

Council Communication

February 21, 2017, Business Meeting

Second Reading of Ordinance Amending AMC Section 3.08.020 Code of Ethics

FROM:

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SUMMARY

This agenda item is the Second Reading of an ordinance amendment designed to reduce the complexity of the analysis a public official must undertake when trying to determine the proper course of action when faced with a possible conflict of interest; to add a recusal requirement to the City Code of Ethics in the event of an actual conflict of interest; and to confirm that advisory boards and commissions, like other public officials, are subject to the State's disclosure and recusal requirements in the event of potential or actual conflicts of interest.

BACKGROUND AND POLICY IMPLICATIONS:

A 2012 amendment to the City's Ethics Code brought it into essential conformity with the Oregon Government Ethics Law with respect to limits on gifts to public officials. The 2012 amendment, however, did not harmonize the City and State processes for handling actual or potential conflicts of interest. The confusion caused by fairly minor discrepancies between the two sets of requirements for disclosing possible conflicts can cause considerable anxiety and inadvertent mistakes.

Currently, City code allows full participation in an official action after open disclosure whether the conflict disclosed is potential (*could affect*) or actual (*would affect*). State law also requires open disclosure of potential or actual conflicts, but is more stringent in that it requires the public official to refrain from participating in an official action when the conflict is actual (*would affect*).

The proposed amendment adopts in Section 3.08.020E(1) the State's already-established process for disclosing potential or actual conflicts and its requirements for nonparticipation in an official action in the event of an actual conflict.

The City's definition of conflict of interest is somewhat more stringent than the State's. Under ORS 244.020, a conflict of interest occurs only when participating in an official action which *could* or *would* result in a **financial** benefit or detriment to the public official, a relative, or a business with which the public official or relative is associated. In contrast, under AMC 3.08.020E, a conflict could exist not only when a public official or relative or associated business *would* or *could* be affected financially, but also when a public official's participation – including **non-financial** participation – in a proposed or current City transaction might impair his or her independence of judgment about a possible official action or might be incompatible with the performance of the public official's official duties.



Impairment of independent judgment is unquestionably an abstract notion, and neither the current ordinance nor the proposed amendment presented for Second Reading defines the phrase. But it clearly means more than just having a particular worldview, or being influenced by past relevant experiences, or even having preconceived ideas about a particular matter before considering the arguments for and against it. Other wording in the City Ethics Code suggests *independent judgment* means having as one's primary concern the public interest instead of just one's personal interest. There is no established definition of *the public interest*; it is necessarily a judgment call each public official must make on a case-by-case basis depending on the matter before him or her.

The amendment presented in this agenda item does not attempt to define either *impairment of independent judgment* or *the public interest*. The proposed amendment is based on an assumption that the Council wants to maintain a concept of conflict of interest that is more strict than that in the state statute even though the City's ordinance contains some relatively abstract standards. The main effect of the amendment, then, would be to reconcile the City's process for disclosing potential or actual conflicts -- however they are defined -- with the process established in State law.

Elsewhere in Oregon, there have been assertions occasionally that appointed advisory boards, commissions, and committees are not *governing bodies* subject to State requirements concerning gifts and conflicts of interest. The proposed amendment adds language in Section 3.08.020A clarifying that the City Code of Ethics (and the Oregon Government Ethics Law) is applicable to all City public officials, inclusive of City-appointed members of regular or ad hoc boards, commissions or committees.

FISCAL IMPLICATIONS:

N/A

STAFF RECOMMENDATION AND REQUESTED ACTION:

Staff recommends Council approval of second reading of this ordinance.

SUGGESTED MOTION:

I move for approval of the second reading of an Ordinance titled, "An Ordinance Amending AMC Section 3.08.020 Code of Ethics," as presented.

ATTACHMENTS:

1) Ordinance



ORDINANCE NO. _____

AN ORDINANCE AMENDING ASHLAND MUNICIPAL CODE
SECTION 3.08.020 CODE OF ETHICS

Annotated to show ~~deletions~~ and additions to the code sections being modified. Deletions are **~~lined through~~** and additions are **underlined**.

WHEREAS, Article 2. Section 1 of the Ashland City Charter provides:

Powers of the City. The City shall have all powers which the constitutions, statutes, and common law of the United States and of this State expressly or impliedly grant or allow municipalities, as fully as though this Charter specifically enumerated each of those powers, as well as all powers not inconsistent with the foregoing; and, in addition thereto, shall possess all powers hereinafter specifically granted. All the authority thereof shall have perpetual succession.

WHEREAS, the requirements public officials must meet under the current City Code of Ethics when faced with potential or actual conflicts of interest differ in substantial and confusing ways from the requirements in the state statutory provisions on conflict of interest; and

WHEREAS, the state statutory provisions on conflict of interest should be made expressly applicable to members of the City's appointed boards, commissions, and committees.

THE PEOPLE OF THE CITY OF ASHLAND DO ORDAIN AS FOLLOWS:

SECTION 1. Ashland Municipal Code Chapter 3.08, Section 3.08.020 Code of Ethics is hereby amended to read as follows:

SECTION 3.08.020 Code of Ethics

- A. Declaration of Policy. The proper operation of democratic government requires that public officials, including elected officials, appointed officials and employees be independent, impartial and responsible to the people; that governmental decisions and policy be made in the proper channels of the governmental structure; that public office not be used for personal gain; and that the public have confidence in the integrity of its government. In recognition of these goals, there is hereby established a Code of Ethics ~~for~~ **applicable to** all public officials, whether paid or unpaid, **including members of Regular or ad hoc boards, commissions, or committees filled by appointment by the Mayor or members of the City Council.**

The purpose of this Code is to establish ethical standards of conduct for all public officials by setting forth those acts or actions that are incompatible with the best interests of the City of Ashland. It is also the purpose of this Code to assist public officials in determining the proper course of action when faced with uncertainty regarding the propriety of a

contemplated action, thereby preventing them from unwittingly entangling public and private interests.

Through adoption of this Code the City hereby expresses its intent to maintain high ethical standards in the City service, and to increase public confidence in the integrity of City public officials.

The provisions of ORS 244 (“Government Ethics Law”) as it currently exists or may from time to time be amended are incorporated by reference herein. A violation of any provision of ORS 244 shall be considered a violation of this Code of Ethics.

- B. Responsibilities of Public Office. Public officials are agents of public purpose and are engaged for the benefit of the public. They are bound to uphold the Constitution of the United States and the Constitution of this State and to carry out impartially the laws of the nation, state and the City, and thus to foster respect for all government. They are bound to observe in their official acts the highest standards of morality and to discharge faithfully the duties of their office regardless of personal considerations, recognizing that the public interest must be their primary concern.
- C. Dedicated Service. All public officials of the City should work to support the political objectives expressed by the electorate and the programs developed to attain those objectives. Appointive Officials and employees should adhere to the rules of work and performance established as the standard for their positions by the appropriate authority.

Public officials should not exceed their authority or breach the law or ask others to do so, and they should work in full cooperation with other public officials unless prohibited from so doing by law or by officially recognized confidentiality of their work.

D. Fair and Equal Treatment.

1. Interest in Appointments. Canvassing of members of the Council or Mayor, directly or indirectly, in order to obtain preferential consideration in connection with any appointment to the City service shall disqualify the candidate for appointment except with reference to unpaid positions filled by appointment by the Mayor or Council.
2. Use of Public Property. No public official shall request or permit the use of city-owned vehicles, equipment, materials or property for personal convenience or profit, except when such services are available to the public generally or are provided as municipal policy for the use of such employee in the conduct of official business or as a specifically defined benefit in compensation of employment.
3. Obligations to Citizens. No public official shall grant any special consideration, treatment or advantage to any citizen beyond that which is available to every other citizen except as otherwise permitted by law or ordinance.

E. Conflict of Interest.

1. Disclosure. No public official, whether paid or unpaid, shall take any action in the course of his/her duties, the effect of which **potentially or actually** would be to the private financial gain or loss of (a) the official, (b) any relative of the official or (c) those with whom the official has a close business relationship, without first disclosing such potential **or actual** gain or loss to the proper authority. Nor shall any public official, whether paid or unpaid, engage in any business or participate in any proposed or current City transaction, contract, purchase or sale which is potentially **or actually** incompatible with the proper discharge of that public official's official duties or which would tend to impair independence of judgment or action in the performance of that public officials' official duties without first disclosing such potential **or actual** incompatibility or impairment of independent judgment or action to the proper authority. ~~For elected officials, such disclosure shall be made in an open meeting to the elected body on which the official serves. For appointed officials, such disclosure shall be made in an open meeting to the appointed body on which the official serves.~~ **The requirements for such disclosure by elected and appointed officials and the limits on their participation in discussion, debate, or voting on any issue out of which an actual conflict arises shall be those set forth in ORS 244.120(2), as it may be amended from time to time and as it is interpreted by the Oregon Government Ethics Commission.** For employees, such disclosure shall be made in writing to the employee's immediate supervisor and Department Head. Any employee or appointed official who has a financial or other private interest in a particular matter shall disclose the nature and extent of such interest on the records of the Council before participating in Council discussion on or giving an official opinion to the Council on the matter.
2. Transactions with the City. A public official acting in an official capacity shall not recommend, approve, award, enter into or authorize a City transaction, contract, purchase or sale to which one of the parties is (a) the public official acting in his or her own behalf, (b) a relative of the official or (c) a business entity in which the official or a relative of the official has a substantial or controlling interest.
3. Gifts. No public official shall solicit or accept gifts, favors, services, compensation, retainers or promises of future employment from a source with a legislative or administrative interest in the performance of his/her official duties or in anticipation of official action to be taken by the public official or by the City. For purposes of this provision, "gift" means something of economic value given to a public official, a candidate or a relative or member of the household of the public official. A public official may not accept a gift from a source with a legislative or administrative interest in the public official's official duties if the gift has a value in excess of \$50 or smaller gifts from a single source with an aggregate value exceeding \$50 in the course of a calendar year. Gifts received by City employees with a value of less than \$50 shall, to the extent practical, be shared with other City employees. Public officials may accept gifts with de minimis value, such as caps, coffee mugs, pens and paperweights, and are not expected to share such gifts.
4. Remuneration Contingent on City Action. No public official shall accept a retainer or compensation that is contingent upon a specific action by the City.

5. Disclosure of Confidential Information. No public official shall, without proper legal authorization, disclose confidential information concerning the property, government or affairs of the City that is confidential or not readily available to the public. Nor shall any public official use information that is confidential or not readily available to the public to benefit private interests, including the official's private interests, at the expense of or in conflict with the public interest. Information that is public may not be readily available to the public if a special request is required to obtain the information or if special knowledge, such as that acquired as a public official, is needed to take advantage of the information.
6. Representing Private Interests before Courts or City Departments or Elected or Appointed Bodies. No appointed official shall appear on behalf of a client for a fee or pro bono before the board or commission to which that official is appointed. No employee whose salary is paid in whole or in part by the City shall appear on behalf of private interests before any department or elected or appointed body of the City. An employee shall not represent private interests in any action or proceeding against the interests of the City in any litigation to which the City is a party, unless the employee is representing himself/herself as a private citizen on purely personal business.
7. Incompatible Employment. No employee shall engage in or accept employment from or render services for another person or entity when such employment or service is incompatible with the proper discharge of that employee's official duties for the City or would tend to impair independence of judgment or action in the performance of that employee's official duties.
8. More Restrictive State Law Provisions. Nothing in this ordinance relieves or excuses public officers and employees from compliance with more restrictive state laws applicable to the particular public position. Planning Commissioners, for example, are subject to more restrictive Conflict of Interest Provisions pursuant to ORS 244.135.

F. Political Activity

Employee involvement in certain political activities is protected under the First Amendment. However, under Oregon and federal law, there are some restrictions on the political activities of Oregon public employees. City employees are expected to be familiar with and to comply with these laws as they currently exist or as amended.

Oregon law (ORS 260.432(2)) requires that: "No public employee shall solicit any money, influence, service or other thing of value or to promote or oppose any political committee or to promote or oppose the nomination or election of a candidate, the gathering of signatures on an initiative, referendum or recall petition, the adoption of a measure or the recall of a public office holder while on the job during working hours. However, this section does not restrict the right of a public employee to express personal political views."

The Hatch Act (federal law) further requires that employees whose principal job responsibilities are financed in whole or in part from loans or grants made by the federal

government may not use their official influence to interfere with or affect the result of an election or a nomination for office. An employee covered by the Act may not, either directly or indirectly, coerce or advise another employee to contribute anything of value in any form whatsoever to any organization or agency for political purposes.

The expression of personal political views while on the job during working hours is permitted only to the extent that such expression does not interfere with the performance of the employee's duties or performance of the duties of other employees. While on the job, during working hours, any comment or suggestion to fellow employees or the public to vote a certain way is prohibited, even if it does not interfere with the performance of duties of the employee or other employees. Politically related activities such as fundraising, soliciting volunteer help on political campaigns or disseminating partisan election material is prohibited while on the job during working hours.

No public official shall promise an appointment to any municipal position as a reward for any political activity.

G. Applicability of City Code of Ethics and State Ethics Law; Responsibility for Defense.

This City ethics code shall be operative in all instances covered by its provisions except when superseded by an applicable statute, ordinance or resolution which is mandatory or when the application of a statute, ordinance or resolution provision is discretionary but determined to be more appropriate or desirable. Full compliance with the City code of ethics and with Oregon's Government Ethics Law is the personal responsibility of each public official. The opinion of the City Administrator, the City Attorney, or the Mayor shall not be considered an affirmative defense if a public official is charged by the Oregon Government Ethics Commission with a violation of state Ethics Law. Any public official accused of violating the state Ethics Law shall be solely responsible for the costs of his or her defense before the Oregon Government Ethics Commission. If the charges are dismissed or determined to be unfounded, the City Council, at its sole discretion, may elect to reimburse a public official for some or all of the costs incurred by the official.

1. Employees. When an employee has doubt as to the applicability of a provision of this ethics code or the Government Ethics Law to a particular situation, the employee should apply to the City Administrator, who is charged with the implementation of the City's ethics code for an advisory opinion, and be guided by that opinion when given. The employee shall have the opportunity to present his or her interpretation of the facts at issue and of the applicable provision(s) of the ethics code or Government Ethics Law before such advisory decision is made. All such requests for advice shall be treated as confidential. The City Administrator may ask the City Attorney to provide an advisory opinion based upon the facts presented, which opinion shall be subject to the attorney-client privilege.
2. Appointed and Elected Officials. When an appointed official or an elected official has doubt as to the applicability of a provision of ethics code or state Ethics Law to a particular situation, he or she may seek an advisory opinion from the City Attorney. If an appointed or elected official requests advice on an ethics question about that

official's actions or potential actions, the opinion itself shall be subject to the attorney-client privilege and not be disclosed to the Mayor, Council members, or anyone other than the requesting official without the official's explicit approval.

3. The opinion of the City Administrator or the City Attorney shall not be considered an affirmative defense if a public official is charged by the Oregon Government Ethics Commission with a violation of state Ethics Law.

H. Code of Ethics Definitions:

- 1) Employee - For the purposes of this section, "employee" shall mean one who is hired and paid a wage or salary to work for the City other than elected or appointed officials.
- 2) Appointed Official - For the purposes of this section, "appointed official" shall mean a person who is appointed to serve on one of the City's boards or commissions and shall also mean the City Administrator and City Attorney.
- 3) Elected Official - For the purposes of this section, "elected official" shall mean one who is elected by the registered voters of the City of Ashland to serve the city and shall include: the Mayor, the city councilors, the city recorder, the municipal judge and the parks commissioners.
- 4) Public Official - For purposes of this section, "public official" shall mean any employee, appointed official or elected official.
- 5) Private Interests - The interests, including but not limited to financial interests, of discrete individuals or entities, as distinct from the interests of the City as a whole or the interests of its citizens in general.
- 6) Relative - (a) The spouse and any children, siblings, parents, or spouses of siblings or parents of a public official; (b) any children, siblings, parents, or spouses of siblings or parents of a public official's spouse; (c) any individual for whom a public official has a legal support obligation; or (d) any individual for whom a 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.

I. Municipal Court Judge. Notwithstanding any other provision of this ordinance, the conduct of the Municipal Court Judge, an elected official, shall be governed by the Rules of Judicial Conduct of the Oregon State Bar, including subsequently enacted amended, reordered, or renumbered versions thereof, specifically incorporated herein and made a part hereof by this reference.

J. Sanctions. Violation of any provision of this section, determined after notice and an opportunity to be heard, shall constitute cause for disciplinary action up to and including termination for an employee, or removal from office of an appointed official. Discipline or removal actions shall be in addition to, and not in lieu of, any other City initiated sanction or penalty authorized by Title 1 of the Ashland Municipal Code.

SECTION 2. Savings. Notwithstanding this amendment/repeal, the City ordinances in existence at the time any criminal or civil enforcement actions were commenced, shall remain valid and in full force and effect for purposes of all cases filed or commenced during the times said ordinances(s) or portions thereof were operative. This section simply clarifies the existing situation that nothing in this Ordinance affects the validity of prosecutions commenced and continued under the laws in effect at the time the matters were originally filed.

SECTION 3. Severability. The sections, subsections, paragraphs and clauses of this ordinance are severable. The invalidity of one section, subsection, paragraph, or clause shall not affect the validity of the remaining sections, subsections, paragraphs and clauses.

SECTION 4. Codification. Provisions of this Ordinance shall be incorporated in the City Code, and the word “ordinance” may be changed to “code”, “article”, “section”, or another word, and the sections of this Ordinance may be renumbered or re-lettered, provided however, that any Whereas clauses and boilerplate provisions (*i.e.*, Sections [No. 2-4] need not be codified, and the City Recorder is authorized to correct any cross-references and any typographical errors.

The foregoing ordinance was first read by title only in accordance with Article X, Section 2(C) of the City Charter on the ____ day of _____, 2017, and duly PASSED and ADOPTED this ____ day of _____, 2017.

Barbara M. Christensen, City Recorder

SIGNED and APPROVED this ____ day of _____, 2017.

John Stromberg, Mayor

Reviewed as to form:

David H. Lohman, City Attorney