MEMORANDUM OFFICE OF CITY ATTORNEY

DATE: September 23, 2008

TO: Commercial and Industrial Buildable Land (CIBL) Stakeholder Committee

FROM: Bill Van Vactor BVV
Office of City Attorney

RE: Oregon Public Official Ethics Laws

The Springfield Planning Department has asked the City Attorney's Office to discuss Oregon's Newly Revised Ethics Laws as they apply to the Commercial and Industrial Buildable Land Stakeholder Committee.

Stakeholder Committee is a Public Body

The opening discussion on this sort of analysis is to determine the legal nature of the CIBL Stakeholder Committee. It appears that the Stakeholder Committee will make recommendations to both the Planning Commission and the City Council. As a result, the Stakeholder Committee is a public body within the public meaning law of Oregon Law, ORS 192.610(3). As a consequence, notice of all meetings must be provided, minutes must be taken and meetings must be open to the public.

Public Official

As a member of a public body, you are a public official. ORS 244.020(13) provides,

> "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."

Conflict of Interest

As a result of your public official status, Oregon's Ethics Laws apply and need to be considered as you make recommendations. The area where the law is likely

to apply is whether or not a real or potential conflict of interest has arisen. The definition section in ORS Chapter 244 defines "Actual conflict of interest" Section (1) to mean,

> "...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 (11) of this section." [emphasis added]

Section (11) provides in part,

> "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,...." [emphasis added]

As you can see, the language defining a potential conflict of interest is quite broad. Fortunately, the legislature also put some sideboards on this definition. After the definition above, they provided as follows:

> "...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 if a non-profit corporation that is tax-exempt under section 501(c) of the Internal Revenue Code."

We interpret this language to mean that if there was a doctor or retail store owner on the Committee and the Stakeholder Committee were to make a

recommendation which affected all doctors in the same manner or all retail stores throughout Springfield in the same manner it would not constitute a potential conflict of interest. Continuing with another example; (1) If you were an owner of undeveloped residentially zoned land inside the current UGB; (2) the Committee recommends provisions to increase the density of residential land; and (3) realtors and appraisers were of the opinion that the effect could be to increase the value of residentially zoned property, then the class exceptions still likely applies as owners of residentially zoned property would be similarly impacted. However, if we change the facts and there was only one large undeveloped parcel left inside the UGB and that was yours, there would be no other equally impacted citizens and the class exception would not apply. At a minimum, a potential conflict would need to be declared.

What Should I Do if I Think I Have a Conflict of Interest?

ORS 244.120(2) provides,

> "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.
>
> (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.
>
> (4) Nothing in this section authorizes a public official to vote if the official is otherwise prohibited from doing so."

The State of Oregon made a policy choice when it enacted the Ethics Law. The State has had a long tradition of using citizens as volunteers to help develop governing policies. Regularly, citizens with expertise in certain areas are asked to serve on advisory committees. Often, because of this expertise, the Public Official may face a potential conflict and, in rare circumstances, an actual conflict. The choice was made to continue using citizens on advisory boards even though conflicts would arise. It was better to maintain a high level of citizen involvement rather than to go the other way and have policy decisions developed by either paid appointees or well meaning citizens having little expertise in the subject matter. What the State said was that it is appropriate to participate when it is only a potential conflict of interest (and only after the declaration of the potential conflict) but, of course, withdraw when the conflict is actual. As a result, many Oregon advisory bodies includes citizens with expertise i.e., farmers on LCDC, lawyers on the Oregon Government Ethics Commissions, etc. The policy is to declare when potential, recuse when actual but by all means participate.

Gifts

As a public official, you also need to be aware that the Oregon Code of Ethics also prohibits you from accepting gifts. ORS 244.020(5)(a) provides,

> "Gift means something of economic value given to a public official or a relative or member of the household of the public official;
> (A) Without valuable consideration of equivalent value, including the full or partial forgiveness of indebtedness, which is not extended to others who are not public officials or the relatives or members of the household of public officials on the same terms and conditions; or
> (B) For valuable consideration less than that required from others who are not public officials."

The gift limit is $50.00 per calendar year. ORS 244.025.

One of the caveats on this is that in order for this prohibition to be applicable, the person offering the gift must have a legislative or administrative interest in pending actions. ORS 244.020(8) states,

> "Legislative or administrative interest means an economic interest, distinct from that of the general public, in one or more bills, resolutions, regulations, proposals or other matters subject to the action or vote of a person acting in the capacity of a public official."

With this broad definition of gift, you would expect that there would be quite a bit of consternation across the state and, in fact, there has been substantial dissention throughout Oregon. Fortunately, the Legislature created at least a partial list of practical exceptions and a list of them, as listed in the statute, is attached to this memo. As a practical matter, we would encourage you to be cautious if you receive invitations from citizens who happen to own land outside, but close to, the Urban Growth Boundary. If they have an interest in bringing the property within Springfield's UGB, they would likely be deemed to have a legislative and administrative interest in your proceedings and you could not accept gifts beyond the limit specified above.

Planning Commissioners

Two members of the Committee who are Planning Commissioners also need to be aware of ORS 244.135 which provides,

> "(1) A member of a city or county planning commission shall not participate in any commission proceeding or action in which any of the following has a direct or substantial financial interest:
> (a) The member or the spouse, brother, sister, child, parent, father-in-law, mother-in-law of the member;
> (b) Any business in which the member is then serving or has served within the previous two years; or
> (c) Any business with which the member is negotiating for or has an arrangement or understanding concerning prospective partnership or employment.
> (2) Any actual or potential interest shall be disclosed at the meeting of the commission where the action is being taken."

In light of the fact that these members are non-voting, this statute is not likely to apply during your proceedings.

Final Comments

The nature of your work on this Committee is very broad, long term and deals with such concepts as a vision for the City of Springfield, what business the City wants to encourage as it develops its commercial and industrial land base, etc. With this scope of work, it will be very difficult to discern whether recommendations made today will have any significance when the Springfield City Council ultimately makes its final policy choices. Therefore, it is possible you will consider policies or criteria that, in time, could potentially impact you or your

business. However, today, any such analysis is highly speculative. If this occurs, we would encourage you to forward the facts to the Office of City Attorney. We would quickly conduct an analysis and provide our advice as to whether or not you need to declare a potential conflict of interest or withdraw. Our practical advice, except when the conflict is actual, is that when in doubt, declare the potential conflict and continue to participate.

Finally, please keep in mind that while we are pleased to assist, our opinion is not binding on the Oregon Government Ethics Commission. With adequate time (over 60 days) there are ways to obtain binding opinions from the OGEC and if obtained, you can eliminate the risk that the Ethics Commission could find you have violated Oregon Law.

If you have any questions at any time, please do not hesitate to contact our office at 541-746-9621.

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(5)(a) "Gift" means something of economic value given to a public official or a relative or member of the household of the public official:

(A) Without valuable consideration of equivalent value, including the full or partial forgiveness of indebtedness, which is not extended to others who are not public officials or the relatives or members of the household of public officials on the same terms and conditions; or

(B) For valuable consideration less than that required from others who are not public officials.

(b) "Gift" does not mean:

(A) Contributions as defined in ORS 260.005.

(B) Gifts from relatives or members of the household of the public official.

(C) An unsolicited token or award of appreciation in the form of a plaque, trophy, desk item, wall memento or similar item, with a resale value reasonably expected to be less than $25.

(D) Informational material, publications or subscriptions related to the recipient's performance of official duties.

(E) Admission provided to or the cost of food or beverage consumed by a public official, or a member of the household or staff of the public official when accompanying the public official, at a reception, meal or meeting held by an organization before whom the public official appears to speak or to answer questions as part of a scheduled program.

(F) Reasonable expenses paid by any unit of the federal government, a state or local government, a Native American tribe that is recognized by federal law or formally acknowledged by a state, a membership organization to which a public body as defined in ORS 174.109 pays membership dues or a not-for-profit corporation that is tax exempt under section 501(c)(3) of the Internal Revenue Code and that receives less than five percent of its funding from for-profit organizations or entities, for attendance at a convention, fact-finding mission or trip, or other meeting if the public official is scheduled to deliver a speech, make a presentation, participate on a panel or represent state government as defined in ORS 174.111, a local government as defined in ORS 174.116 or a special government body as defined in ORS 174.117.

(G) Contributions made to a legal expense trust fund established under ORS 244.209 for the benefit of the public official.

(H) Reasonable food, travel or lodging expenses provided to a public official, a relative of the public official accompanying the public official, a member of the household of the public official accompanying the public official or a staff member of the public official accompanying the public official, when the public official is representing state government as defined in ORS 174.111, a local government as defined in ORS 174.116 or a special government body as defined in ORS 174.117:

(i) On an officially sanctioned trade-promotion or fact-finding mission; or

(ii) In officially designated negotiations, or economic development activities, where receipt of the expenses is approved in advance.

(I) Food or beverage consumed by a public official acting in an official capacity:

(i) In association with the review, approval, execution of documents or closing of a borrowing, investment or other financial transaction, including any business agreement between state government as defined in ORS 174.111, a local government as defined in ORS 174.116 or a special government body as defined in ORS 174.117 and a private entity or public body as defined in ORS 174.109;

(ii) While engaged in due diligence research or presentations by the office of the State Treasurer related to an existing or proposed investment or borrowing; or

(iii) While engaged in a meeting of an advisory, governance or policy-making body of a corporation, partnership or other entity in which the office of the State Treasurer has invested

moneys.

(J) Waiver or discount of registration expenses or materials provided to a public official at a continuing education event that the public official may attend to satisfy a professional licensing requirement.

(K) Expenses provided by one public official to another public official for travel inside this state to or from an event that bears a relationship to the receiving public official's office and at which the official participates in an official capacity.

(L) Food or beverage consumed by a public official at a reception where the food or beverage is provided as an incidental part of the reception and no cost is placed on the food or beverage.

(M) Entertainment provided to a public official or a relative or member of the household of the public official that is incidental to the main purpose of another event.

(N) Entertainment provided to a public official or a relative or member of the household of the public official where the public official is acting in an official capacity while representing state government as defined in ORS 174.111, a local government as defined in ORS 174.116 or a special government body as defined in ORS 174.117 for a ceremonial purpose.

(6) "Honorarium" means a payment or something of economic value given to a public official in exchange for services upon which custom or propriety prevents the setting of a price. Services include, but are not limited to, speeches or other services rendered in connection with an event.

244.025 Gift limit; entertainment prohibition. (1) During a calendar year, a public official, a candidate for public office or a relative or member of the household of the public official or candidate may not solicit or receive, directly or indirectly, any gift or gifts with an aggregate value in excess of $50 from any single source that could reasonably be known to have a legislative or administrative interest in any governmental agency in which the public official holds, or the candidate if elected would hold, any official position or over which the public official exercises, or the candidate if elected would exercise, any authority.

(2) During a calendar year, a person who has a legislative or administrative interest in any governmental agency in which a public official holds any official position or over which the public official exercises any authority may not offer to the public official or a relative or member of the household of the public official any gift or gifts with an aggregate value in excess of $50.

(3) During a calendar year, a person who has a legislative or administrative interest in any governmental agency in which a candidate for public office if elected would hold any official position or over which the candidate if elected would exercise any authority may not offer to the candidate or a relative or member of the household of the candidate any gift or gifts with an aggregate value in excess of $50.

(4) Notwithstanding subsection (1) of this section:

(a) A public official, a candidate for public office or a relative or member of the household of the public official or candidate may not solicit or receive, directly or indirectly, any gift of payment of expenses for entertainment from any single source that could reasonably be known to have a legislative or administrative interest in any governmental agency in which the public official holds, or the candidate if elected would hold, any official position or over which the public official exercises, or the candidate if elected would exercise, any authority.

(b) A person who has a legislative or administrative interest in any governmental agency in which a public official holds any official position or over which the public official exercises any authority may not offer to the public official or a relative or member of the household of the public official any gift of payment of expenses for entertainment.

(c) A person who has a legislative or administrative interest in any governmental agency in which a candidate for public office if elected would hold any official position or over which the candidate if elected would exercise any authority may not offer to the candidate or a relative or member of the household of the candidate any gift of payment of expenses for entertainment.

(5) This section does not apply to public officials subject to the Oregon Code of Judicial Conduct. [2007 c.877 §18]