



October 21, 2015

VIA EMAIL

Re: Complaint to Ombudsman's Office (2015-213)

Concerned Portland Citizens:

Thank you for contacting my office and for your patience during my review. I have completed my review of your ethics complaint and wanted to share my conclusions and recommendations.

Summary

On June 12, 2015, the Office of the Ombudsman received your complaint, which raised a number of concerns about the West Quadrant Plan Stakeholder Advisory Committee (SAC). I limited the scope of my review to the alleged conflicts of interest involving SAC members. I have concluded that the Bureau of Planning and Sustainability did not properly train SAC members about their legal obligations. I have also concluded that it appears likely that individual SAC members did not comply with their obligations to disclose potential conflicts of interest. As a remedy, I have recommended that the Bureau of Planning and Sustainability call for SAC members to publicly disclose any potential conflicts before the Planning and Sustainability Commission or the City Council adopts a final plan in 2016. After the additional opportunity for disclosure, any complaints about undisclosed potential conflicts of interest should be lodged with the Oregon Government Ethics Commission.

Background

Your original complaint to my office raised a number of concerns about the West Quadrant Plan SAC, including alleged violations of the Civil Rights Act, Statewide Planning Goal 1, and the City's Code of Ethics. Your complaint suggested the appropriate remedy would be to invalidate the SAC's votes to increase height limits and relax zoning. In subsequent communications, you also raised conflict of interest concerns about Commissioner Saltzman's participation in the Council vote regarding whether to adopt the West Quadrant Plan Resolution.

After a preliminary review, I concluded that the alleged violations of the Civil Rights Act and Statewide Planning Goal 1 lacked sufficient merit to warrant being part of the scope of my inquiry. The complaint does not allege a plausible claim that there was discrimination against a class of people who are protected by the Civil Rights Act, and the Bureau of Planning and Sustainability has met the requirements of Statewide Planning Goal 1.



Additionally, my office lacks jurisdiction to investigate alleged ethics violations by Commissioner Saltzman. Ethics complaints against elected officials should be directed to the Oregon Government Ethics Commission. Accordingly, the scope of my review is limited to the conflict of interest allegations involving SAC members.

Analysis

The threshold question is whether SAC members are public officials under state ethics law. The Oregon Government Ethics Commission has found that the definition of “public official” encompasses volunteer committee members who serve in an advisory capacity to a City agency (see Advisory Opinion No. 07A-1001). As such, SAC members clearly fall under the definition of public official. And as public officials, SAC members were required to disclose the nature of any conflicts of interest. To date, they have not.

The cause of this omission initially lies with the Bureau of Planning and Sustainability, which did not properly apprise SAC members that they were public officials subject to state ethics law. The Bureau acknowledges that it did not screen for conflicts of interest as part of the SAC selection process. Nor did it inform or train appointed SAC members on their obligations as public officials. Bureau officials indicated that members of more formal committees, like the Planning and Sustainability Commission, are informed of their status as public officials, but that Bureau officials were previously unaware that volunteer members of bureau advisory committees met the definition of public officials. According to the Oregon Government Ethics Commission’s *A Guide for Public Officials*, “[i]t is imperative for government agencies . . . to ensure their public officials receive training in Oregon Government Ethics law. Those that fail to provide this training do a disservice to the public officials who they employ or who represent them” (page 3).

Nevertheless, as the *Guide* makes clear, compliance with the Oregon Government Ethics Law is the *personal responsibility* of each SAC member. As such, the Bureau’s failure to train SAC members does not excuse an SAC member’s failure to comply with the law (page 3).

Public officials face two types of conflict of interest under Oregon Government Ethics Law: actual and potential (see ORS 244.020(1), (12)). The Oregon Government Ethics Commission describes the difference between the two as being determined by the words “would” and “could.”

“An actual conflict of interest occurs when an action taken by the official would directly and specifically affect the financial interest of the official, the official’s relative or a business with which the official or a relative of the official is associated. A potential conflict of interest exists when an official takes action that could have a financial impact on that official, a relative of that official or a business with which the official or the relative of the official is associated.”

(Advisory Opinion No. 07A-1001, page 3).

SAC members do not face actual conflicts of interest. In a closely analogous scenario, the Oregon Government Ethics Commission explained that actual conflicts of interest cannot occur where an advisory committee makes non-binding recommendations (Advisory Opinion No. 07A-1001, page 3). According to the SAC's charter, the SAC develops recommendations to present to City decision-makers, but it is the City Council that has the ultimate decision-making authority regarding whether to adopt the West Quadrant Plan.

SAC members still face a potential conflict of interest if they take any action that could have a financial impact on them, a relative or a business with which the SAC member or a relative is associated. A potential conflict of interest does not preclude anyone from being a member of the SAC or voting on a recommendation. Rather, any SAC member faced with a potential conflict of interest must publicly disclose the nature of the potential conflict of interest prior to taking any action. Based on the information you presented in your 46-page complaint, it appears likely that multiple SAC members should have – but did not – publicly disclose potential conflicts of interest before discussing and voting on recommendations for the West Quadrant Plan.

Public disclosure of a potential conflict of interest is a critical safeguard to assure the public that the planning and development recommendations to decision-makers are based on consideration of what is in the public interest, not what will most benefit the personal financial interest of an individual advisory committee member. That did not happen before the SAC voted on recommendations for the West Quadrant Plan.

Recommendations and Conclusion

Options under state law to remedy the failure to publicly disclose conflicts of interest are limited. According to the *Guide*, “any official action that is taken may not be voided by any court solely by reason of the failure of the public official to disclose an actual or potential conflict of interest” (page 24). Typical enforcement takes the form of education or monetary sanctions against the individual who violated the law.

That being said, there does remain an opportunity to serve the spirit of the law. As it currently stands, the West Quadrant Plan has only been passed as a resolution by City Council, which means that it is not yet binding law. At the March 5, 2015 Council hearing, Bureau of Planning and Sustainability leaders made clear that prior to it being merged into an ordinance with other geographic area plans, the West Quadrant Plan could be refined if needed.

I recommended that the Bureau of Planning and Sustainability contact SAC members and have them disclose any potential conflicts of interest. The Bureau should then compile a disclosure document that itemizes the responses. The document should not only include the responses by the SAC members, but it should note if any members fail to respond. That document should be entered into the public record and presented to the decision-makers when the Central City Plan

– of which the West Quadrant Plan is a part – goes before the Planning and Sustainability Commission in February 2016 and to City Council after that. Such action would provide the sort of transparency that Oregon Ethics law requires and help to restore public confidence in the integrity of the process. Such action would also provide Planning and Sustainability Commissioners and City Council members with information sufficient to allow them to exercise their electoral judgment in light of any potential conflicts of interest.

If you believe this proposed remedy to be insufficient, you may still bring your complaint about individual SAC members to the Oregon Government Ethics Commission (subject to any statute of limitations). The Commission does not, however, accept anonymous complaints; under ORS 244.260(1)(a) complaints must be signed.

As for the broader institutional shortcoming that your complaint revealed, the City Attorney's Office intends to develop a standard, City-wide approach to informing and training volunteer public officials on their obligations under state ethics law (and open meetings and public records law, for that matter). This is a past due and vital step to ensure that the many advisory bodies to City agencies are complying with the sunshine laws designed to make government fully accountable for the actions it takes on the public's behalf.

Thank you again for bringing your concerns to my attention.