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OREGON GOVERNMENT  
ETHICS COMMISSION

# Oregon Government Ethics Commission

## COMPLAINT FORM

Case No. 15-256EDG  
(assigned by commission)

See page two of form for important information

(please type or print clearly)

1. Identify the public official(s) you believe may be involved in the alleged violation: *(If you are alleging that more than one person may have violated the law, you must provide complete information for each individual. You may attach additional sheets if necessary.)*

Name: Donald Williams

Address: 801 SW Hwy 101, Lincoln City, OR 97367

Public Position: Mayor of the City of Lincoln City

Telephone: (work) 541-996-1205  
(include area code)

(home) \_\_\_\_\_

(email) dwilliams@lincolncity.org

2. Describe in detail the circumstances, incidents or events that lead you to believe a violation has occurred. Provide information that would answer such questions as who, what, how, where and when. Enclose any supporting documents, minutes, recordings, statements, news clippings, etc. The information you provide must support your belief that a violation occurred and the named official was responsible. *(You may attach additional sheets if necessary)*

See attached complaint authorized by the City Council of Lincoln City by motion on August 10, 2015.

I understand that upon receipt of this complaint, the public official subject to this complaint will be notified of the nature of the complaint, my identity and will be provided copies of this complaint and any enclosures.

Signature:  *Council President*  
*as*  
*directed by City Council*

Date: 8-19-15

Printed Name: Roger Sprague

Mailing Address: 801 SW Hwy 101, Lincoln City, OR 97367

Telephone: (work) 541-994-2651  
(include area code)

(home) \_\_\_\_\_

(email) rsprague@lincolncity.org

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### IMPORTANT

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The jurisdiction of the OGEC is limited to the following areas:

- Use of public office for financial gain (*ORS Chapter 244*)
- Conflict of interest (*ORS Chapter 244*)
- Statements of Economic Interest (*Chapter 244*)
- Executive session provisions of Public Meetings law (*ORS 192.660*)
- Lobbying regulation law (*ORS Chapter 171.725 - 171.785; 171.992*)

(Statutes can be viewed on our web site at [www.oregon.gov/ogec](http://www.oregon.gov/ogec))

If you have questions about this form, your complaint or the jurisdiction of the OGEC, it is suggested that you call 503-378-5105 to discuss the issue briefly with a staff investigator before you file.

Please complete all sections of the form. **Complaints will not be accepted without a signature.**

You will receive verification of receipt of your complaint and will be given any further instructions by return mail. The public official subject to this complaint will be notified of the nature of the complaint, your identity and will be provided with copies of this complaint and any enclosures.

The OGEC is required by law to conduct the preliminary review confidentially. The OGEC will make no public disclosure or comment related to this matter other than to acknowledge that a complaint is pending if an inquiry is made. The confidentiality requirement applies only to OGEC personnel. The ability of any other persons to publicly comment about this matter is not affected. At the conclusion of the preliminary review, all information concerning this matter will become available to the public.

Submit your form to: Oregon Government Ethics Commission  
3218 Pringle Rd SE, Suite 220  
Salem, OR 97302-1544

Telephone: 503-378-5105



## CITY COUNCIL

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August 20, 2015

Oregon Government Ethics Commission  
3218 Pringle Rd, SE, Suite 220  
Salem, OR 97302-1544

This complaint was authorized to be filed by the City Council of Lincoln City by motion on August 10, 2015.

### Summary.

This complaint alleges that Lincoln City Mayor Don Williams acted in violation of ORS 244.020(1) (Actual Conflict of Interest), and ORS 244.040(1) (Use of Office). Other statutes are implicated and will be addressed as they are pertinent.

In sum, it is alleged that the Mayor, contrary to Oregon law:

- Initiated and participated in discussions concerning repeal of the vacation rental dwelling (VRD) accessory use limitation and advocated against enforcement of the limitation. City code accessory use provisions directly limit and restrict use of the Mayor's family VRD. The Mayor did not disclose a conflict of interest, nor recuse himself, despite specific training and advice from counsel. Repeal of the accessory use limitation would permit the Mayor's family business to rent more than the current land use approval limit of 150 nights. Similarly, failure to enforce the limitation would excuse the business from alleged violations based on the 150 night limit. Either of these actions would result in a financial benefit or the avoidance of a financial detriment.
- Disclosed the content of confidential attorney-client memoranda and executive session discussions to the manager of the VRD business (his spouse) and that person attempted to use the information to obtain favorable statements and commitments from the City Planning Director concerning additional VRD use for 2015 and to avoid receiving a Notice of Violation for exceeding the numeric limit of rental nights for 2014. Such actions would also result in a financial benefit or avoidance of a financial detriment.

Applicable Statutes:

**ORS 244.040 [Use of Position or Office].**

(1) Except as provided in subsection (2) of this section, a public official may not use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment for the public official, a relative or member of the household of the public official, or any business with which the public official or a relative or member of the household of the public official is associated, if the financial gain or avoidance of financial detriment would not otherwise be available but for the public official's holding of the official position or office.

**ORS 244.020(1) [Conflict of Interest].**

(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 (12) of this section.

**ORS 244.040(4). [Misuse of Confidential Information]**

(4) A public official may not attempt to further or further the personal gain of the public official through the use of confidential information gained in the course of or by reason of holding position as a public official or activities of the public official.

**ORS 162.415 [Official Misconduct in the First Degree].**

(1) A public servant commits the crime of official misconduct in the first degree if with intent to obtain a benefit or to harm another:

(a) The public servant knowingly fails to perform a duty imposed upon the public servant by law or one clearly inherent in the nature of office; or

(b) The public servant knowingly performs an act constituting an unauthorized exercise in official duties.

(2) Official misconduct in the first degree is a Class A misdemeanor.

Mayor's interest in a vacation rental business.

Genesis Family Properties LLC (Genesis) is the owner of a large vacation rental dwelling (VRD) located at 2624 SW Coast Avenue in Lincoln City, Oregon, according to Lincoln County records.<sup>1</sup> The Mayor's wife (Debbie Williams) is listed as the Registered Agent and Manager on Oregon Secretary of State Corporations Division records.<sup>2</sup> The exact interest of the Mayor in the property is not disclosed but the LLC property is acknowledged to be a business with which the Mayor's spouse is associated. [See July 14, 2015, OGEC letter of advice to VRD owner Ross Smith submitted "on behalf of Don Williams, Mayor of Lincoln City"]<sup>3</sup>. As a Planning Commissioner, Don Williams recused himself in vacation rental overlay zone hearings, acknowledging his family's interest in the Genesis property.<sup>4</sup>

Zoning limitation applicable to vacation rentals in residential zones.

The Genesis property is currently zoned (R-1) single-family residential. In all residential zones, vacation rental use is an accessory use; LCMC 17.80.050.B.2 provides:

2. Accessory or Permitted Use. A VRD is allowed as an accessory use in a residential zone and a permitted use in a commercial zone, provided the VRD meets the applicable standards of this chapter and obtains a license under Chapter 5.14 LCMC.<sup>5</sup>

By definition, the vacation rental use is limited to use which is incidental and subordinate to the main use of the property as the owner's vacation home. LCMC 17.08 provides:

"Accessory structure" or "accessory use" means a structure or use incidental and subordinate to the main use of property and located on the same lot as the main use, including any required off-street parking within 200 feet (measured in a straight line) of the building or use it is intended to serve. [LCMC 17.08]

This limitation is a discretionary land use standard which has existed in the City Code for over twenty-five years. Notwithstanding this limitation, however, VRDs have come to predominate certain residential areas in Lincoln City, both in terms of number and

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<sup>1</sup> Exhibit A Page 1 (County Records)

<sup>2</sup> Exhibit A Page 2 (Genesis Family Properties, Oregon Secretary of State Corporations Div.)

<sup>3</sup> Exhibit A Page 4 (OGEC letter to Ross Smith dated July 14, 2015)

<sup>4</sup> Exhibit A Page 7 (Planning Commission Minutes)

<sup>5</sup> Exhibit A Page 10 (LCMC 17.80.050)

number of nights rented, rather than the intended principal use of the dwelling by the owner as a vacation home. The City Council has recognized that such intense VRD use creates conflicts with existing residents and disrupts neighborhoods.<sup>6</sup>

In 2013 and 2014 the City Council considered several ordinances related to regulation (and deregulation) of vacation rentals. Ultimately, the Council decided not to repeal the Code language making VRD use in residential zones an accessory use. Such a repeal of the accessory use limit was sought by VRD owners because it would have the effect of authorizing an unlimited number of rental nights in residential areas – the same as in commercial zones.<sup>7</sup> Owing in large part to threats of Measure 49 claims if new regulations were adopted, Council elected instead to enforce the existing accessory use limitation (exempt from Measure 49) and adopted ordinances designed to ease the burden of such enforcement.<sup>8</sup>

In December 2014, after adoption of the ordinances, the City Council expressly directed the City Attorney and the City Manager, by motion, to enforce the accessory use limitation.<sup>9</sup> In implementing this directive, the City Attorney discussed with the Planning Director, City Manager, and City Council, in subsequent executive session meetings, the need to hold VRDs with numeric limits in their VRD applications to those limits in enforcement actions, as well as the urgency of proceeding with evidence collection, prerequisite Notice of Violation letters, and (if necessary) citations, due to the six month statute of limitations.

As a VRD owner, before taking elected office, Don Williams appeared at City Council and Planning Commission meetings and testified against the Council's proposed ordinances and the enforcement of the accessory use limitation.<sup>10</sup> However, despite Mr. Williams' election to office, the majority of the Council has not expressed any interest in repealing the accessory use limitation.

#### Genesis property –alleged violation of the VRD accessory use limitation.

At the time Genesis applied for accessory use VRD land use approval in January 2010, their land use application indicated they would rent the property approximately 150 nights per year.<sup>11</sup> This application was approved. During the evidence collection effort commenced by the City Attorney for possible 2014 violations of the accessory use

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<sup>6</sup> Exhibit A Page 16 (Ordinance No. 2014-21, Exhibit A, and Exhibit 1 to Findings)

<sup>7</sup> Ibid (Repeal Ordinance VRD2 was rejected).

<sup>8</sup> See Footnote 6 (Three ordinances were adopted; two ordinances were later rejected in the May referendum)

<sup>9</sup> Exhibit A Page 91 (Council minutes December 8, 2014).

<sup>10</sup> Exhibit A Page 98 (Lincoln City Council Special Meeting, September 15, 2014. See also Footnote 4)

<sup>11</sup> Exhibit A Page 101 (Vacation Rental Dwelling Application)

limitation, it was revealed that for calendar year 2014, the number of nights Genesis actually rented was 171 nights, or 21 nights more than the numeric limitation specified on the land use application.<sup>12</sup> This degree of usage, especially as it is in excess of the number of nights approved in the land use application, raised the significant probability, that the Mayor's use of his family VRD was not "incidental and subordinate" to the use as the owner's vacation home. Such usage would be a violation of the Lincoln City Municipal Code, Chapter 17.84 (making the land use approval conditions enforceable) and subject Genesis to an enforcement action or revocation proceedings under the City Council's directive to the City Manager and City Attorney.<sup>13</sup>

A Notice of Violation letter setting forth the City's case for such a violation and asking for voluntary compliance is a prerequisite to citation.<sup>14</sup> Once an NOV is delivered, the offender has ten days to submit a voluntary assurance of compliance. If the assurance is deemed acceptable to the Planning Director and the Municipal Court Judge, it is signed by the Judge and becomes a Court Order (punishable by Criminal Contempt). The offender is bound by this Order and can elect to avoid the risk of fines and costs. If an assurance of compliance is not timely provided, the offender is cited. If cited, each night over the numeric limit would constitute a separate Class A offense, punishable by a fine of up to \$1000 a day and a \$100 code enforcement fee.<sup>15</sup>

#### Knowledge of the applicable Conflict of Interest and Use of Public Office Laws

At Council orientation on January 7, 2015, the former City Manager and City Attorney covered the basics with the newly elected City Councilors, including Mayor Williams (a former Planning Commissioner).<sup>16</sup> Training materials<sup>17</sup> were distributed in advance including the OGE *Guide for Public Officials*. At the orientation meeting, pages from the LOC *City Handbook* were distributed by the City Attorney.<sup>18</sup> [Orientation@1:08] The City Attorney reviewed criminal conduct applicable to public officers, including official misconduct, ORS 162.405 and ORS 162.415 as well as ORS 244 Ethics and Gift Restrictions. Topics covered included procedures when met with an actual conflict of interest and the prohibition on misuse of official position –i.e. the 'but-for' test. Relevant LOC Handbook pages distributed included Chapter 4, page 4-11, (ORS 244.020 actual conflict of interest) and page 4-13 ("but for" prohibition of ORS 244.040).

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<sup>12</sup> Exhibit A Page 103 (Guest Register)

<sup>13</sup> Exhibit A Page 107 (LCMC 17.84)

<sup>14</sup> Exhibit A Page 111 (Sample NOV from June 1 confidential memo)

<sup>15</sup> See footnote 14, specifically Section 17.84.020.A.

<sup>16</sup> See Enclosed Digital Recording of January 7, 2015 Training

<sup>17</sup> Exhibit A Page 115 (David Hawker - Orientation Materials Transmittal)

<sup>18</sup> Exhibit A Page 206 (pages from LOC Handbook, statutes and memos)

[Orientation @ 1:35] In addition, misuse of confidential executive session information was covered, including LOC Handbook page 3-16 which provides in pertinent part:

Councilors should not disclose what was discussed in an executive session with persons who were not in attendance. ...Although nothing in the Public Meetings law prohibits disclosure, the council's rules of procedure, city ordinances or the city charter may prohibit disclosure and impose penalties ranging from public censure to loss of office. In addition, disclosure may violate an individual's privacy rights, exposing the councilor and the city to liability. **Willful disclosure for the purpose of harming another or for pecuniary gain could constitute an ethics violation or official misconduct.** ORS 162.415, 162.425 and ORS 244.040(4). **(Emphasis added)**<sup>19</sup>

See Orientation @1:35-1:37 & 1:46-1:51. See ORS 244.040 (1)&(4). ORS 162.415, ORS 162.425. (i.e. Resolution 2008-47, Section 3.1 "Under the Charter, the authority of the City Council as governing body lies in the Council as a whole, not individual Councilors." Only the full Council can authorize release of confidential executive session materials; accordingly, unauthorized release by one Councilor would constitute an unauthorized exercise in official duties under ORS 162.415).

The Charter and Council Rules were also distributed prior to the January 7, 2015, orientation.<sup>20</sup> Section 8.1.(1)(c) of the City Charter provides that conviction of Official Misconduct or Misuse of Confidential Information constitutes vacancy in the office.<sup>21</sup> Council Rules Resolution 2008-47 requires Councilors to "...observe the requirements of State Ethics Law (ORS 244.010 to ORS 244.390) dealing with the use of public office for private financial gain." Similarly, Council Rules also address "Confidential Information" requiring, in Rule 5.1:

Councilors will keep confidential information provided to them in executive session meeting, or information provided as a confidential communication under law, to insure the City's position in the confidential matter is not compromised. No mention of the information obtained should be made to anyone other than to other Councilors, the city manager, city attorney, or designated staff.<sup>22</sup>

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<sup>19</sup> See Footnote 19

<sup>20</sup> See Footnote 18

<sup>21</sup> See Footnote 18

<sup>22</sup> See Footnote 18

## Summary of Actions giving rise to this Complaint

In sum, the enclosed materials, transcripts, and affidavit evidence demonstrates:

- The Mayor has an interest in a VRD business (Genesis) located in a residential zone and the Municipal Code currently restricts such VRD business to accessory use. The Mayor's land use application indicated 150 rental nights and the Mayor's actual business use of his VRD is in excess of this limitation (171 nights in 2014). Don Williams took office as Mayor in January 2015 with knowledge that the City Council had declined to adopt ordinances repealing or lessening the VRD accessory use limitation. On December 8, 2014, the Council directed the City Manager and City Attorney to enforce the accessory use limit. [City Council Meeting Minutes of December 8, 2014, page 6]. The Mayor was specifically advised that Council had in December of 2014 directed the City Attorney and City Manager to enforce the VRD accessory use limitation.<sup>23</sup> Notwithstanding the actual conflict of interest, the Mayor made no disclosure and, in fact, initiated and actively participated in discussion in executive session directed toward repeal of this accessory use limitation. Repeal would eliminate future violation of the limitation, eliminate future exposure to fines (avoiding financial detriment), and result in more authorized VRD use in the residential zone (financial gain).
- Similarly, despite an actual conflict of interest, the Mayor made no disclosure and participated in discussions concerning VRD enforcement, including requesting that VRD owners be given a "grace period" or delay relative to VRD accessory use enforcement, even though Genesis Family LLC was one of the vacation rentals reviewed in the initial enforcement review of the top 25 VRDs in residential zones.<sup>24</sup> This participation relative to repeal of the accessory use limitation and delay in enforcement for violations of the accessory use limitation violates ORS 244.020(1) (actual conflict of interest) and ORS 244.040(1)(use of office). Ultimately, despite Council's express direction in December 2014, to enforce the accessory use limitation and the City Attorney's stated urgency to the Manager and Planning Director to issue Notice of Violation letters (NOVs), given the six

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<sup>23</sup> "In general, except for prosecution, the role of the City Attorney is not to make decisions but to make sure the decision-maker is well informed. In the process of making decisions, the City Attorney points out the strengths and weaknesses of particular alternative courses of action. The Attorney will always recommend the most defensible position, but ultimately the decision belongs to Council. Once a decision is made, the City Attorney will vigorously defend the decision. At this point, the decision being made, my obligation is to vigorously defend the Council's decision and defend the ordinances. Similarly, the City Manager and I have been directed to enforce the existing accessory use limitation in land use permitting and quasi-judicial revocation proceedings. This directive is consistent with the mandates of Oregon law. See ORS 162.415." [Feb 9, 2015 Ex Session memo – emphasis added]

<sup>24</sup> Exhibit A Page 264 (June 1, 2015, Confidential memo to City Manager and Planning Director and attachments)

month statute of limitations, no Notice of Violation (NOV) letters were issued for violations in the 2014 calendar year.

- The Mayor received confidential executive session information concerning proposed procedures and strategy for enforcement of the VRD accessory use limitation, including the proposal to hold those with specific numeric limitations stated in their applications to those terms. City practice is to make sure that all persons attending executive sessions are informed that nothing said in executive session is to be disclosed absent express authorization from the full City Council. Materials discussed in executive session are marked "Confidential" and Council Rules and Municipal Code prohibit disclosure. Nevertheless, Mayor Williams appears to have shared confidential information regarding enforcement with his wife, the manager of their family VRD; Ms. Williams approached the Planning Director four days after one such executive session (where the Genesis number was discussed) seeking to explain the number on their VRD land use application (as a partial year number) and seeking the Director's commitment (which she presumably would claim reliance upon) that they could rent up to 180 nights for 2015. This misuse of confidential information received as a consequence of the Mayor's position was both for purposes of avoidance of financial detriment and pecuniary gain. If the Planning Director agreed that the numeric limit of 150 nights on the land use application was simply a partial year, the Director would be hard pressed to send a Notice of Violation to Genesis Family LLC for renting 171 nights in 2014. Genesis would therefore avoid any enforcement action requiring strict observance of their numeric limit, fines, and costs, – financial deterrents. Similarly, if the Director agreed Genesis had the right to rent up to 180 nights for calendar year 2015, Genesis would realize financial gain (30 nights more than their land use approval). This disclosure and use of confidential information violates ORS 244.040(1)&(4) and appears to violate ORS 162.415.

#### Detailed Chronological account of actions giving rise to the Complaint.

For purposes of this complaint, executive session materials and discussions on the following meeting dates contain relevant information: February 9, 2015, February 18, 2015, March 9, 2015, April 27, 2015, and June 22, 2015. Transcribed excerpts and portions of executive session written materials are included in this complaint and are made available as confidential transferred records. The Executive Session recordings, or portions thereof, can be made available to OGEC for *in camera* review, however, the City Council wishes to maintain confidentiality<sup>25</sup>.

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<sup>25</sup> Exhibit A Page 280 (Records request from Ross Smith and Response approved by Council on July 8, 2015)

**February 9, 2015, memorandum containing enforcement example:**

An executive session was held on February 9, 2015. In preparation for the executive session a written Confidential Memorandum was prepared – entitled “Litigation Update”. (The executive session was held under ORS 192.660(2)(f) and (h) (review confidential records and consult with legal counsel on litigation)

The February 9, 2015, Confidential Executive session memo included the following text describing proposed land use enforcement in relation to a settlement offer provision in Ordinance 2014-22 which was on appeal to LUBA:

▪ *Example. Mrs. White owns a VRD in a residential zone. The VRD is managed by Mr. Black. Mr. Black actively markets the VRD and as a consequence it rents 250 nights a year. The land use application for Mrs. White’s VRD addressed the accessory use limitation by stating that the VRD would rent between 50-75 nights per year. This application was approved. When faced with an enforcement action, Mr. Black, the manager, and Mrs. White, the owner, are facing [a] citation[s] for each day over 75 days the VRD was rented. 175 violations at \$1100 each. In this instance a safe harbor [settlement] at 180 nights might be a beneficial option to the owner. (Most VRDs did not propose specific numbers, so a land use hearing to determine if 250 nights was incidental and subordinate would be necessary in such cases).*

The example above is based on a real case and was discussed at the Special Executive Session on February 18, 2015, [@40’-45’ minutes] and again on March 9, 2015 [Please note: the referenced 180 night settlement option was rejected by the voters in the May 2015, referendum election on Ordinance 2014-22].

After the February 9, 2015, Executive Session, Council took action in regular session to schedule a special meeting on February 18, 2015, to review the Petition in the pending LUBA appeal concerning the new VR zone and the associated ordinance containing settlement options for VRD enforcement of the accessory use limitation. The purpose of the meeting was to discuss the petitioner’s brief and assess the option of withdrawal for reconsideration.

**February 18, 2015, Executive Session (special meeting)**

@40:35 minutes:

*Councilor Ward: ... and accessory use ... is there a definitive authority on what that number is or is there a process that will get you definitively ...*

*City Attorney: Let me...*

*Mayor: Or is it necessary? Do we really need to keep that [accessory use] in?*

*City Attorney: Let me explain, the accessory use, there is nothing wrong, I'll go back to what Chris Thomas, [former city attorney 2005] said, there is nothing wrong with the accessory use standard....*

*[City Attorney explains the accessory use enforcement example in the memo from February 9, 2015.]*

*@ 45:30 minutes:*

*Mayor: For the guys that were here - were you here for the change from when it wasn't accessory use to --voted in -- accessory use?*

*Planning Director: It has always been accessory use.*

*Mayor: "From day one... You've always had accessory..."*

*Planning Director: "Yes"*

*Mayor: It hasn't always been ...*

*Planning Director: Yes, it has.*

*Mayor: Not since Lincoln City was founded.*

*Planning Director: Well, ever since there was something called a VRD.*

*Mayor: OK, well that's what I'm asking .... So my question is...*

*Are we further ahead with it? Do see any benefit from it?*

*Are we getting anything out of it that was intended in the first place?*

*Or is it just something we are now just ... going to enforce against each other, for no benefit.*

*City Attorney: The reasoning for it ...*

*Mayor: [to Attorney] well... I'm kinda asking them ...[Councilors] if I might...*

*Councilor Noreikis: well... With all due respect your honor, that's a policy question. We are trying to deal with a specific issue here I believe*

*Mayor: I understand but I'm just trying to grasp a policy of accessory use... we haven't discussed just pulling that out.*

*Councilor Noreikis: The last Council did not want to do that.*

*Mayor: I understand that, but I wasn't. Are we deriving benefit from an accessory use limitation?*

*City Attorney: The findings address the benefits of accessory use. The Council actually went through that exercise in the findings and explained why the accessory use [limitation] furthered comprehensive plan policies in balancing the housing and economic elements. That is all in writing ...*

*Mayor: I get that ...*

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@47:30 minutes:

*Mayor: So that's ...my question is. Did it do what was intended? Is there any detriment to taking it away? Is there anything that would say look let's just get rid of these two words? [i.e. "accessory use"]*

*Councilor Noreikis: In my opinion yes. There is a serious detriment. And it is in those findings...*

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### **March 9, 2015, Executive Session**

On March 9, 2015, in executive session, the Mayor was specifically advised that he should not participate in efforts to repeal the accessory use limitation applicable to vacation rental use of residentially zoned property. At that meeting, the City Attorney explained that he was uncomfortable with what had occurred at the February executive

session meeting. The Attorney explained that he was aware the mayor was renting more than his land use approval (code violation under LCMC 17.84.020) and that repeal of the accessory use limitation would eliminate that violation. Being unable to disclose what occurred in executive session (e.g. client confidence) the City Attorney asked for advice from the Ethics Commission staff regarding a hypothetical case of a public officer advocating repeal of a code provision the public officer was violating. At the March 9, 2015, executive session the City Attorney related the advice from staff at the Oregon Ethics Commission:

@21.46 minutes:

*City Attorney: The point of me bringing this up was actually a statement made by the Mayor at the last executive session. When we were at the last executive session, we were talking about the LUBA appeal. And while we were in this room [executive session] the Mayor mentioned that could we talk about the repeal of the accessory use limitation. Which was again, I brought up at that meeting - it was considered in Ordinance VRD2 last year and rejected by the Council. And it didn't sit right with me that the Mayor was asking about that because I know the Mayor has a VRD and I've done these numbers relative to the Mayor's VRD. And I know the Mayor's number of days rented exceeds the land use approval days.*

*Mayor: I don't think so, because I can show you when we registered we signed up for 180 ...*

*City Attorney: I am not here to argue with you... about the number of days ...*

*Mayor: Well, if you bring it up I'm gonna argue with ya.*

*City Attorney: The number of days on the application is 150, and the repeal of the accessory use limitation would again, bringing that up, would cure that problem, it would remove the limitation. So I was concerned about this so I talked to the Ethics Commission ...*

@ 23:52 minutes:

*City Attorney: Where you have a particular situation where you appear to have a code violation and what you are recommending is repealing the ordinance that causes the code violation, is that a conflict of interest ...and that was the question I asked them.*

*They said it is not only a conflict of interest under the actual conflict of interest rules, it is a violation of the use of office provision as well, this is the 'but for' test in Chapter 244, and that is you can't use or attempt to use your position as a public official to obtain a financial benefit for yourself or your family or business with which you are associated. The financial benefit that is prohibited is either an opportunity for gain or the avoidance of a loss or an expense. ... So that's one of the violations the other is the classic actual conflict of interest you can't participate or vote on a matter that, where you would obtain a financial benefit or come to benefit your immediate family or business with which you are associated...*

*My point in bringing this up is to say I think we need to set some parameters here for future participation by the Mayor when we're talking about the repeal of the accessory use limitation...*

*Mayor: I'll just throw this out...I'm not gonna get mad, you're doing your job, I appreciate it. If anyone thinks that I brought this up for any other reason just than the exercise of, I think it's a wrong thing to do, with or without me being part of a vacation rental, you are so mistaken it's not even funny. I am so completely offended, beyond words, that there is even an idea that I did it for a gain. Now, I have brought this up for the last two years and unfortunately I wasn't the Mayor for the last two years, without getting an attitude, it would have been nice to say "Don, by the way, maybe you ought to look at that", but I'm just saying right now, right here, that is not why it was brought up. It was brought up just like any other question I've had about this whole stupi..., this whole process. I think it's wrong and that's the end of what I'm going to say. If I need to sit out of this whole discussion ... I'll sit out of the whole discussion.*

*City Attorney: The point of me bringing this up is to give legal advice to my client, this body, and I have given you all the Guide for Public Officials and I have attached the copies and I highlighted the two sections that the young lady at the ethics commission told me that you would be violating if you advocated the repeal of the accessory use limitation because you have a VRD that has this issue.*

*Mayor: Ok, and, I wasn't even aware of it, but I'll clarify with my wife.*

*\*\*\**

*@45.26 minutes:*

*City Attorney: Nobody that is in this room can report without us going out there [open session] and saying lets release the executive session ....*

*Councilor Noreikis: [to Mayor] I interpret that as, if you choose to not regard his advice, [City Attorney] that the possibility is that we can go into Council [open session] and reveal what occurred... And you would be in violation...*

[Note: at this meeting the City Attorney handed out pages from the OGEC Guide for Public Officials concerning conflict of interest and use of office.]

### **Contact with Planning Director/apparent disclosure to Genesis LLC manager<sup>26</sup>**

On March 13, 2015, four days after the above-referenced executive session, the City Planning Director was visited by the Manager of the Genesis Family LLC vacation rental, Debbie Williams. Ms. Williams related that she understood that Mr. Appicello (City Attorney) was threatening an enforcement action. She indicated the 150 nights on their application was for the remainder of that year, [the year they applied] and not for the calendar year. She indicated that they all assumed they had 180 nights and that she already had reservations for 2015 for 173 nights. She asked the Planning Director "what should I do?" The Director advised he could not give legal advice. The Director's impression was that Ms. Williams wanted the Planning Director to agree to her characterization of 150 on the application and her statement about expecting to be able to rent 180 nights. [Please see enclosed Declaration from City Planning Director]

The City Attorney observed Ms. Williams in the Director's office and on the following Monday, March 16, 2015, inquired of the Director what transpired. The Director relayed the conversation and the City Attorney asked specifically whether it appeared Ms. Williams had knowledge of the executive session enforcement discussions. The Director replied affirmatively, that she clearly knew the substance of the executive session discussions.

### **April 27, 2015, Executive session**

@18:54 minutes:

*City Attorney: And the last item is VRD enforcement. I told you...last year...You directed myself and the manager last year to begin accessory use enforcement. I basically gathered the top 25 grossing VRDs that are in residential zones and looked at them and now we're trying to compare their TRT with their advertised rates, but we're trying to nail down*

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<sup>26</sup> Exhibit A Page 285 (Planning Director Declaration)

exactly the rental usage, so we're requesting their guest registers under the existing ordinance so a letter will go out to that effect.

There is some urgency that this needs to be done because we do have a statute of limitations on all violations at six (6) months. So, we won't be dragging our feet. We need to request the guest registers and then take a good look at their land use approvals and send them the NOV letter as a prerequisite, so they get a ten (10) day NOV letter as a prerequisite to the issuance of a citation. That doesn't mean ... everyone in the top twenty-five (25) will get an NOV letter, but we gotta get that prerequisite done in order to issue citations to the ones that absolutely have to be issued citations.

City Manager: Mr. Mayor, a couple of things on this I need to add to it. As we go forward with this, um, there's a, there's a couple of issues that I think need to be addressed before, like I said. Richard was talking about, at this point, it's simply a request for their registers so we can see how uh, so we have a way of determining uh, if they are in compliance. Now, we are expecting there will be two types of responses, or uh, two types of applications we'll be dealing with, those that have specific numbers on their VRD licensing, 50 days, 150 days, whatever it may be. Those ones are relatively easy to determine whether or not they have exceeded their permitted days. The other is under that definition of accessory use. And one of the things that I have felt will make a big difference is that if we go forward with determining if somebody has violated the accessory use provision is that we will be relying heavily on what Richard [Planning Director] is already starting to do with applications in determining what accessory use actually means. The other part that I wanted to bring up, that Richard [Planning Director] and I discussed a little bit today, is that I really struggle with this idea of \$1,000.00 or \$1,100.00 a day. The example that was cited in here, if it holds true, it would be \$192,500.00 fine. I struggle with that.

Mayor: Hahaha

City Manager: So, one of the things that we've discussed doing is going back and reviewing the penalties associated with violations and see if we can come up with something that's a little bit more reasonable and workable.

Mayor: Perhaps a grace period that says look, this was a convoluted mess that nobody could anticipate, but,

Councilor Davis: It had not been addressed in many years.

City Attorney: We actually have an existing project that I've addressed with Council before and Mr. Twigg has done a lot of work. He's gone through the entire code and tried to

outline what's an offense and what's not an offense and to classify Class A, B, C, or D for the different offenses, and we did do that to a certain extent in the VRD ordinance. We actually, in the ordinances that were adopted. The other more technical issue is the bail amount that gets written on the ticket. And I also had addressed this with the Council previously, that I have on my list of things to do, revisions to the code enforcement process, because what the ordinance says now is that you write the maximum penalty on the ticket. So, that's just silly. You don't get the maximum penalty written on the ticket when you get a ticket from an officer, driving through town exceeding the speed limit, you get the scheduled bail amount, which is a formula, which is written, is less than the maximum, and it's there because they would like you to acknowledge that you did, in fact, exceed the speed limit, and you signed the back, no contest, you've sent in the bail amount, and you're done. It's just not, it's not efficient to have, to require the maximum bail amount be written on the ticket. So we have some technical code enforcement issues with the code that need to be fixed. But, I believe that daily fines are very worthwhile, and in answer to the Mayor's comment about a grace period, every Title 17 violation gets a Notice of Violation letter, so you get 10 days to submit a Voluntary Assurance of Compliance so there is no fine.

Mayor: So there won't be any going back based on what they've already earned, because, they didn't know.

City Attorney: You get a ten (10) day period in order to basically say "I agree I won't violate the accessory use limitation" and that gets submitted to the Court and the Judge signs it and then there's no fine...

Mayor: From that day forward...

City Attorney: Yeah. And so, you do have a grace period. You have an opportunity to avoid any fine, it's built into our Code, it's the Notice of Violation process. There is no mental state required for violations, so not knowing is not a defense, but we have a grace period, we have a ten (10) day grace period built in the NOV process. That kind of delays everything, delays citation, delays enforcement, and when you have a statute of limitation running, we have to take that into consideration. So, we're gonna need to get those NOV letters out, and then individuals could submit a document that says here's my voluntary assurance of compliance, I will not exceed the number written on my land use approval in the future, Judge if that's acceptable, thank you, then if not, then let's talk about it.

Mayor: I would request some type of script, because once this happens we're gonna start getting phone calls, and I wanna be able to say something clearly, kindly, gently, to these

*people that no, we're not gonna take your home, you're not gonna get a \$190,000 fine, but you do need to stop.*

*City Manager: Part of what we'll be doing on this, is, in each of the letters, we'll be writing these things out so that, it can't just be legalese. People have to understand what is taking place, and, like I said, it's something that we need to work our way through a little bit and we'll be doing that at the same time we're going through and starting to collect this information. I should also point out one other thing...following what the City Council recommended last year, we're looking at the top twenty-five (25). However, in going forward, one of the things that the City periodically does, well, actually, they do it each year, they randomly select different businesses, hotels, VRDs, just to see, calculate their Transient Room Taxes....*

*\*\*\**

*[City Attorney advises against random enforcement]*

### **Request for Guest Register letters mailed April 29, 2015 – response by May 11, 2015**

On April 20, 2015, the City Attorney drafted for the City Manager's signature 25 letters requesting guest registers from the top 25 grossing vacation rentals in residential zones, which included Genesis. On April 29, 2015, the City Attorney signed and mailed the letters requesting guest registers. Owners were given until May 11, 2015, to submit their registers. Some claimed not to have received the letters, some complied albeit it late, but most complied.

### **Phone Call to Planning Director/apparent disclosure to Genesis LLC manager**

On or about May 12, 2015, the Planning Director received a phone call from Ms. Williams of the Genesis Family LLC. Ms. Williams demanded to know why the City Attorney was requesting her VRD guest register. She indicated that if you allege we are limited to 150 days, the Mayor is going to sue the City or words to that effect. The Planning Director reported this call to the City Attorney. The correspondence from the City Attorney requesting the guest register made no reference to the number of days on the Genesis application. The information had, however, as noted above, been discussed in the earlier executive sessions.<sup>27</sup>

### **June 1, 2015, Confidential Memo to City Manager and Planning Director requesting issuance of Notice of Violations**

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<sup>27</sup> See Footnote 28

After receipt of the guest registers the City Attorney compiled results of the guest registers, reviewed the applicable land use approvals and created fill-in-the-blank NOV forms for the Planning Director's use. The results and forms were transmitted to the Planning Director and Manager on June 1, 2015, with a recommendation to immediately issue NOVs. (There were two forms, one for use when the vacation rental approval had a specific accessory use number and one for use when there was no specific accessory use number). Because of the possibility of it being appealed as a land use decision, the Planning Director was asked to sign and send the letter.

**Excerpt from June 5, 2015, confidential email exchange on confidentiality of records**

The following email exchange occurred between the Mayor and City Attorney (copy to council). See Exhibit.<sup>28</sup>

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>>> Don Williams 6/4/2015 5:39 PM >>>

Mr. Appicello, could you enlighten me as to how this is confidential, what authority your office has to declare such things as confidential and ramifications of council members not holding such information confidential?

Thank you,

Mayor Don Williams

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On Jun 5, 2015, at 8:15 AM, Richard Appicello <[rappicello@lincolncity.org](mailto:rappicello@lincolncity.org)> wrote:

Internal Advisory Communications are confidential and exempt from public records disclosure under ORS 192.502(1). In addition, Attorney - Client communications are confidential and exempt from disclosure under ORS 192.502(9) / ORS 40.225. Confidentiality may be waived only by the full Council. Unauthorized disclosure of Confidential information may result in sanctions under Council rules, ethics violations or prosecution for official misconduct.

Richard Appicello  
City Attorney

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<sup>28</sup> Exhibit A Page 287 (Email exchange between Mayor Williams and City Attorney Appicello on confidentiality)

City of Lincoln City

**June 22, 2015, Executive Session**

The Council was to consider at regular session on June 22, 2015, a proposed city-initiated rezone application to the newly created VR (vacation rental) zone. Council had withdrawn other city-initiated applications. Since the area involved in the rezone included the Mayor's property, the City Attorney stated the Mayor would not be participating – which is the beginning of the exchange below. After this exchange, the issue of VRD enforcement was addressed.

@1:37:06 minutes:

*City Attorney: ...this matter is yours Roger [Council President] to deal with ...*

*Mayor: ... I want to touch on that if I could just briefly, It is kind of a personal gripe I'm having, is being told that I may not participate. I don't know that anyone here has that authority except me ... to say that. It is a small point. But I would appreciate it ... that's my decision.*

*City Attorney: I believe that in terms of the SW quadrant, that was the one which... your property is actually involved.*

*Mayor: I understand that, but still I get to say I have an actual I will not. I do not have a may not participate Order, right? ... I roll the dice.*

*Council President: If it is a conflict of interest, you can't participate.*

*Mayor: I understand that. I just don't think it is right to have someone saying I may not participate. It is one of those hackle- raising things, I make that call. Chester has to make the call too. You've got a house in that district too, yet we haven't even discussed your house being in it.*

*Councilor Noreikis: I don't have a VRD...*

*Mayor: I called the government ethics commission, and they said "well you are in a class", but I didn't go into the big discussion of it... they are the only ones who can decide if it is a class or not... It is a small point. I would like the courtesy...*

*City Attorney: In terms of the order of proceedings, we would pick up with the item ... say now continuing deliberations on the SW quadrant, does anyone have any ex parte contact or conflict of interest they wish to declare. Declare your conflict, move on... deliberations and if this goes the way the others go –there will be a withdrawal.*

*City Attorney: Next item is VRD accessory use enforcement and TRT compliance review. Now on this item as well, the Mayor has a VRD ...and is subject to VRD enforcement proceedings, so given that, I wouldn't recommend that the Mayor participate in this discussion.*

...

*Mayor: Thanks ...Ha, Ha, Ha, I appreciate that*

*City Attorney: And the manner in which land use enforcement matters are addressed is that the Planning Director sends a notice of violation letter to the individuals that he believes or has reasonable cause to believe is violating the land use code, basically states the case, asks for voluntary compliance, if the property owner agrees, they can submit a voluntary assurance of compliance, and ... it is reviewed by the planning director, if it is acceptable, it goes to the ... municipal court judge , who then signs it, and the matter is done. There is no fine; there is no assessment; however the order becomes an Order of the Court and so the property owner is then bound by that.... So that's the process under Title 17 land use violations. I cannot sign Notice of Violation letters, the Planning Director has to ...Now I prepared a template for the Planning Director for Notice of Violation ...*

*Council directed back in December of last year...that we enforce the accessory use limitation. I requested guest registers from approximately 25 VRDs. We did not get compliance from all 25 ...*

*The ones that did comply submitted guest registers, and the guest registers, in sum, show basic noncompliance with the accessory use limitation as well as discrepancies between the guest register and the actual TRT returns. So that triggers two kinds of enforcement action, one is tax collection, TRT compliance review so the Tax Administrator has been notified and the second is Accessory Use Notice of Violation; so I prepared letters, I sent them to the Planning Director however we have not had any, ... any letters sent.*

[Note: The Genesis Family LLC VRD is included in the list sent to the Tax Administrator on June 5, 2015 concerning VRDs with a discrepancy between guest register and TRT returns.<sup>29</sup>]

*Councilor Davis: I think that the Council we have to address accessory use real soon, put a number of days on it; How are we going to fine people without a number of days on anything. Richard Townsend has cost three realtors sales in the past week by authorizing ninety (90) days instead of one hundred eighty (180) days for god knows what reason, so the 'sales fell though on three homes this week.*

*City Manager: I talked this through with Richard Townsend, and neither of us right now are supportive of moving forward with these [NOV LETTERS]... there is much that is in flux on VRDs ... as you know I am starting to meet with people ... it has been very positive, however, I have one comment that came to me was pretty typical of the feelings that I'm getting and that is ... Ron you're inviting us to come to the table and your staff is going to stab us underneath it ... great concern ...even though we are only talking about having them sign a notice of violation, there is the perception, whether it is true or not, that we are going to fine people \$1000 a day and hit them with tens of thousands of dollars in fines.*

*I think you are probably right, you can make a pretty good case that these people that have sent their guest registers have gone beyond what accessory use is, but it is not a well-defined term and that is one of the things that I think ultimately has to be defined ...*

*Councilor Davis: That's an ordinance, I don't think that is Richard's [Planning Director] decision, I think it is this Council's decision ...*

*City Manager...it ultimately could be ... but right now it is up to Richard to define the number of days [as part of the land use approval]*

*Councilor Davis: ... when you guys wrote the words accessory.... I think you were thinking less than ½ the year*

*Councilor Noreikis: ...I wasn't involved in the original ordinance*

*Mayor: I was encouraged by Wes's letter he just sent today, I mean ... he got to the heart of it.*

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<sup>29</sup> Exhibit A Page 289 (Redacted Referral to Tax Administrator)

*Councilor Wahlke: Wes sent a letter?*

*Mayor: I would encourage you to read it. Especially coming from Wes ... It was great.*

*Council President: I want to remind you though that if we put "x" number of days...*

*Mayor: Then we have a rule.*

*Council President: ...on accessory use we are going to have Measure 49 rolling in...*

*City Attorney: I am reporting to you the efforts to do VRD accessory use enforcement. And what I am reporting is that it has been abject failure. OK. There has been no accessory use enforcement. So what Chris Thomas [former City Attorney] said 15 years ago is true today, there is nothing wrong with the ordinance. It is simply a land use standard, it has a different land use enforcement mechanism than an objective "here is your citation because you went over 55 mph". It is different; it is a land use enforcement proceeding and we are not doing it. I am reporting that we are not doing it.*

*Councilor Davis: OK what about a place like Newport or Tillamook that doesn't put a limitation on the number of days.*

*Mayor: Yes*

*Councilor Davis: let the economy drive it.*

*Mayor: when you apply for a license you don't even have a place to put a number of days.*

*Councilor Davis: how are you going to fine someone if you haven't even defined the law...that's what bugs me.*

*Mayor: Ridiculous.*

*Councilor Davis: ...I can understand if their books are not in line...,*

*Mayor: Ha Ha Ha*

*Councilor Davis: You went 65 mph but it wasn't posted and it was an eight lane road.... It's just stupid.*

*Mayor: I guess we can't have an agreement here, do we have to say something tonight just to tell planning not to apply any number until we decide that ... because otherwise we are leaving it up to Richard [Planning Director] to pick a number out of the air ...*

*City Attorney: I guess I want to point out...*

*Councilor Davis: ...what is the possible criteria to give someone 90 days vs 180...*

*City Attorney: Richard Townsend is the Planning Director; this is a land use criterion. The job of the Planning Director is to take discretionary land use criterion, flesh them out in the land use approval process which is subject to appeal. And ... If his determination is not supported with adequate findings, then on appeal it can be overturned by the Planning Commission or by LUBA. It again it is a land use enforcement procedure; it is a land use standard. It's no different than a land use standard that says it cannot adversely affect the neighborhood. It is a discretionary standard it has to be interpreted through that land use process subject to appeal. And that is not happening ...*

*Mayor: If we choose to continue with that avenue, I just don't want you [City Attorney] advocating for a position. It is up to us to discuss and decide. I understand where you are coming from it is up to Richard [Townsend] ...*

*City Attorney: I am reporting that there are two things that last year the Council directed to be done, in land use permitting and land use enforcement that the accessory use limitation be enforced. ...*

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In sum, the City Attorney informed the City Council that VRD accessory use enforcement (for calendar year 2014) was an abject failure, apparently due to a lack of willingness to proceed with land use enforcement actions. Delay, and the imminent expiration of the statute of limitations for 2014 violations precluded action based on the evidence collected by the City Attorney.

NOTE:

On June 22, 2015, the City Council for Lincoln City Oregon granted permission to the City Attorney to disclose executive session materials, confidential memoranda and client confidences, as appropriate, to address ongoing efforts to block, thwart and obstruct VRD accessory use enforcement. On July 8, 2015, in response to a records

request, Council clarified the motion was not a general release of confidential materials but simply permission to the City Attorney to make necessary disclosures without violating client confidences. This complaint was prepared by the City Attorney pursuant to this authorization but was submitted to the Council for a decision concerning whether the Council would file the complaint. Council authorized the complaint on August 10, 2015, and authorized the Council President to sign the complaint form after review by outside counsel.

[On June 15, 2015, the Genesis property (3 tax lots) was added to a pending rezoning application by a private developer (Olivia Beach) to rezone a total of 32 tax lots (including Genesis) to the new mixed use (VR) zone; if the rezoning is finally approved (by Ordinance) the accessory use limitation will be removed from the Mayor's property. On July 27, 2015, the City Council voted to approve rezoning the property (tentative oral decision- subject to an Ordinance and findings to be adopted). In doing so, the City Council applied the facts of the rezone application to the applicable law as is proper in a quasi-judicial setting.]