


# CITY OF BROOKINGS

## COUNCIL AGENDA REPORT

Meeting Date: May 13, 2013

  
Signature (submitted by)

Originating Dept: Mayor

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City Manager Approval

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Subject: Secretary of State Complaint Filed by Commissioner David Brock Smith

Recommended Motion:

Motion for the Mayor and City Council to execute a letter to Secretary of State Kate Brown in the matter of the complaint filed by Curry County Commission Chair David Brock Smith.

Background/Discussion:

Curry County Commission Chair David Brock Smith submitted a complaint to the Oregon Secretary of State alleging violation of various State statutes by the City Council and the City Manager in the discourse concerning Measure 8-71 and the proposal for a Home Rule Charter.

The Secretary of State's Office has provided notice that they have opened an investigation into the matters contained in the Smith letter that are within their purview.

City Attorney Martha Rice has provided an initial response to the Secretary of State.

Mayor Hedenskog has requested that the City Council consider sending the attached letter to the Secretary of State.

Attachment(s):

- a. Draft letter to Secretary of State
- b. Letter from Commission Chair David Brock Smith
- c. Letter from Secretary of State
- d. Letter to Secretary of State from City Attorney Martha Rice

Kate Brown  
Secretary of State  
255 Capitol Street NE, Suite 501  
Salem, OR 97310

RE: Complaint of David Brock Smith

Dear Secretary Brown,

In 2012, the Curry County Board of Commissioners formed a Curry County Citizens Committee (CCCC) to make recommendations to the Commission for dealing with the County fiscal crisis. Brookings City Manager Gary Milliman and 22 other Curry County citizens were appointed to the CCCC by the Board of Commissioners. The CCCC met several times in meetings facilitated by Oregon Consensus and developed 19 recommendations to the Board of Commissions.

It has come to our attention that Curry County Commissioner David Brock Smith has filed a complaint with the Office of the Secretary of State alleging that Gary Milliman, acting in his official capacity as Brookings City Manager "misinformed the public" by stating that the only CCCC recommendation that has been pursued by the Board of Commissioners is the placement of a property tax levy on the May Ballot.

Please note that it is a widely held belief among Curry County citizens that the Curry County Board of Commissioners failed to act on any of the 19 recommendations made by the CCCC other than the proposed property tax measure.

This failure to act by the Commissioners has resulted in the formation of two grass roots citizens committees...one known as the Fiscal Independence Committee which has taken on the task of reviewing each of the CCCC recommendations, and one known as the Curry Charter Committee... or "C-3"...which is drafting a County charter initiative proposal to change the County form of government as recommended by the CCCC..

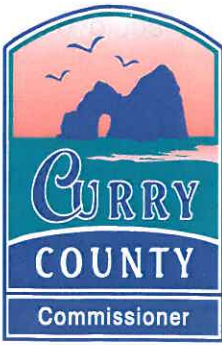
Another outcome of the County's failure to act has been the development of an unprecedented spirit of cooperation between the three Curry County Cities. The Mayors and City Managers of the three cities are now meeting regularly to address matters of common interest, including alternative concepts for addressing the County's fiscal crisis which affects city and unincorporated area residents alike.

Commissoner Smith's allegation that Mr. Milliman has misinformed the public concerning this matter is without merit. Indeed, Mr. Milliman and his staff should be commended for their efforts in analyzing the hastily-crafted County tax levy Measure 8-71 which appears on the May

ballot. The analysis provided by Mr. Milliman and his staff clearly demonstrates that the underlying assumptions used in determining the proposed tax rate structure are flawed, and that the Commission majority has been less than transparent in providing information to the public.

The City of Brookings first received a copy of the County spreadsheet which formed the basis for the split rate property tax that is contained in Measure 8-71 on the same date that the Board of Commissioners voted to place the matter on the ballot. The City had no opportunity to analyze the proposed Measure...which proposes to levy a property tax rate of \$1.84 within the City of Brookings to fund County law enforcement services...prior to the Measure being placed on the ballot.

We have reviewed the comments attributed to Mr. Milliman that are 'called out' in Mr. Smith's complaint letter of April 18, 2013. We believe that those comments fairly represent the consensus opinion of the Brookings City Council and there was no violation of ORS 260.432 or 260.532.



**Curry County  
Board of Commissioners**

David Brock Smith, *Chair*

94235 Moore Street, Suite 122  
Gold Beach, OR 97444  
541-247-3296, 541-247-2718 Fax  
800-243-1996 [www.co.curry.or.us](http://www.co.curry.or.us)

April 16, 2013

Honorable Secretary of State Kate Brown  
136 State Capitol  
Salem, OR 97310

Dear Secretary of State Brown:

It is with great regret that I contact you today regarding concerns over possible violations by public employees in regard to Oregon Revised Statutes 294.100, 260.432 and 260.532.

As you are aware, Curry County is on the brink of fiscal insolvency and to avert the impending Public Safety Fiscal Crisis, the Board of Curry County Commissioners has lawfully placed Measure 8-71, County Law Enforcement Split Rate Levy on the ballot for the registered voters decision on May 21st, 2013. I am dismayed by the actions of the City of Brookings Manager Mr. Milliman and at a loss to explain the authority given to him by his Council which has resulted in these possible violations occurring.

Eight Public Meetings were publicly noticed from January 7th through February 13th discussing the dire county fiscal situation, one of which was on January 28th, in the Brookings City Council Chambers for Council input and Commissioner discussion. These publicly posted meetings were designed to gather public input and discussion to reach a funding solution and avoid a public safety and fiscal catastrophe. The decision to place the Law Enforcement Levy was voted on February 13th, 2013 in a lawfully publicly noticed Board of Commissioners Meeting, signed by me, as Chair that afternoon and became a measure on February 26th, 2013.

It has come to my attention through recent statements made to the press, in Brookings City Council Meetings and email correspondence, that City Manager Milliman has possibly violated ORS 294.100 by directing City Attorney Rice to draft a County Home Rule Charter and subsequently spending City of Brookings Taxpayer dollars to create said document without the authority to do so and knowingly having no authority to place said document on a ballot for vote of the electorate. Furthermore, City Manager Milliman; through the supporting documentation supplied, directed City Attorney Rice to begin the draft, possibly violating ORS 294.100 before City Council approval on March 25th, 2013. As the motions for this action were drafted by City Manager Milliman and were subsequently voted on and approved by the Brookings City

Council, there is a concern that the Council itself; all who voted in favor, could be in violation of 294.100 as well.

It has also come to my attention through recent statements made to the press, in Brookings City Council Meetings and email correspondence, that Brookings City Manager Milliman has possibly violated ORS 260.432 and 260.532. Manager Milliman writes, "to prop up a bankrupt county government with a dysfunctional management structure". He states in another article, "If they'd conferred with us, we could have come up with a formula everyone agreed with, that didn't happen". Manager Milliman goes on to say, "Now we're in position where we need to respond and do our own analysis and propose something to voters based on that". He further misinforms the public by stating in his report, "Only one of the recommendations that has been pursued is the placement of a property tax levy on the May Ballot". (260.532) Manager Milliman also states at a Brookings City Council Meeting that, "the measure is flawed" (referring to the County's proposal).

As unfortunate as this is, the documentation supporting these concerns of multiple possible violations of ORS 294.100, 260.432, 260.532 are, in my opinion, valid. I would also suggest to you that more documentation exists in the audio and video of Brookings City Council Meetings beginning in February of 2013. I respectfully request a swift and thorough inquiry into these possible violations and should any violations be founded, appropriate penalties to all violating parties responsible be rendered for each occurrence. Thank you in advance for your diligence in this important matter.

Very Respectfully,

A handwritten signature in black ink, appearing to read "David Brock Smith", with a large, stylized flourish at the end.

David Brock Smith, Chair  
Curry County Board of Commissioners



KATE BROWN  
SECRETARY OF STATE



ELECTIONS DIVISION  
STEPHEN N. TROUT  
DIRECTOR  
255 CAPITOL ST NE, SUITE 501  
SALEM, OREGON 97310  
ELECTIONS — (503) 986-1518

April 17, 2013

Gary Milliman  
898 Elk Dr.  
Brookings, OR 97415

Dear Mr. Milliman:

This is to notify you that a written complaint has been received by the Secretary of State, Elections Division, alleging possible violations of Oregon election law. The complaint relates to possible violations of ORS 260.432 stemming from alleged opposition of a county measure while on the job during work hours. The complaint also makes allegations related to ORS 260.532 and ORS 294.100. These statutes are not enforced by the Elections Division, and therefore our inquiry will be limited to whether any violation of ORS 260.432 took place.

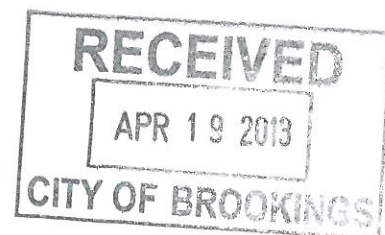
The Secretary of State, Elections Division, is required to notify the subject of a complaint. ORS 260.345. The complaint was received on April 17, 2013. A copy of the complaint has been included for your reference.

This office will be reviewing the complaint as soon as possible to determine the appropriate action. You will be notified of any need for information or determinations.

Sincerely,

Alana Cox  
Compliance Specialist

Case no. 13-040



# **LAW OFFICES OF ROBERT N. BLACK**

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April 24, 2013

Alana Cox, Compliance Specialist  
Office of the Secretary of State  
225 Capitol Street NE, Suite 501  
Salem, OR 97310

Re: Complaint submitted April 16, 2013 by Curry County Commissioner David Brock Smith Alleging Elections Violations by Brookings Public Officials

Dear Ms. Cox:

I have read the complaint submitted to the Secretary of State's office on April 16, 2013, by Curry County Board of Commissioners Chair David Brock Smith alleging that Brookings City Manager Gary Milliman, and possibly the Brookings City Council, has violated three Oregon statutes relating to (1) expending money for a purpose other than provided for by law (ORS 294.100), (2) a public employee to promote or oppose the adoption of a measure during work hours (ORS 260.432), and (3) communicating a false statement of material fact relating to a measure (ORS 260.532). My legal analysis of the allegations follows.

**A. Spending money for a purpose other than authorized by law (ORS 294.100).**

(1) *Text:*

**294.100 Public official expending money in excess of amount or for different purpose than provided by law unlawful; civil liability.**

**(1) It is unlawful for any public official to expend any moneys in excess of the amounts provided by law, or for any other or different purpose than provided by law.**

(2) *Analysis:* Violation of this statute is based upon the City's direction to have the City Attorney draft a home rule charter for Curry County. The specific allegation being that because the City cannot place the charter on the ballot as a measure, it has spent money for



legal service without the lawful authority to do so. Either the local district attorney or any city taxpayer may file a civil suit to redress of violations of ORS 294.100 and seek return of the money alleged to have been improperly spent. While the Secretary of State does not appear to have jurisdiction to address violations of this statute, I will nonetheless provide my analysis of the alleged violation.

In reviewing the published cases that involve violations of this statute, most of the cases involve spending public funds expended to promote or defeat ballot measures – actual funded campaigns. In related cases involving Section 9 of Article XI of the Oregon Constitution (limiting powers of counties and cities to assist corporations), the courts discuss the criteria for evaluating whether an expenditure is made for a public purpose. The principal determination when dealing with general fund revenues for a general purpose government is whether “the expenditures are sufficiently beneficial to the community as a whole to justify governmental involvement. . . The judiciary should invalidate expenditures only where reasonable men **could not** differ as to their lack of social utility.” *Thunderbird Motel, Inc. v. Portland* (1979) 40 Ore. App. 697, 704-706 (emphasis added).

In this case, the City of Brookings authorized the drafting of a “draft” home rule charter for Curry County. The reason that the City took such action is due to the current fiscal crisis of the County. City residents are also residents of the County and depend on certain County functions and services. The City Council expressed the opinion that the County could benefit from a form of government that employed the services of a professional manager that could utilize his or her experience and expertise to improve the efficiency of the day to day operations of County government. The City Council intended this draft charter to be a tool for the use and benefit of its residents. The Charter is not a final draft and it will be up to private citizens to place the Charter (or some version of it) on the ballot. The drafting of a county home rule charter to be utilized by local residents in an effort to improve local government is beneficial to the whole community and justifies the relatively minor expense.

## **B. Public employee opposing a measure during work hours (ORS 260.432).**

(1) *Text:*

**260.432 Solicitation of public employees; activities of public employees during working hours.**

(1) **No person shall attempt to, or actually, coerce, command or require a public employee to influence or give money, service or other thing of value to promote or oppose any political committee or to promote or oppose the nomination or election of a candidate, the gathering of signatures on an initiative, referendum or recall petition, the adoption of a measure or the recall of a public office holder.**

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



(2) *Analysis:* The allegations pertaining to violating this ORS section include City Manager Milliman's analysis of the tax measure and presentation to the City Council. The argument apparently being that the City Manager's analysis of the tax measure constituted a public employee opposing the adoption of a measure while on the job during working hours. Again, the case law discussing this section generally involves actual campaigns designed to defeat a measure. Campaigns include activities directed at a particular outcome such as newspaper ads, fliers, radio ads, operating telephone hotlines, special public presentations, etc.

The only actions taken in this case were responses to press questions and public discussion of the measures at an open and public meeting. Mr. Milliman's actions were not a campaign or concerted effort to oppose the measure. Instead his actions were as the City Manager providing information and analysis to the City Council on an important issue facing the County and affecting both city residents and potentially City government (proposed state bills). The fiscal crisis of Oregon's rural counties is an unprecedented situation in Oregon. The City government would be doing its taxpayers a disservice by sitting idly by and failing to take an active role in preparing and analyzing how the current fiscal crisis of Curry County will affect the City of Brookings and its residents.

### **C. False publication relating to a measure (ORS 260.532).**

(1) *Text:*

**260.532 False publication relating to candidate or measure; civil action; damages; other remedies; limitation on action.**

(1) No person shall cause to be written, printed, published, posted, communicated or circulated, any letter, circular, bill, placard, poster, photograph or other publication, or cause any advertisement to be placed in a publication, or singly or with others pay for any advertisement, **with knowledge or with reckless disregard that the letter, circular, bill, placard, poster, photograph, publication or advertisement contains a false statement of material fact relating to any candidate, political committee or measure.**

(2) *Analysis:* Chair Brock Smith alleges that Mr. Milliman has made various statements that amount to false statements of material fact relating to the tax measure, including:

*"The only one of the recommendations that has been pursued is the placement of a property tax levy on the ballot."*

*"[T]o prop up a bankrupt county government with a dysfunctional management structure."*

Redress of violations of ORS 260.532 is obtained through a court action filed by an aggrieved party (must be filed within 30 days of the election). This is an exclusive remedy. Nevertheless, I provide my legal analysis of the allegation.

Statements are not "false" within meaning of this section if any reasonable inference can be drawn from the evidence that statement is factually correct or that statement is merely an expression of opinion." *Committee of 1000 v. Eivers* (1983) 296 Or. 195. Mr. Milliman continues to have the belief that the first statement is a fact. Comments like the

second quote above made in response to newspaper questions and/or to the City Council are clearly Mr. Milliman's opinion as to the wisdom/utility of the tax measure – sentiments echoed by the City Council.

**Summary:** Two of the statutes cited by Commissioner Smith (ORS 294.100 and ORS 260.532) are not within the jurisdiction of the Secretary of State to redress. Regardless, it is my opinion that the allegations are unsubstantiated. As to the alleged violations of ORS 260.432, Mr. Milliman was simply doing his job in analyzing a county proposed tax levy for which the county board of commissioners had indicated they would be seeking City Council support.

Thank you for taking the time to read and consider the points made in this letter.

Sincerely,



Martha D. Rice  
CITY ATTORNEY  
CITY OF BROOKINGS, OREGON

cc: Gary Milliman