



Oregon

Kate Brown, Governor

Government Ethics Commission

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April 26, 2019

Kristina Schmunk Kraaz
Assistant City Attorney
City of Springfield
225 Fifth Street
Springfield, Oregon 97477

Re: Advice Number 19-0551

Dear Ms. Kraaz:

This letter of advice is provided in response to your request received on March 29, 2019, which present questions regarding how Oregon Government Ethics laws would apply to actual and potential conflicts of interest that might arise during the City of Springfield's pending Development Code Update Project. The analysis and advice that follows is offered under the authority provided in ORS 244.284 as guidance on how the current provisions of Oregon Government Ethics law may apply to the specific circumstances presented.

Background

According to the information provided, the City of Springfield has recently begun the process to revise and readopt its land use regulations through a Development Code Update Project (the "Project"). Phase I of the Project will update regulations relating to housing and residential land use. It will include new residential development standards for all types of housing and may expand the uses allowed in residential zones. Phase I is anticipated to culminate in the adoption of a single ordinance adopting the new housing-related code. Phase II (addressing commercial and industrial uses) and Phase III (addressing miscellaneous code sections) will also culminate in the adoption of additional ordinances.

In the initial advice and input stages of Phase I, a community Technical Advisory Committee, with members appointed by the Springfield Planning Commission, will provide analysis of the existing code and new code concepts and technical advice on proposed changes, but will not provide formal recommendations. There will also be a Governance Committee, comprised of two City Councilors and two Planning Commissioners, which will identify key issues and provide direction on areas of focus and opportunities at a policy level. City staff will also hold quarterly meetings with the Planning Commission and City Council to discuss topics and proposed changes; these discussions will initially be broad but eventually will include discussion of specific proposed changes.

Amendments to land use regulations require a public hearing and formal recommendation by the Planning Commission, followed by another public hearing and adoption by the City Council. Following the advice and input phase, the formal package of proposed code amendments for public hearing will be presented to the Planning Commission and City staff will send the required notice to the Oregon Department of Land Conservation and Development (DLCD) as required by OAR 660-018-0020. The Planning Commission's recommendation, in the form of a final order, will then be forwarded to the City Council, which will hold its own public hearing(s) on the proposed code amendments. Finally, the City Council will vote to adopt/not adopt the final ordinance.

All members of the City Council and most members of the Planning Commission own residential property in Springfield. It is likely that the Project will change development standards for all residential properties in Springfield, though the extent of those changes is not yet known. The changes may expand allowable uses within residential zones or increase buildable areas of residential lots, which could have an impact on property values, affect the ability of property owners to partition their property, or allow construction of improvements not previously allowed.

Conflicts of Interest

ORS 244.020(1) defines an actual conflict of interest and ORS 244.020(13) defines a potential conflict of interest. A public official is met with either an actual or a potential conflict of interest when participating in an official capacity in any action, decision, or recommendation, if the effect 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 either is associated. An actual conflict of interest occurs when a public official participates in an official action that would have a direct financial impact on that official, the official's relative or any business with which either is associated. A potential conflict of interest occurs when a public official's action, decision or recommendation could have a financial impact on the official, the official's relative or any business with which either is associated.

A business with which one is associated includes any private business or closely held corporation of which the person or their relative is a director, officer, owner or employee, or agent, or in which the person or their relative currently 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 year. [ORS 244.020(3)(a)]. For public officials required to file a statement of economic interest under ORS 244.050, any business listed as a source of income under ORS 244.060(3) (a source producing ten percent or more of the total annual household income) is a business with which the official is associated. [ORS 244.020(3)(d)]. City Councilors and Planning Commissioners are public officials required to file statements of economic interest. [ORS 244.050(j) and 244.050(k)].

Elected officials or those appointed to a board or commission, when met with a conflict of interest, whether it is an actual or a potential conflict of interest, must on each occasion where the issue arises, publicly announce the nature of their conflict. Then, if the conflict is actual, they must also refrain from any discussion, debate or vote on the issue giving rise to the conflict. If the conflict is potential, they may participate in official actions following their public disclosure. [ORS 244.120(2)]. If the public official has an actual conflict of interest, but the public official's vote is necessary to meet quorum requirements, then the public official is eligible to vote, but must not participate in any discussion or debate on the issue from which the conflict of interest arises. [ORS 244.120(2)(b)(B)].

There is a class exception to the conflict of interest provisions which applies to any action a public official may take in their official capacity that 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 which includes the public official, their relative, or a business with which either is associated. [ORS 244.020(1) and (13)(b)]. Only the Oregon Government Ethics Commission may make the determination of whether a class exists.

Question 1: Would members of the Governance Committee have only potential conflicts of interest, even though the Governance Committee includes City Councilors who will eventually make final decisions?

You have indicated that the Governance Committee, comprised of two Planning Commission members and two City Councilors, will identify key issues and provide direction in the advice and input phases, but will not be making any final decisions regarding code amendments. When at a Governance Committee meeting, a Planning Commissioner or City Councilor would be acting as a Governance Committee member and not as a Planning Commissioner or City Councilor.

Because the Governance Committee is an advisory committee and not the ultimate decision maker on the Project, when the City Councilors and Planning Commissioners sit as Governance Committee members, they would only be met with potential conflicts of interest. When met with a potential conflict of interest, a Governance Committee member must publicly announce the nature of the member's conflict of interest prior to participating in taking any action on the matter giving rise to the conflict. The official must make the public announcement once on each occasion that the matter arises.

For the City Councilors, the conflicts of interest could ripen to actual conflicts of interest when they sit as the City Council to make final decisions and act upon the recommendations of the Planning Commission. Public officials are individually responsible for exercising their own good judgment in determining whether or not an

action, decision or recommendation presents an actual or potential conflict of interest. If a City Councilor determines that the City Council's actions would have a direct and specific financial benefit or detriment on the City Councilor, a relative or a business with which either is associated, the City Councilor must make a public announcement of the nature of the conflict and refrain from further participation in the matter giving rise to that conflict. If the conflict of interest remains potential, meaning that the City Council's actions could possibly have a financial impact on the City Councilor, a relative or a business with which either is associated, then the City Councilor must once again make a public announcement of the nature of the conflict, but may continue to participate on the matter.

Question 2: Does the fact that a City Councilor owns residential property in Springfield, by itself, constitute an actual conflict of interest if the code changes would affect all property owners' abilities to further build onto existing dwellings or establish new uses on existing properties? Does it matter whether a specific City Councilor has current plans to further develop their property in the future?

The fact that a City Councilor owns residential property in Springfield means that the City Councilor would have at least a potential conflict of interest and quite possibly an actual conflict of interest in the code amendments when they come before the City Council. Based on the facts as presented, it is not clear whether or not for any particular property the financial impact of the proposed amendments would be certain and specific, meaning that it gives rise to an actual, rather than a potential, conflict of interest. That determination must be made by each City Councilor, and may depend in whole or in part on the specific code amendments, the type of property, the property location, and the use of the property.

If a City Councilor has current plans to develop their property in the future, and the specific code amendments being considered would impact that future development, the City Councilor would have an actual conflict of interest. The City Councilor may have an actual conflict of interest even without any current development plans if it can be determined, at the time the matter is before the City Council, that the specific code amendments would affect the value of the City Councilor's property. If the City Councilor cannot determine whether the specific code amendments would have a certain financial impact, however, then the conflict of interest would remain potential. As owners of property within the City, each City Councilor must make a careful consideration of whether the specific code amendments being considered would or could have a financial impact on their own property or the properties of their relatives or businesses with which they are associated.

Question 3: If owning residential property in Springfield gives rise to an actual conflict of interest, does it qualify for a class exemption under ORS 244.020(13)(b)? Because not all properties are identical within the City, the development code would not cause the exact same effect on each owner of residential property, although all similarly situated property owners would be affected the same way.

ORS 244.020(13)(b) provides an exception to compliance with the conflict of interest provisions of ORS 244.120 if an official action would financially impact the public official, a relative, or any business with which either is associated to the same degree as a broader class of individuals. If a significant number of other persons or entities are also "affected to the same degree" by the action, then the public official may be exempt from conflict of interest provisions on the basis of a class exception. Only the Commission may determine what groups constitute such a class.

Whether a class exists depends on the number of property owners affected and if the code amendments would affect those property owners to the same degree. Because of the variations in property size, type, location, and usage, the code amendments may not affect all property owners to the same degree. For the Commission to determine whether the class exception in ORS 244.020(13)(b) applied to an action by the City Councilors, it would need to know the specific code amendments at issue, and the number and type of properties affected by those specific code amendments. Such a determination cannot be made without that information at this stage in the process.

Question 4: The City Council will be engaged in a long process of providing direction and guidance to City staff on proposed code amendments, long before the City submits its formal 35-day notice to DLCD. At what point in the process would a City Councilor have an actual as opposed to a potential conflict of interest? For example, during the first phases of quarterly check-in meetings where the Council provides direction and guidance as to high-level topics but not specific code language? Only when the Council is providing specific input on the language of proposed code changes? Only after the City submits the formal 35-day notice of post-acknowledgement plan to DLCD?

According to the information provided, the City Council cannot take any formal action on the Code Amendments until the City submits its notice to the DLCD; thus any discussions by the City Council before that DLCD notice take the form of recommendations to City staff for the Project, rather than formal, binding decisions. The DLCD notice is submitted prior to the Planning Commission's public hearing; once the DLCD notice is submitted, a City Councilor would not participate any further in the process until the Planning Commission submits its recommendation and final order to the City Council.

As explained above, a City Councilor would have a potential conflict of interest when sitting as a Governance Committee member because the nature of that role is preliminary and advisory in nature. Similarly, a City Councilor participating in a discussion or making a recommendation during the advice and input stages, in the quarterly check-in meetings, or in other forums before the formal DLCD notice would also have a potential conflict of interest, even if the discussion or recommendation were on specific code language, because the code amendments are still preliminary and have not been integrated into a final order for the City Council to review and act upon.

The nature of the conflicts of interest could change once the DLCD notice is submitted and the Planning Commission's recommendations and final order are presented to the City Council. At that point, the City Councilors sit as members of the City Council to hold a formal public hearing on the code amendments and vote to adopt or not adopt the code amendments. The City Councilors' conflicts of interest, which were only potential during the preliminary, informal stages, could ripen to become actual conflicts of interest.

Question 5: If a quorum of Councilors have an actual conflict of interest in the final housing ordinance, does ORS 244.120(2)(B) require the affected City Councilors to abstain from *all* discussion on the proposed housing ordinance, or only from discussing the aspects of the ordinance for which they have an actual conflict? For example, if a Councilor has no actual conflict of interest with multifamily housing standards, could they participate in deliberations on that aspect of the ordinance?

A City Councilor may have an actual conflict of interest arising from some sections of the final code amendments, but have no conflict of interest in other sections. In that case, if the final code amendments are presented to the City Council in sections for the formal public hearing and vote, the City Councilor may participate in deliberations and vote on those sections of the code amendments that do not give rise to an actual conflict of interest for the City Councilor. For those sections that do give rise to an actual conflict of interest, the City Councilor would need to make a public announcement of the nature of the conflict and refrain from further participation in those sections.

If the City Council is required to vote on the entirety of the code amendments or final ordinance, City Councilors with actual conflicts of interest would be required to publicly announce their conflicts and refrain from further participation. If a quorum of the City Councilors have actual conflicts of interest, ORS 244.120(2)(b)(B) provides that if their votes are necessary for a quorum, they would be eligible to vote, but would still need to refrain from any discussion or debate on the matters giving rise to their conflicts.

Kristina Schmunk Kraaz
April 26, 2019
Page 7

This general advice is limited to the application of ORS 244.020 and 244.120 to the situations presented in your request. As the Project continues and more specific information becomes available, we encourage the City Councilors and any other public officials involved in the Project to call the Commission.

If you have any additional questions regarding the application of Oregon Government Ethics law, please feel free to contact me directly.

Sincerely,



Ronald A. Bersin
Executive Director

RAB/svm

****Disclaimer****

This staff advice is provided under the authority given in ORS 244.284(1). This opinion offers guidance on how Oregon Government Ethics law may apply to the specific facts described in your request. This opinion is based on my understanding and analysis of the specific circumstances you described and should not be applied to circumstances that differ from those discussed in this request.