by the committees and subsequently filed with the county clerk.

An owner whose land is classified as forestland or forestland urban-interface is required by statute to provide adequate fire protection. Forestland owners may meet that obligation by filing a forest protection plan that the ODF board approves, or by membership in a forest protective association. If the forestland owner does not meet the obligation through an approved protection plan or membership in an association, the state forester provides forest protection. Owners of lands provided protection by the state forester must pay fire patrol assessments.

Forestland-urban interface owners (except those whose lands are classified as low) are required to comply with minimum standards for minimizing or mitigating certain fire hazards or risks on their land. The standards to be applied vary according to the land's classification. For instance, among other requirements, owners of land classified as moderate, high, extreme or high density extreme must provide and maintain primary and secondary fuel breaks, and maintain trees and the area under decks in the manner specified by administrative rule. Additional standards apply for lands classified as high density extreme.

QUESTION 1: Would members of the forestland and forestland-urban interface classification committees be defined as public officials and come under the jurisdiction of Oregon Government Ethics law?

ANSWER 1: Yes. A public official is defined in ORS 244.020(14) as any person who 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 appointed official, irrespective of whether the person is compensated for such services. ORS 174.109 indicates public bodies include local government bodies and an entity created by statute for the purpose of giving advice only to local government [ORS 174.116(A)].

The stated facts indicate the forestland and forestland-urban interface classification committees are established by the governing body of each county for the purpose of periodic classification of all land within the boundaries of its county. Committee members are appointed officials serving a public body in an advisory capacity by adopting preliminary and final classifications by written order. Members of the committees meet the definition of public official in ORS 244.020(14).

QUESTION 2: Could forestland and forestland-urban interface committee members be met with a conflict of interest when investigating all land in the county, which may include their own land, for determination and classification as forestland or forestland-urban interface?

ANSWER 2: Yes. Oregon Government Ethics law defines actual conflict of interest [ORS 244.020(1)] and potential conflict of interest [ORS 244.020(12)]. A public official is met with a statutory conflict of interest when participating in any official action, decision or recommendation, the effect of which would or could be to the private pecuniary benefit or detriment of the public official, the public official's relative or any business with which the public official or a relative is associated.

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 a public official participates in an official action that would have a direct and specific financial impact on that official, the official's relative or any business with which the official or a relative is associated. A potential conflict of interest exists when a public 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.

A benefit or detriment that arises out of an interest required by law as a prerequisite to holding the official position [ORS 244.020(12)(a)], and any action in the person's official capacity which would affect to the same degree a class consisting of an industry, occupation or other group in which the person, or the person's relative or business with which the person or the person's relative is associated [ORS 244.020(12)(b)] does not fall within the definition of actual or potential conflict of interest.

Based on the stated facts the classification or non-classification of forestland ultimately filed with the county (except those whose lands are classified as low by the forestland-urban interface committee) would have a certain financial impact on the landowner. This is because land classified as forestland or forestland-urban interface requires the land owner by statute to provide fire protection or fire mitigation. Committee members who review and classify land owned by them, a relative or a business with which they are associated or a relative is associated would be faced with an actual conflict of interest.

QUESTION 3: Would the industry or class exceptions found in ORS 244.020(12)(a) and ORS 244.020(12)(b) apply to committee members when making decisions or recommendations concerning their own land, the land of a relative, or the land of a business with which the member or a relative is associated?

ANSWER 3: No. The industry or class exception would apply if the conflict of interest arises from membership held in a particular business, industry, or other class that is a prerequisite for holding the public official position, such as landowner, and the official actions taken by committee members would affect all landowners within the county or a smaller group of landowners located within a defined geographical area to the same degree.

Although statute requires at least one member of each committee be a landowner, the stated circumstances indicate members would be participating in official actions that would have a financial impact on individual landowners ultimately at the tax lot level and not on all landowners within the county or a smaller group to the same degree. The industry or class exception would not apply when members participate in official actions that would have a financial impact on land owned by them or a relative, or land owned by a business with which the member or a relative is associated.

QUESTION 4: What procedures should committee members follow in the event their role as a public official gives rise to an actual or potential conflict of interest?

ANSWER 4: When met with conflicts of interest, members would be required to handle them in accord with the methods described in ORS 244.120(2).

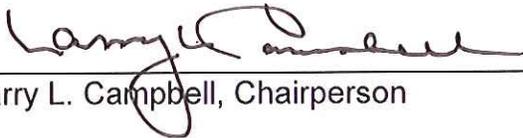
ORS 244.120(2) requires that committee members publicly announce the nature of any conflict of interest before taking action on the matter. In the case of an actual conflict of interest, members would be required to refrain from further participation, including discussion and vote, in official action on the issue that gave rise to the conflict. In the case of a potential conflict of interest, following the announcement members may participate in official action on the issue that gave rise to the conflict. It is recommended that members confirm announcements are included in the official records of committee meetings.

Although it is not apparent in the stated circumstances, the situation could arise when a member is met with an actual conflict of interest and their vote is required to meet a minimum number of votes required to take official action. In these circumstances, ORS 244.120(2)(b)(B) would require a member to make the required announcement, refrain from any discussion, and then the member may participate in the vote required for official action by the governing body. It should be noted these circumstances do not often occur. This provision does not apply to situations where there are insufficient votes because of a member's absence when the governing body is convened. Rather, it applies in circumstances when all members of the governing body are present and the number of members who must refrain due to actual conflicts of interest make it impossible for the governing body to take official action.

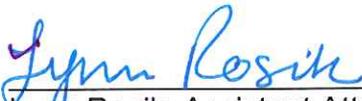
The Oregon Revised Statutes relevant to the issues addressed in this opinion are provided as an addendum to this Commission Advisory Opinion.

THIS OPINION IS ISSUED BY THE OREGON GOVERNMENT ETHICS COMMISSION PURSUANT TO ORS 244.280. A PUBLIC OFFICIAL OR BUSINESS WITH WHICH A PUBLIC OFFICIAL IS ASSOCIATED SHALL NOT BE LIABLE UNDER ORS CHAPTER 244 FOR ANY ACTION OR TRANSACTION CARRIED OUT IN ACCORDANCE WITH THIS OPINION. THIS OPINION IS LIMITED TO THE FACTS SET FORTH HEREIN. OTHER LAWS OR REGULATIONS NOT WITHIN THE JURISDICTION OF THE COMMISSION MAY ALSO APPLY.

Issued by Order of the Oregon Government Ethics Commission at Salem, Oregon on the 7th day of September 2012.



Larry L. Campbell, Chairperson



Lynn Rosik, Assistant Attorney General

ADDENDUM

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 (12) 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 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(12) "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:

(a) An interest or membership in a particular business, industry, occupation or other class required by law as a prerequisite to the holding by the person of the office or position.

(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.

(c) Membership in or membership on the board of directors of a nonprofit corporation that is tax-exempt under section 501(c) of the Internal Revenue Code.

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.

244.020(15) "Relative" means:

(a) The spouse of the public official or candidate;

(b) Any children of the public official or of the public official's spouse;

(c) Any children of the candidate or of the candidate's spouse;

(d) Siblings, spouses of siblings or parents of the public official or of the public official's spouse;

(e) Siblings, spouses of siblings or parents of the candidate or of the candidate's spouse;

(f) Any individual for whom the public official or candidate has a legal support obligation;

(g) Any individual for whom the public official provides benefits arising from the public official's public employment or from whom the public official receives benefits arising from that individual's employment; or

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.

244.120 Methods of handling conflicts; Legislative Assembly; judges; appointed officials; other 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:

(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

(b) When met with an actual conflict of interest, announce publicly the nature of the actual conflict and:

(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.

(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.

244.120(3) Nothing in subsection (1) or (2) of this section requires any public official to announce a conflict of interest more than once on the occasion which the matter out of which the conflict arises is discussed or debated.