



Oregon

Kate Brown, Governor

Government Ethics Commission

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via email and USPS

Daniel H. Kearns
621 S.W. Morrison Street, Ste 1225
Portland, Oregon 97205

Dear Mr. Kearns,

At its May 20, 2016 meeting, the Oregon Government Ethics Commission (Commission) adopted the following advisory opinion in response to the request set forth in your letter to the Commission dated February 25, 2016.

OREGON GOVERNMENT ETHICS COMMISSION ADVISORY OPINION NO. 16A-1001

SYNOPSIS OF FACTS AS PRESENTED TO THE COMMISSION:

The City of Hood River has a population of approximately 7500. According to a recent housing needs analysis, a large segment of the city's housing stock is being used for short-term vacation rentals and second homes. For example, residents or property owners may rent out individual rooms while remaining in the home, they may rent out their entire house, or they may do both at different times. Because these short-term rentals (STRs) are not available as affordable housing, the City Council determined that the city had a deficit of affordable housing and began a process of regulating STRs to address this problem.

The Council gave the Planning Commission the task of creating a set of land use regulations related to STRs through a public hearing process. The City Council will also consider a set of business regulations related to STRs.

The proposed regulations will likely cover a variety of areas, and have, at various times in the process, included such concepts as:

1. A licensing system that would require that anyone wishing to operate an STR will have to obtain a license with an annual fee per unit or property;



2. Operational regulations related to nuisance and public health, including occupancy limits, trash collection standards, parking limits and requirements, safety inspection requirements, and requiring a local contact;
3. Limitations on the number of days that a home or part of a home may be rented out as an STR if it is in a residential zone, with a cap of 60 days per year;
4. A cap on the number of short-term rental permits available to residents or property owners, or a restriction on the density of short-term rentals permitted.

Two Hood River City Councilors have rented out all or part of their homes as short-term housing.

Question 1: Does the legislative package of STR regulations that is likely to come before the city council present an actual conflict of interest for either [of] the two councilors that have in the past operated short-term rentals?

Answer 1: Yes. Any Hood River City Councilor who engages or intends to engage in renting out their residence as a short-term rental in the City of Hood River will be met with actual conflicts of interest when called upon to discuss or vote on concrete regulations that will affect STRS, because the regulations will affect the councilor's personal financial interest.

A public official is met with a conflict of interest when the public official is called upon to take an action or make a decision or recommendation in the person's official capacity if the effect of that action, decision or recommendation could or would be to the private pecuniary benefit or detriment of the person, the person's relative, or a business with which the person or a relative is associated. ORS 244.020(1),(13). If the financial impact of the action is uncertain – if the action could have an effect on the public official's personal financial interest – it is a potential conflict of interest. ORS 244.020 (13). If the financial impact of the action is certain – if the action would have an effect on the public official's personal financial interest – it is an actual conflict of interest. ORS 244.020(1).

Each Councilor will have to make their own determination of whether or not they engage or intend to engage in short-term rental in the City of Hood River in order to determine whether or not they have a conflict of interest. The fact that the two councilors who have engaged in the practice of short-term rental of their residences may not have renters staying in their homes on the specific day that the Council is called upon to make a determination on these regulations does not mean that the councilors avoid actual conflicts of interest on these matters. The actual conflict of interest arises because a councilor who engages or intends to engage in the practice of short-term rental of their residence is taking an action that will affect their own personal financial interest: the regulations surrounding STRs will determine such things as whether the councilor may

operate an STR, whether they may continue to operate their STR in the same manner as they have in the past, and how much competition their business will have.

If, in advance of any discussion or vote on this matter, a councilor who has engaged in the practice of renting their residence as a short-term rental chooses to forego, permanently, continued rental of their residence as an STR, that person will not have a conflict of interest with regard to the regulations on STRs. Only the councilor in question can make a determination as to whether or not they have permanently removed themselves from the business of renting their residence as an STR.

In the case of the two Hood River City Councilors who engage or have engaged in short-term rental of their residences, both of them appear to be met with actual conflicts of interest when called upon to discuss or vote on land use and business regulations that will affect STRs. As elected officials, Hood River City Councilors who are met with an actual conflict of interest must comply with the provisions of ORS 244.120(2)(b): when the matter arises, they must publically explain why they have an actual conflict of interest (the nature of the conflict) and refrain from participating as a public official in any discussion or debate on the matter. They must also refrain from voting on the matter.

Question 2: Does a class exemption apply so as to allow either councilor to participate in the deliberation and vote on these regulations?

Answer 2: No. The financial impact of the proposed regulations, positive or negative, will vary based on a number of factors, and the regulations will not affect all residents or property owners to the same degree. This is because the proposed regulations determine who can and who cannot operate short-term rentals and how they may operate them. The types of regulations proposed will likely permit some residents and property owners to operate short-term rentals and prohibit others from doing so, and they will likely change the terms on which some residents or property owners operate short-term rentals while allowing others to continue unchanged. There is, therefore, no existing class pursuant to ORS 244.020(13)(b) that would create an exception to the conflict of interest provisions of Oregon Government Ethics law.

As noted above, it appears that the two city councilors who have engaged in short-term rental of their residences have actual conflicts of interest with regard to the proposed regulation of STRs in Hood River. The question you posed was whether ORS 244.020(13)(b) would apply, relieving them of their conflict. ORS 244.020(13)(b) states that even if a public official's personal financial interest would be affected by an action in their official capacity, the person does not have a conflict of interest, and need not comply with the disclosure requirements for conflicts of interest, if the personal pecuniary benefit or detriment arises out of an action in the person's official capacity which would affect all members of a class to the same degree. The class may consist of all inhabitants of the state, or it may be a smaller class consisting of an industry, occupation or other group including the one of which or in which the person, the person's relative or business with

which the person or the person's relative is associated, is a member or is engaged. Only the Commission may determine whether a group constitutes a class.

The facts in this case indicate that the proposed regulations will have varying effects on residents and property owners in the City of Hood River. Not all residents have an equal probability of engaging in the STR business, nor do they have the same opportunity. Residents who live in rental properties may be prohibited by their leases from renting their residences as STRs. Residents who own homes that do not or cannot conform to the parking or occupancy restrictions will be unable to rent their residences as STRs without potentially significant investment in the property. Residents may be unable or unwilling to share their private space with strangers. They may simply not have a free bedroom. Property owners, whether or not they reside in Hood River, may be unable to meet the requirements for a local contact, if only because a home owner is displaced while renting out their home as an STR. Residents and property owners who do rent their property as STRs may benefit from any limitation on the number of days a home may be rented, as it will reduce competition, or they may experience a financial detriment because they can no longer rent their property as often as they could prior to the regulations.

Because residents and property owners in the City of Hood River will be affected by the regulations to varying degrees, no identifiable class exists that would avoid an actual conflict of interest for the Hood River City Councilors who engage or intend to engage in renting their property as a short-term rental in the City of Hood River.

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.

Issued by Order of the Oregon Government Ethics Commission at Salem, Oregon on the 20th day of May 2016.



Charles Tauman, Chairperson



Lynn Rosik, Assistant Attorney General

ADDENDUM

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

ORS 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 (13) of this section.

ORS 244.020(13) "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.

ORS 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.