

OREGON GOVERNMENT ETHICS COMMISSION

PRELIMINARY REVIEW

CASE NO: 21-251ESM

DATE: December 16, 2021

RESPONDENT: SCHMIDLIN, Mark, Chair, Board of Directors, Banks Fire District #13

COMPLAINANT: GREY, Sean

RECOMMENDED ACTION: Move to Dismiss Complaint

PRELIMINARY REVIEW: The Oregon Government Ethics Commission (Commission) received a complaint from Sean Grey on November 17, 2021. The complaint alleges that Mark Schmidlin, Chair of the Board of Directors (Board) for the Banks Fire District #13 (District), violated Oregon Government Ethics law at a Board meeting on June 1, 2021 by failing to publicly disclose conflicts of interest and using his position to benefit himself and his relative. Receipt of the complaint was acknowledged in letters to Sean Grey and Mark Schmidlin. Mr. Schmidlin was provided with the information received in the complaint and invited to provide any information that would assist the Commission in conducting this preliminary review.

Complaint

In his complaint, Sean Grey explains that at the June 1, 2021 meeting:

* * * [the] Banks Fire District Board [d]iscussed the possible purchase of land surrounding a fire station. Board Chair Schmidlin is identified in meeting minutes as being familiar with the property as his family has leased the land and has been farming it for several years. My understanding is that his family continues to farm the land following purchase and Board Chair Schmidlin may still be or may have been receiving compensation from the business at the time of the meeting in

1 question. Meeting minutes do not indicate that Board Chair Schmidlin declared a
2 conflict of interest, actual or potential, [and he] engaged in discussion of the
3 property including estimated valuation of the land and participated in voting to
4 acquire the land for the District. (#PR1).

5 6 Meeting Minutes

7 The meeting minutes from the June 1st meeting indicate the Board was discussing a
8 possible purchase of the property referred to as the "Hornshuh property." The minutes
9 state:

10
11 Board Chair Schmidlin is very familiar with the property as his family has leased *
12 * * the land for farming for several years. He went through a thorough analysis of
13 the property as follows:

- 14
- 15 i. 11 acres – good farmland with water rights – approximately \$12,000
16 per acre = \$132,000
 - 17 ii. 9 acres – good farmland = \$8,500 per acre \$76,500
 - 18 iii. 3 acres – unfarmable – approximately \$1,000 per acre = \$3,000
 - 19 iv. 4 acres wet most of the year only use is farming hay \$4K per acre =
20 \$16,000 (#PR2).
- 21

22 According to the minutes, at the end of the discussion the "Board decided it would benefit
23 the District to purchase the property surrounding the Hornshuh Creek Station 14 and to
24 offer a fair price to the seller." Board Member Matt Pihl then moved for the District to offer
25 \$229,000 to the seller and move up to \$250,000 if necessary. Board Member Ed Ewing
26 seconded the motion. The minutes then record that "[t]he motion passed unanimously."
27 (#PR2).

28 29 Response

30 Respondent Mark Schmidlin is represented by attorney Jennifer Bouman-Steagall. She
31 submitted a response letter in which she asserts:

1 Respondent complied with ORS chapter 244. First, Respondent did not engage in
2 a conflict of interests [sic] when, as a member of the Banks Fire District (District)
3 Board of Directors (Board), he informally estimated the value of property for sale
4 on which Respondent's brother leases farmland. By law, even after a change in
5 ownership, existing leases remain unchanged until after crops are harvested, in
6 this case late next year. In the future, if the District decides to lease out farmland,
7 and if Respondent's brother seeks lease renewal, Respondent will recuse himself
8 from the Board's process. Second, even if there were a conflict of interests [sic] in
9 valuing the property, Respondent disclosed his brother's lease, and he did not
10 participate in introducing or finalizing the terms of sale or vote on any related
11 matter. (#PR3).

12
13 According to the response, Mark Schmidlin (Respondent) has extensive knowledge of
14 local land, having farmed in the Banks area for his entire working life. "Both Respondent
15 and his brother, Daryl Schmidlin, have farmed the property in question, known locally as
16 the 'Hornshuh property.'" Ms. Bouman-Steagall explains that Mark Schmidlin no longer
17 farms the Hornshuh property and does not earn any income from his brother's farming
18 activity. Several years ago, the Hornshuh family donated property to the District and
19 permitted the District to use a portion of the adjacent property for training purposes. In
20 May 2021, this adjacent property was listed for sale by the Estate of Mark W. Hornshuh.
21 The Board then held an emergency meeting on June 1, 2021 to discuss its potential
22 purchase of the Hornshuh property. (#PR2; #PR3).

23
24 The response then explains:

25
26 As a lifelong farmer and local resident, Respondent has the knowledge and ability
27 to value local properties generally, especially land he has personally farmed. Thus,
28 those present at the meeting asked Respondent to approximate the value of the
29 land on behalf of the District. Respondent consulted a map and did so, on the spot.
30 While the meeting minutes do not label Respondent's mentioning his brother's
31 lease as a "disclosure," the minutes are clear that Respondent disclosed his

1 relationship, and he did not introduce or finalize the terms of the sale or vote on
2 any matter related to the Hornshuh property. * * *

3
4 Finally, the Board never voted on the topic of farming leases. When current farming
5 leases expire, if the District decides to renew them, and if Daryl seeks lease
6 renewal, Respondent must redisclose his conflict of interests [*sic*] and refrain from
7 involvement and voting, a potential future event. Authority to negotiate the
8 purchase of the property was delegated to Chief Rodney Linz, who finalized the
9 sale on behalf of the District, outside the Board's process. As it turned out, the
10 seller included a term of sale that existing leases would be honored for two years,
11 and Chief Linz accepted that and other terms based on the authority vested in him
12 by the Board. (#PR3).

13
14 Ms. Bouman-Steagall's asserts that the doctrine of emblements, codified in ORS 91.230,
15 applies to Daryl Schmidlin's lease of the Hornshuh property. "Regardless of the purchaser
16 of the Hornshuh property after the sale was announced, a change in ownership would not
17 impact Daryl's lease or farming rights. Under the doctrine of 'emblements,' any active
18 farming lease survives a sale." She writes: "Any buyer, regardless of valuation of the land
19 or purchase price, purchases farmland with existing leases intact, by way of emblements.
20 * * * After harvest, leases may be terminated or renewed by the new owner." (#PR3, citing
21 *Taggart v. Battaglia*, 140 Or App 585, 915 P2d 1001, 1002-1003 (1996)).

22
23 Addressing conflicts of interest, Ms. Bouman-Steagall writes that a public disclosure of
24 the conflict of interest is required and that "[t]here is no indication that the disclosure must
25 include magic words, such as 'conflict of interests,' but it should be sufficient to advise the
26 public of the nature of the public official's interest." She goes on to explain:

27
28 No conflict existed. While Respondent's brother had an existing lease, Respondent
29 merely estimated the value of the property. Respondent did not engage in
30 negotiations with the seller or vote to purchase the property on behalf of the
31 District. The District asked Respondent for his input as a farmer with local insight,

1 with full knowledge of Respondent's personal relationship to the property in
2 question. Informally valuing property for a board to contemplate a purchase does
3 not constitute "official action" by a board.

4
5 Respondent did not stand to gain or lose from valuing the land, nor did
6 Respondent's brother. Again, a farm lessor's rights continue until harvest,
7 regardless of a change in land ownership. After harvest, a conflict would exist for
8 Respondent *if* the District were to choose to lease out the property and *if*
9 Respondent's brother were to be considered as a potential lessor: potential future
10 events at the time Respondent acted. If a conflict existed, which Respondent
11 denies, it was a potential conflict. (#PR3).

12
13 Ms. Bouman-Steagall indicates that the meeting minutes were unclear and that Mark
14 Schmidlin "did not vote on any matter relating to the Hornshuh property – the vote was
15 'unanimous' among those actually voting." She also explains that "Chief Linz negotiated
16 terms and closed the sale independently, with authority from the Board." Ms. Bouman-
17 Steagall concludes by reaffirming that Mark Schmidlin did not have a conflict of interest
18 when he informally valued property which his brother currently leases as farmland, and
19 even if a potential conflict of interest existed, Mr. Schmidlin announced his relationship to
20 the property and did not participate in the vote of finalizing the sale. (#PR3).

21
22 Mark Schmidlin Statement

23 With her response, Ms. Bouman-Steagall provided a written statement from Mark
24 Schmidlin. After introducing himself, he states:

- 25
- 26 3. Neither I nor any member of my family stood to lose or gain from the
27 purchase price of the Hornshuh property.
 - 28 4. I do not earn income or benefit in any way from my brother's lease or
29 farming of the Hornshuh property.
 - 30 5. While the meeting minutes are accurate, they do not tell the entire story. I
31 disclosed my relationship to the Hornshuh property at the time I was asked

1 to informally value the property by the Board. I now know that I should have
2 ensured that the Recording Secretary record my statement as a "disclosure
3 of a conflict of interests" [sic].

4 6. Another fact missing from the meeting minutes is that I did not vote
5 regarding whether the District should purchase the property.

6 7. As chairperson, I participated in overseeing Board procedure, but I did not
7 vote on any matter relating to the purchase of the Hornshuh property.

8 8. The board did not vote on or discuss whether leases should be renewed on
9 the Hornshuh property when the time comes for lease renewal.

10 9. If and when the District discuss whether to lease out the land, and if my
11 brother seeks lease renewal, I will remind the Board of our relationship and
12 recuse myself from the process.

13 10. The Board gave Chief Linz authority to negotiate and finalize the sale and
14 Chief Linz did not involve me. I played no role in introducing or finalizing the
15 terms of sale. (#PR4).

16
17 Additional Statements

18 Ms. Bouman-Steagall also provided statements from District Recording Secretary Kari
19 Erwert and Fire Chief Rodney Linz. In her statement Kari Erwert explains that "[w]hile the
20 meeting minutes are accurate, they do not tell the entire story. Mr. Mark Schmidlin, Board
21 Chair, disclosed his relationship to the Hornshuh property at the time he was asked to
22 informally value the property for the Board. I now know that Mr. Schmidlin should have
23 ensured that I record his statement as a "disclosure of a conflict of interests." She goes
24 on to explain that the term in the minutes to a "unanimous vote" meant that the vote was
25 unanimous among those who voted, but that Mark Schmidlin did not vote. (#PR5)

26
27 In his statement, Fire Chief Rodney Linz states: "Mr. Schmidlin did not vote regarding
28 whether the District should purchase the Hornshuh property." Chief Linz explains that the
29 Board delegated authority to him to negotiate and finalize the property purchase and that
30 the Board did not discuss or vote on leases on the property. He asserts that Mark
31 Schmidlin "was not involved in introducing or finalizing the terms of sale." (#PR6).

1 Land Sale Contract

2 The Land Sale Contract was signed on June 23, 2021 by Chief Linz on behalf of the
3 District. In the recitations, the contract states that the property is:

4
5 SUBJECT TO verbal crop share lease in favor of Schmidlin Farms, Banks Oregon.
6 Purchaser to honor current lease from Oct. to Oct. for 2 years from date of sale.
7 (#PR7).
8

9 Noting that the Land Sale Contract indicates the lease is with Schmidlin Farms, rather
10 than with Daryl Schmidlin as an individual, Commission staff examined records in the
11 Secretary of State's Business Registry. According to those records, Schmidlin Farms is
12 an assumed business name registered by both Mark Schmidlin and Daryl Schmidlin.
13 (#PR8).
14

15 Supplemental Response

16 Commission staff requested a copy of the Schmidlin Farms lease for the Hornshuh
17 property. In an e-mail, Ms. Bouman-Steagall explained:

18
19 * * * we ultimately learned through our research that farmers don't need written
20 leases. Once farmers plant their crops, however long they take to grow to harvest
21 time, they have legal rights called emblements. It's an age-old doctrine from
22 ancient times. It predates common law, and it has since been codified in the statute
23 I cited, ORS 91.230. Farmers do oral leases in small towns, and there are benefits
24 to not having a time frame locked in. It depends on growth and harvest. (#PR9).
25

26 Commission staff asked who made the decision that the lease term would be two years
27 rather than just until the crops were harvested? Ms. Bouman-Steagall responded that the
28 seller included the two-year lease as a term of the sale. She explains that Chief Linz, with
29 the authority delegated to him from the Board, "accepted that and other terms":

30 ///

31 ///

1 The Chief saw no issue with two years and accepted the term with the authority
2 that had been delegated to him to close the deal, without mention of specific lease
3 terms or even whether there was a plan to renew leases after harvest, whenever
4 that would be. The Board never discussed or voted on whether to renew existing
5 leases after harvest. (#PR9).

6
7 Ms. Bouman-Steagall goes on to note that “no sale term between buyer and seller, without
8 the lessee's involvement and agreement, can override existing rights to emblements. For
9 example, if it had been a three-year tree crop, the lessee would have a three-year lease,
10 and the ‘two-year’ term in the land sale contract would have been meaningless. (We now
11 know it’s a one-year crop.)” (#PR9).

12
13 **RECOMMENDATIONS:** Mark Schmidlin is an elected Board Member and Chair of the
14 Board of Directors of the Banks Fire District #13 and held that position during the period
15 relative to this preliminary review. As such, he is a public official, as defined in ORS
16 244.020(15), and is subject to compliance with Oregon Government Ethics laws.

17
18 **Conflict of Interest**

19 Actual and potential conflicts of interest are defined in ORS 244.020(1) and (13),
20 respectively, as arising when a public official, acting in their official capacity, participates
21 in any action, decision, or recommendation, the effect of which would be (actual) or could
22 be (potential) to the private pecuniary benefit or detriment of the public official, a relative,
23 or any business with which the public official or a relative is associated.

24
25 “Relative” is defined in ORS 244.020(16)(a) as the spouse, parent, stepparent, child,
26 sibling, stepsibling, son-in-law or daughter-in-law of the public official. In this case, Daryl
27 Schmidlin is Mark Schmidlin’s brother and is his relative for purposes of Oregon
28 Government Ethics law.

29
30 A “business with which the person is associated” includes any private business or closely
31 held corporation of which the person or their relative is a director, officer, owner,

1 employee, or agent, or one in which the person or their relative currently owns or has
2 owned within the preceding year, stock, another form of equity interest, stock options or
3 debt instruments worth \$1,000 or more. [ORS 244.020(3)(a)]. In this case, Schmidlin
4 Farms is a business with which Mark Schmidlin and Daryl Schmidlin are associated as
5 the business operates under an assumed business name registered by both Schmidlin
6 brothers.

7
8 ORS 244.120(2) provides that when met with an actual or potential conflict of interest, an
9 elected public official, such as Mark Schmidlin, must on each occasion, publicly
10 announce, at a public meeting, the nature of their actual or potential conflict of interest. If
11 the conflict of interest is potential, the public official may participate in official actions
12 following their public disclosure. If the conflict of interest is actual, they must refrain from
13 participating in any discussion, debate or vote on the issue giving rise to their conflict of
14 interest.

15
16 In this case, at the June 1st meeting, the Board was considering whether to purchase the
17 Hornshuh property, on which Schmidlin Farms has an existing crop lease. According to
18 the response, the farming under this lease is done by Daryl Schmidlin, and Mark
19 Schmidlin states that he earns no income from Daryl's farming of the Hornshuh property.
20 The Land Sale Contract, however, indicates that the lease is not with Daryl Schmidlin;
21 rather, it is with Schmidlin Farms, which is a business with which both Mark Schmidlin
22 and Daryl Schmidlin are associated.

23
24 Because Schmidlin Farms is a business with which both Schmidlin brothers are
25 associated, Mark Schmidlin would have a conflict of interest when he participates, as a
26 public official, in any action, decision, or recommendation that would or could result in a
27 financial impact on Schmidlin Farms. The question is whether, when Mark Schmidlin
28 participated in the June 1st discussion of property valuations and the District's potential
29 purchase of the Hornshuh property, he had an actual or potential conflict of interest.

30 ///

31 ///

1 The facts gathered do not support a conclusion that Mark Schmidlin was faced with an
2 actual conflict of interest. There is no indication that the sale of the property would result
3 in a certain financial benefit to Schmidlin Farms, and the doctrine of emblements may
4 protect Schmidlin Farms against any unexpected financial detriment that could arise by
5 virtue of the sale of the Hornshuh property. See, e.g., *Simpson v. McCormmach*, 125 Or
6 App 603 (1994) (citation omitted) (describing the principal purpose of the emblements
7 doctrine as protecting “the interest of farmers to harvest crops on land that they planted
8 with the expectation that the bounty would be available to them, but whose possessory
9 rights failed through no fault of their own before the time for harvesting.”). Thus, Mark
10 Schmidlin would not appear to have an actual conflict of interest.

11
12 The decision the Board made to purchase the property could perhaps result in a financial
13 impact on Schmidlin Farms, particularly if the Schmidlins seek to renew the lease. But
14 that financial impact is not certain. Thus, it appears that Mark Schmidlin may have had a
15 potential conflict of interest.

16
17 In the meeting, Mark Schmidlin provided estimates of land valuation. The Board then
18 voted to authorize Chief Linz to make an offer and negotiate the purchase of the Hornshuh
19 property. While the minutes indicate the vote was unanimous, the response and the
20 additional statements all state that Mark Schmidlin did not actually vote. Because it
21 appears that his conflict of interest was potential, not actual, Mark Schmidlin could
22 continue to participate in the discussion and could have voted on the matter, after making
23 a public disclosure of his potential conflict of interest.

24
25 ORS 244.120(2) requires a public official to announce the nature of their conflict of
26 interest. While the Commission may recommend using the term “conflict of interest” to
27 provide notice and clarity, the statute does not require use of the term. In this case, Mark
28 Schmidlin’s public announcement in the meeting disclosed that his family has leased and
29 farmed the land for several years, but did not use the term “conflict of interest.” We note
30 here that the minutes indicate that Mark Schmidlin did not identify which members of his
31 family leased and farmed the land, or whether these family members were currently

1 leasing the property. Additionally, he did not disclose, either in the Board meeting, as
2 reflected in the minutes, or in his response to the Commission, that the lease is actually
3 with Schmidlin Farms, a business with which he himself is a registrant and authorized
4 representative. Notwithstanding these deficiencies in Mark Schmidlin's disclosure, it does
5 appear that his announcement disclosed the nature of his potential conflict of interest –
6 that he or his relatives, or businesses with which he or his relatives are associated, may
7 have a possible financial interest in farming the Hornshuh property. Thus, Mark Schmidlin
8 appears to have substantially satisfied his disclosure requirement. For that reason, further
9 investigation of this issue does not appear to be warranted.

11 Prohibited Use of Office

12 ORS 244.040(1) prohibits a public official from using or attempting to use their official
13 position or office to obtain financial gain or avoid a financial detriment, for themselves,
14 their relatives, their household members, or any businesses with which they or their
15 relatives or household members are associated, if the financial gain or avoidance of
16 financial detriment would not otherwise be available but for the public official's holding of
17 the official position or office.

18
19 In this case, Mark Schmidlin participated in the discussion of whether the Board should
20 purchase the Hornshuh property. That discussion does not appear to have provided Mark
21 Schmidlin or Schmidlin Farms a financial gain or avoidance of financial detriment that
22 would not otherwise have been available but for Mark Schmidlin being on the Board. To
23 the contrary, the financial benefit of Schmidlin Farms' existing crop lease was already
24 available and was unlikely to be affected by the sale of the property, regardless of its
25 valuation.

26
27 Additionally, the actual negotiations for the Land Sale Contract, which includes the lease
28 term for Schmidlin Farms, were conducted by Chief Linz. According to the response and
29 additional statements, the Board did not discuss or vote on the lease. The inclusion of a
30 two-year lease term, rather than just until after the crops are harvested, was proposed by
31 the seller and agreed to by Chief Linz. There is no information available in this preliminary

1 review to indicate that Mark Schmidlin was involved in negotiating that provision or that it
2 would not otherwise be available but for Mark Schmidlin's position as a Board member.
3 It does not appear that Mark Schmidlin engaged in a prohibited use of office.
4

5 Based on the information available in this preliminary review, there does not appear to be
6 substantial objective basis to believe that Mark Schmidlin violated Oregon Government
7 Ethics laws relating to the District's purchase of the Hornshuh property. The Oregon
8 Government Ethics Commission should move to dismiss the complaint against Mark
9 Schmidlin. (Motion 2).
10
11

12 **ASSOCIATED DOCUMENTS:**

13 #PR1 Complaint from Sean Grey, received on 11/17/2021.
14 #PR2 Banks Fire District Board Meeting Minutes, 6/1/2021.
15 #PR3 Response from attorney Jennifer Bouman-Steagall, received on 12/1/2021.
16 #PR4 Statement of Mark Schmidlin, dated 11/30/2021.
17 #PR5 Statement of Kari Erwert, dated 11/30/2021.
18 #PR6 Statement of Rodney Linz, dated 11/29/2021.
19 #PR7 Land Sale Contract signed by Chief Linz, executed 6/23/2021.
20 #PR8 Secretary of State Business Registry for Schmidlin Farms.
21 #PR9 Supplemental Email from Attorney Jennifer Bouman-Steagall, received
22 12/10/2021.

PREPARED BY Susan Myers, Compliance and Education Coordinator *see 12/16/2021*
and Torrey D. Sims, Investigator

APPROVED BY Ronald A. Bersin, Executive Director *RB 12/16/2021*

REVIEWED BY Joshua Nasbe, Assistant Attorney General *UNA 12/16/2021*