MAYOR BRIAN COOPER

COUNCIL PRESIDENT KEITH KUDRNA	*COUNCILOR BALWANT BHULLAR*
COUNCILOR WENDY LAWTON	*COUNCILOR STEVE OWEN*
COUNCILOR STEVE MARKER	*COUNCILOR DARREN RIORDAN*

FAIRVIEW CITY COUNCIL AGENDA

Zoom Meeting

Join: https://zoom.us/j/95802069123
Meeting ID: 958 0206 9123
Passcode: 1908
Join by Phone: 253-215-8782

Members of the public are welcome to join the Zoom meeting to view the Work Session. Please contact the City Recorder at 503-674-6224 or leymasterd@ci.fairview.or.us with any questions.

WEDNESDAY, JANUARY 13, 2021

WORK SESSION

1. CALL TO ORDER — 6:00 PM
2. COUNCIL TRAINING (CP 2-86)
   (Heather Martin, City Attorney)
3. ADJOURNMENT

Brian Cooper
Mayor

January 6, 2021
Date

(A) Action requested (I) Information only

NEXT COUNCIL MEETING IS JANUARY 20, 2021

COUNCIL EXECUTIVE SESSION – IF NECESSARY – END OF MEETING

PARK VIEW CONFERENCE ROOM
ORS 192.660(2)(d) - Labor Negotiations, ORS 192.660(2)(e) - Real Property Transactions,
ORS 192.660(2)(f) - Exempt Public Record and ORS 192.660(2)(h) - Legal Counsel

City Council Regular Sessions are broadcast live on Comcast Cable Channel 30 and Frontier Channel 39. Replays of the meeting are shown the following Saturday at 5:30pm and Sunday at 4:30pm following the original broadcast date. Meetings are also available for viewing via MetroEast Community Media, the week following the meeting, at metroeast.peg.tv. Go to the Playlist tab and select Municipal Meetings or find the link at http://fairvieworegon.gov/AgendaCenter/City-Council-15.

The meeting location is wheelchair accessible. A request for an interpreter for the hearing impaired or for other accommodations for person with disabilities should be made at least 48 hours before the meeting to the City Recorder, 503-674-6224.

Fairview City Council Training

January 13, 2021

Presented by Heather R.

BEERY ELSNER & HAMMOND, LLP

Form of Government

- The City Charter creates a Council-Administrator form of Government.
- All powers reserved to Council (as a body) unless delegated to another person/body.
- The City Administrator performs the day-to-day management responsibilities of the City and serves as the administrative head of the City government.

Council Business

- Council conducts it's business as a body – individual councilors and the mayor have no independent authority to act on behalf of the City.
- Council acts through ordinances (legislative decisions); resolutions (administrative decisions); orders (quasi-judicial decisions); and other motions adopted by a majority of the Council.
- Fairview requires public hearing for ORDs

Council Business

- Council generally uses Robert's Rules of Order to conduct business.
- Mayor or Council President (in Mayor's absence) serves as presiding officer.
- Unless a member of the Council states that he or she is not voting, his or her silence shall be recorded as an affirmative vote.
- Should only abstain from voting if you have an ACTUAL conflict of interest

Council Business

- City Administrator organizes and compiles the Council agenda with final approval by the Mayor.

- A councilor may request an item on the agenda if they have support from one additional Councilor by notifying the City Administrator of the topic at least 5 business days prior to the Council meeting.

- Councilors are expected to conduct themselves so as to bring credit upon the City

Council Business

- Councilors need to wait to be recognized by presiding officer before speaking
- Councilors are to follow Council's Ethics Code (Section 9 of Council Rules)
- Except in a Council meeting, Councilors do not attempt to influence city staff on personnel matters, purchasing issues, awards of contracts, etc. Sharing ideas = ok. (Section 10 of Council Rules)

Public Meetings

- The Oregon form of government requires an informed pubic aware of the deliberations and decisions of governing bodies.
- Deliberations and decisions by a quorum of the Council must be done in public.
- Beware of electronic meetings (e-mail and social media) as well as serial meetings.
- Purely social gatherings are not covered – but don't discuss City business at social gatherings.

Public Meetings

- Presiding officer has inherent authority to keep order and impose reasonable restrictions necessary for the efficient and orderly conduct of a meeting.

- Council should not eject an individual from a meeting unless that individual has actually disrupted the meeting.

Public Meetings

- Council may use executive sessions to discuss certain matters privately.
- No final decisions may be made in an executive session.
- Must follow specific procedures when going into executive session.
- Media permitted to attend in most situations but may not report – can use information to follow other leads though!

Public Records

- Public Records requires both inspection and preservation.
- The law applies to all government records of any kind.
- May charge reasonable fees for inspection – must adopt fee schedule.
- Exemptions exist that permit City to keep certain documents confidential.

Public Records

- City must follow record retention policy adopted by Secretary of State archives division.
- Must keep one official copy of each record for applicable retention period.
- Duty extends to Councilors and Mayor, not just employees (which means social media posts and emails to home computers must be retained).
- Destruction of public records is a criminal offense.

Quasi-Judicial Decisions

- A quasi-judicial decision typically applies pre-existing criteria to an individual person or piece of land.

- Determining whether a proceeding is "quasi-judicial" turns on whether the decision displays certain characteristics:
    1. "bound to result in a decision."
    2. "bound to apply pre-existing criteria to concrete facts."
    3. "directed at a closely circumscribed factual situation or a relatively small number of persons."

Quasi-Judicial Decisions

- A quasi-judicial decision must comply with general standards of due process.
- Due process standards typically include an opportunity to be heard, an opportunity to present and rebut evidence, an impartial decision-maker and a record and written findings adequate to permit judicial review.

Legislative Decisions

- Legislative decisions typically involve the adoption of more generally applicable policies, standards, etc., that apply to a variety of factual situations and a broad class of people.

- Because a legislative decision is the expression of local government policy, the local government is not required to reach a decision on a legislative proposal and may table the issue or decline to review it altogether.

Ex Parte, Conflicts and Bias

- Ex Parte Contacts, Conflicts of Interest and Biases are all relevant issues that must be considered in quasi-judicial proceedings.
- Only conflict of interest issues must be considered in legislative decisions.

Ex Parte Contacts

- An ex parte contact is commonly understood as a meeting, written communication (including email), or telephone conversation between a member of the hearing body and an interested party, outside of the public hearing process.

- The scope of ex parte contacts is actually much broader—encompassing any evidence, relating to a pending application relied on by a hearing body member in making a final decision that is not fully disclosed—may include things such as newspaper articles, blog posts and radio reports.

Ex Parte Contacts

- Ex parte contact does not render a decision unlawful so long as there is full disclosure.
- Disclosure must occur at the earliest possible time in the decision-making process.
- There are two components to full disclosure: (1) placing the substance of the written or oral ex parte contact on the record and (2) a public announcement of the ex parte contact.
- The public must be given an opportunity to rebut the substance of the ex parte contact.

Ex Parte Contacts

- Under ORS 227.180(4) and ORS 215.422(4) communications with staff are not considered an ex parte contact.
- However, staff may not serve as a conduit for obtaining information outside of the public process unless that information is disclosed.

Conflict of Interest

- An actual conflict of interest is defined under ORS 244.020 as any decision or act by a public official that would result in a "private pecuniary benefit or detriment."

- An actual conflict extends not only to financial gain or loss to the individual public official but also to any relatives of the public official or any business with which the official or relative is associated.

Conflict of Interest

- A relative includes:
  (1) the spouse, parent, step-parent, child, sibling, step-sibling, son-in-law and daughter-in-law of a public official;
  (2) the parent, step-parent, child, sibling, son-in-law and daughter in law of the spouse of a public official;
  (3) any individual that the public official has a legal obligation to support; and
  (4) any individual to whom or from whom the official provides or receives benefits from employment

Conflict of Interest

- Businesses with which a public official is associated :
  - ✓ A person is “associated with” a private business if: the person is a director, officer, owner, or employee or agent of the business; or if a person owns or has owned more than $1000 worth of stock, equity interest, stock options, or debt interest of a private business in the preceding calendar year.
  - ✓ A person is “associated with” a publicly held corporation if: the person is an officer or director of the publically traded company, or if the person owns or has owned more than $100,000 worth of stock in the preceding calendar year.
  - ✓ A person is a “associated with” a business if they are required to file an annual statement of economic interest and that business is a “source of income” that produces 10 percent or more of the person’s total annual household income.

Conflict of Interest

In the case of an actual conflict of interest, the official must both:

- Announce the actual conflict of interest; and
- Refrain from taking official action or participating in any discussion or deliberation.

Conflict of Interest

- A potential conflict of interest is distinguished from an actual conflict of interest in that the benefit or detriment “could” occur while in an actual conflict of interest situation, the benefit or detriment “would” occur.

- In the case of a potential conflict of interest, the official must announce the conflict, but may take action on the issue.

Conflict of Interest

- Where a public official is part of a “class” that consists of a larger group of people affected by a decision, no conflict exists.
- There is no hard and fast rule on the size or type of class to which the conflict exemption applies.
- The class exemption depends on the facts of each case.

Bias

- A biased decision maker substantially impairs a party's ability to receive a full and fair hearing.
- Bias can be in favor of or against the party or the application.
- Generalized expressions of opinions are not bias.

Bias

- Actual bias means prejudice or prejudgment of the parties or the case to such a degree that the decision maker is incapable of being persuaded by the facts to vote another way.

- This can include:
  1. Personal bias;
  2. Personal prejudice; or
  3. An interest in the outcome.

Bias

- Local quasi-judicial decision makers, who frequently are also elected officials, are not expected to be entirely free of any bias. To the contrary, local officials frequently are elected or appointed in part because they generally favor or oppose certain types of development.

- Local decision makers are expected, however, to (1) put whatever bias they may have to the side when deciding individual permit applications, and (2) engage in the necessary fact finding and attempt to interpret and apply the law to the facts as they find them so that the ultimate decision is a reflection of their view of the facts and law rather than a product of any positive or negative bias the decision maker may bring to the process.

Gifts

- The law prohibits public officials, relatives of public officials and members of a public official's household from soliciting or receiving any gifts over $50 in a calendar year from any source that has, or could reasonably be expected to have, a legislative or administrative interest in the public official's decisions or votes.

- Always look to source of the gift!

Gifts

- A gift is anything of economic value, but the definition excludes things such as:
  1. gifts from relatives or members of the household of the public official;
  2. gifts in the form of tokens, plaques, trophies or mementos with a resale value less than $25; and
  3. gifts received as part of one's private business, employment or volunteerism.

- Several other exemptions from definition of gifts.

Abuse of Office

- Public officials may not use or attempt to use their position to obtain financial gain or avoid financial detriment that would not otherwise be available but for the holding of the official position.

Confidential Information

- Public officials may not further or attempt to further personal gain through use of confidential information gained in the course of or by reason of their official positions or activities in any way.

SEI Filing

- The Annual Verified Statement of Economic Interest (SEI) must be filed by April 15 of each year and becomes a public record.
- Covers assets from previous calendar year – just like your taxes.
- The SEI is best characterized as a declaration of income, holdings and business associations.
- Must be on form provided by OGEC.

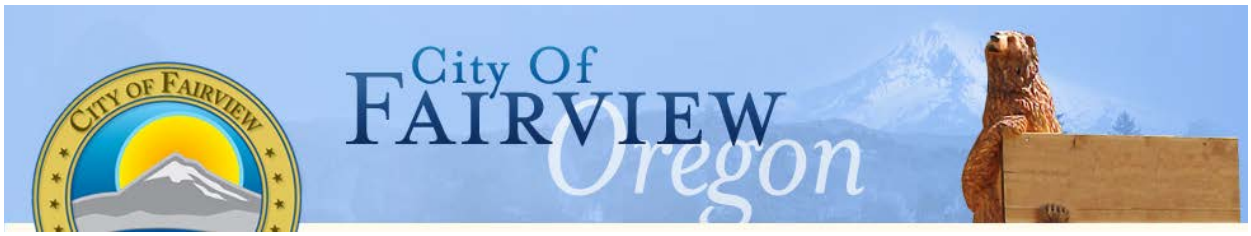
Nepotism

- Public official may not participate in the appointment, employment, promotion, discharge, firing or demoting of a relative or member of the household.
- Public officials may not directly supervise a relative or member of the household unless local policy expressly permits.

Questions

- Please feel free to call or email with any questions or comments.

Heather R. Martin
Beery Elsner & Hammond, LLP
707 NE Couch Street
Portland, OR 97232
t (503) 226 7191 | f (503) 226 2348
heather@gov-law.com
www.gov-law.com



COUNCIL WORKSHOP
TABLE OF CONTENTS

CITY OF FAIRVIEW
COUNCIL WORKSHOP

I. AUTHORITY OF THE CITY

Appendix A sets forth the legal structure pursuant to which the city derives authority. There are two broad categories:

- 1992 Fairview Charter (Charter) as amended and home rule authority; and
- State law and constitutional context.

Administrative

As the administrative head of the city government, Charter Section 23 delegates specific powers and duties to the city administrator (Administrator). Implicit with these delegations is the authority to make rules governing the administrative practices and procedures necessary to discharge these powers and duties.

The Administrator has duties to attend all meetings of the City Council (Council) unless excused by the Mayor or Council; make reports and recommendations to the Mayor and Council about the needs of the city; administer and enforce all city ordinances, resolutions, franchises, leases, contracts, permits and other city decisions; appoint, supervise and remove city employees; organize city departments and administrative structure; prepare and administer the annual city budget; administer city utilities and property; encourage and support regional and intergovernmental cooperation; promote cooperation among the Council, staff and citizens in developing city policies, and building a sense of community; perform other duties as directed by the Council; and delegate duties, but remain responsible for the acts of all subordinates. These duties imply authority to adopt rules, practices, and procedures to perform them. The Council may by ordinance specifically delegate authority to the Administrator to adopt other administrative rules. Councilors have no legal authority over staff activities, and neither Councilors nor the Council should fall prey to micromanaging staff performance.

The Administrator in turn may sub-delegate authority to department directors and other city employees. All such authority is exercised in the name of the Administrator, and the Administrator remains legally responsible for the actions. All departmental regulations, practices and procedures, whether written or unwritten, formal or informal, must be consistent with the Charter, Fairview Municipal Code (Code), and all state and federal law.

A major Council responsibility is the evaluation of the Administrator based on clearly defined goals, guidelines, and executive performance.

II. CITY ENACTMENTS

A policy is a city enactment adopted by Council ordinance or resolution. All city legal authority not delegated to the Administrator, municipal judge, or city attorney by the Charter remains with the Council. The Council has the authority to make city policy through its formal decisions. The Council must work in partnership with city staff to make good policy for the city.

Ordinances – purposes and drafting

A city may exercise legislative authority by adopting ordinances. Only a city council may adopt an ordinance, and this authority may not be delegated to others. An ordinance may be amended or repealed only by another ordinance. After adoption, the city recorder or other custodian of records must attest to the adoption and the date of adoption and submit the ordinance to the Mayor for signature which must occur within three days of passage. Ordinances are retained as permanent city records and often are codified in the Code. The Code contains the general laws of the city that are uniformly applicable without exception.

State law provides that certain city decisions must be made by ordinances. For example, city annexation decisions under ORS 222.120 must be by ordinance. The Charter also requires some Council actions by ordinances. City policies relating to council rules, public improvements, and special assessments must all be by ordinance.

Charter Section 31 requires each ordinance to have an ordaining clause that states: "The City of Fairview ordains as follows:" An ordinance may be adopted after approval by a majority of the Council at two Council meetings on two different days or at a single Council meeting if it is by unanimous vote of all Council members present. Ordinances normally take effect on the 30th day after adoption by the Council. If an ordinance has an emergency clause, it may take effect immediately or at some other time less than 30 days.

In 2012, Fairview's Charter was amended so that under Section 32, there must also be a public hearing/comment period before each ordinance is enacted.

Resolutions – purposes and drafting

A resolution is a form of council action less formal than an ordinance. Resolutions are passed at one council meeting and are used for council administrative decisions. Resolutions and other administrative decisions take effect on the date of approval or on a later day provided in the resolution. State law permits certain city decisions to take place by resolution. For example, annual city budgets and budget amendments or transfers may be approved by resolutions.

Council resolutions may establish city policies and procedures. Resolutions may also adopt procedures for appointing city committees, a comprehensive risk management policy, and financial policies and goals.

Resolutions are often used to set city fees and charges. The city imposes a wide range of fees for specific administrative and other services. It also imposes both systems and user charges for

sewer, water, and storm water utilities. The legal authority for fees and charges is often provided by ordinances that are incorporated into the Code.

III. COUNCIL RULES AND PROCEDURES

Parliamentary procedure is a set of rules that regulates and standardizes how the Council conducts its business. The parliamentary rules that apply to the Council are primarily set forth under Sections 5 and 6 of the Council Rules which are adopted by ordinance. The Council may amend its rules to modify procedures to best suit its needs. The Council rules also default to Robert's Rules of Order Newly Revised as a guide for all parliamentary situations not covered by the rules.

Council Rules

Council meetings are for conducting Council business. As required under Charter Section 12, the Council has adopted Council Rules which allows for effective and productive meetings and sets out clearly defined rules and procedures. Rules help councils maintain focus and avoid redundant discussions. Rules can also promote useful citizen input, courtesy, and sensitivity to public concerns and viewpoints. They help the Mayor maintain civility in public discourse. They facilitate conducting business in an orderly, disciplined, and productive manner.

Charter Section 13 requires the Council to meet at least once a month at a time and place designated by its rules. Charter Section 14 allows less than a quorum of the Council to meet and compel attendance of absent members as prescribed by council rules. Finally, Charter Section 15 provides that a record must be kept of council meetings in a manner prescribed by council rules.

Any Council meeting requires a minimum of four Councilors or the Mayor and three Councilors to conduct business (i.e. a quorum). Under City Charter Section 13, regular council meetings must be held at least once a month at a time and place designated by council rules.

Conduct of meetings: agenda, decorum and protocol

The Council is the elected governing body of the city government. Councilors only exercise legal authority when meeting as the governing body. The Council is responsible for council functions including:

- Establishing community-wide goals that address short- and long-range needs;
- Formulating policies that define a course of action and shape city operations including analysis and balancing of complex and sometimes competing issues;
- Legislation / administrative / quasi-judicial decisions;
- Community relations – constituencies & intergovernmental; and
- Providing quality services using available resources.

Councilors are local leaders who are expected to perform their roles and fulfill their responsibilities. The electorate expects the Council to act as the city "board of governors" and set the tone and direction for municipal operations.

IV. PUBLIC MEETINGS LAW (ORS 192.610 – 192. 710): OPEN AND EXECUTIVE SESSIONS

The Oregon policy of open decision-making is established by ORS 192.620:

> The Oregon form of government requires an informed public aware of the deliberations and decisions of governing bodies and the information upon which such decisions were made. It is the intent of ORS 192.610 to 192.690 that decisions of governing bodies are arrived at openly.

The Public Meetings Law applies to not only the state, but also the cities, counties and special districts despite any conflicts with their charters, ordinances or other rules. Cities, counties and other public bodies may impose greater requirements than those of the law by their charters, ordinances, administrative rules or bylaws.

The Public Meetings Law applies to meetings of the "governing body of a public body." ORS 192.630(1). A "public body" is the state, any regional council, county, city or district, or any municipal or public corporation or any board, department, commission, council, bureau, committee, subcommittee or advisory group or any other agency thereof. ORS 192.610(4). If two or more members of any public body have "the authority to make decisions for or recommendations to a public body on policy or administration," they are a "governing body" for purposes of the meetings law. ORS 192.610(3).

Thus, the Council and citizen advisory commissions and committees of the city are "governing bodies." A subcommittee of a commission or committee can also be a "governing body" if it is authorized to make decisions for or to advise the Council.

Public Body Decisions

A committee or commission that has authority to make decisions for the city on "policy or administration" is a governing body. ORS 192.610(3).

A. Recommendations to a Public Body

An advisory committee, subcommittee, task force or other official group that has authority to make recommendations to the public body on policy or administration also is a governing body. ORS 192.610(3).

"Public body" does not include the Administrator or other individual city officials. For example, an advisory committee appointed by the Administrator is *not* a governing body subject to the law

if the advisory committee reports only to the appointing official. However, if the individual official lacks authority to act on the advisory group's recommendations, and must pass those recommendations unchanged to the Council, then the meetings law applies to the advisory group.

If an advisory body is created by a public body to advise it, the fact that its members are all private citizens is irrelevant. The meetings law applies to private citizens, employees, and others without decision-making authority when they serve on a group that is authorized to advise the public body.

Meetings Subject to the Law

The Public Meetings Law defines a meeting as the convening of any of the "governing bodies" described above "for which a quorum is required in order to make a decision or to deliberate toward a decision *on any matter*." ORS 192.610(5) (emphasis added).

A. Quorum Requirements

The Public Meetings Law does not define "Quorum." For the city's purposes, a majority of the Council constitutes a quorum.

A gathering of less than a quorum is not a meeting under the meetings law. The law applies to committees, subcommittees, and other advisory groups that are charged by the public body with making recommendations. The recommendations must be the result of formal votes taken at meetings at which a quorum was present.

Staff meetings are not subject to the meetings law because they are not "governing bodies" and quorums are not required. ORS 192.610(3). Similarly, the law does not apply to individuals who are authorized to make recommendations. However, if staff meets with a quorum of the Council or a city commission, committee, or subcommittee to discuss matters of "policy or administration," or to clarify a decision or direction for staff, the meeting is within the scope of the law. ORS 192.610(5).

B. Meetings and Social Gatherings

The Public Meetings Law applies to all public body meetings for which a quorum is required to make a decision or deliberate toward a decision on any matter. Even meetings for the sole purpose of gathering information upon which to base a future decision or recommendation are covered. Hence, information gathering and investigative activities of a city body are subject to the law.

If a quorum of the governing body gathers to discuss matters outside its jurisdiction, the "meeting" is not legal under the meetings law. Governing bodies sometimes want to have retreats or goal-setting sessions. These types of meetings are nearly always subject to the Public Meetings Law because the governing body is deliberating toward a decision on official business or gathering information for making a decision. Council "retreats" and other gatherings must be held within the jurisdiction.

The law does not cover purely social meetings of council or committee members. In *Harris v. Nordquist*, 96 Or 19 (1989), the court concluded that social gatherings at which school board members sometimes discussed "what's going on at the school" did not violate the meetings law. The *purpose* of the meeting determines if the law applies. However, a purpose to deliberate on any matter of policy may arise *during* a social gathering and lead to a violation. When a quorum is present, members should avoid any discussions of official business during social gatherings. Some citizens may see social gatherings as a subterfuge for avoiding the law.

C. Electronic Communication

The Public Meetings Law expressly applies to telephonic conference calls and "other electronic communication" meetings of governing bodies. ORS 192.670(1). Notice and an opportunity for public access must be provided when meetings are conducted by electronic means. For non-executive session meetings, the public must be provided at least one place to listen to the meeting by speakers or other devices. ORS 192.670(2). Special accommodations may be necessary to provide accessibility for persons with disabilities. The media must be provided such access for electronic executive sessions, unless the executive session is held under a statutory provision permitting its exclusion.

Communications between and among members of a public body on electronically linked personal computers, including email, text messaging, and social media may be subject to the meetings law.

D. Serial Communications

Members of a governing body may violate the Oregon Public Meeting Law's prohibition on meeting in private even if a quorum never gather contemporaneously.

ORS 192.630(2) provides that a "quorum of a governing body may not meet in private for the purpose of deciding on or deliberating towards a decision on any matter." A decision is "any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required, at any meeting at which a quorum is present. ORS 192.610(1). In other words, a quorum of a governing body may violate the prohibition against private meetings by (1) communicating in private, (2) for the purpose of deciding or deliberating, on (3) any topic that may require a vote.

A recent Oregon Court of Appeals case held that the prohibition against meeting in private includes both when a quorum meets contemporaneously *and* when a series of non-contemporaneous communications between members of the governing body, in the aggregate, include a quorum and the purpose of the communications is to decide or deliberate on a matter that may come before the governing body. *Handy v. Lane Cty.*, 274 Or. App. 644, 689, 362 P.3d 867, 894 (2015).[1]

[1] On November 25, 2106, the Oregon Supreme Court overruled the Court of Appeals decision in part, but it did not directly address the issue of whether serial meetings could violate the state's public meeting laws. Thus, although

To illustrate this point, the following communications between members of a five person governing body may violate the state's public meeting laws:

- A councilor forwards an email discussion she had with another member of the Council regarding a matter that may come before the governing body to a third member of the Council. Because the email messages, in the aggregate, include a quorum of the Council (3 Councilors), and the purposes of the communications was to discuss a matter that will require a vote before the Council, the email exchanges in the aggregate could violate state law under the *Handy* Court of Appeals decision.

- A staff person individually calls members of a governing body to discuss a matter that will require a vote. When the staff person talks to each member, she shares with the member the opinions and comments of the other members. Although the members never speak directly, the staff person is acting as a conduit and allowing the members of the governing body to deliberate through her. These conversations, in the aggregate, could likewise violate state law.

- A citizen posts a comment on the city's Facebook page about an upcoming land use hearing and the comment generates a discussion. Two members of the governing body make comments and share opinion on the Facebook "thread." A third member reads the comments and also makes a comment. Because a quorum (3 members) have communicated opinions on the social media site on a matter that will require a vote before their body, the members may have violated state law.

As explained by the Court of Appeals, the prohibition against meeting in private does not include communications that are purely "information gathering." Members of a governing body should be aware, however, that the parameters of "information gathering" are not clear, and questions regarding whether and to what extent serial communications may occur should be directed to staff and/or the City Attorney's Office.

Legal Requirements

A. Notice

The Public Meetings Law requires public notice of the time and place of meetings. This requirement applies to regular, special and emergency meetings. ORS 192.640. The public notice requirements apply to *any* "meetings" of the governing body, and committees, subcommittees and advisory committees. Regular meeting notice must be *reasonably calculated* to give actual notice of the time and place of the meeting "to interested persons including news media that have requested notice." ORS 192.640(1). Notice must be given to persons and media that have stated in writing that they wish to be notified of every meeting.

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the Court of Appeals decision is no longer binding, it is still persuasive to trial courts and instructive to public officials regarding the limitations on their ability to communicate with each other outside the scope of a public meeting.

If the meeting will consist of only an executive session, notice still must be given to members of the public body, the general public and news media that have requested notice. The notice must also state the specific legal section authorizing the executive session. ORS 192.640(2).

To help satisfy the accessibility requirements of ORS 192.630(5) and the Americans with Disabilities Act, the notice may provide the name of a person and telephone number (including TDD number) at the city to contact to request an interpreter for the hearing impaired or for other communication aids.

The notice for each meeting must "include a list of the principal subjects anticipated to be considered at the meeting." ORS 192.640(1). The list should be specific enough to permit members of the public to recognize the matters in which they are interested; ordinarily this can be met by distribution of an agenda. The agenda need not go into detail about subjects scheduled for discussion or action, but should be sufficiently descriptive so interested persons can understand agenda topics.

The meetings law does not require the description of every proposed item of business in the notice. The law requires a reasonable effort to inform the public and interested persons of the nature of the more important matters ("principal subjects") coming before the body. The public body may consider additional "principal subjects" arising too late to be included in the notice. The listing of principal subjects "shall not limit the ability of the governing body to consider additional subjects." ORS 192.640(1).

The purpose of meeting notice is two-fold: general notice to the public at large and *actual* notices to specifically interested persons.

i. Regularly Scheduled Meetings: News media requesting notice *must* be given notice. Paid advertising is *not* required. If the city is aware of persons having a special interest in a particular action, those persons generally should be notified. This is not required if such notification would be unduly cumbersome or expensive.

ii. Special Meetings: At least 24 hours' notice is required for special meetings. This may be accomplished by press releases or phone calls to the media. The city should make reasonable attempts to notify interested persons either by mail or telephone. News media requesting notice must be notified.

iii. Emergency Meetings: An emergency meeting is a special meeting called on less than 24 hours' notice. An "actual emergency" must exist, and the minutes must describe the emergency justifying less than 24 hours' notice. ORS 192.640(3). The public body must identify and describe in the minutes the reason the meeting could not be delayed to allow at least 24 hours' notice. The law requires that "such notice as is appropriate to the circumstances" be given for emergency meetings. The city must attempt to contact the media and other interested persons to inform them of the meeting. Generally, such contacts are made by telephone.

The Oregon Court of Appeals stated in *Oregon Association of Classified Employees v. Salem-Keizer*, 95 Or App 28 (1989) that it will closely scrutinize any claim of an "actual emergency."

The "emergency" must relate to the matter to be discussed at the emergency meeting. An actual emergency on one matter does not "justify a public body's emergency treatment of all business coming before it at approximately the same time." 95 Or App at 32. Nor does the convenience or inconvenience of members of the public body provide justification for an emergency meeting.

iv. Space and Location: Public bodies should consider the probable public attendance and meet where there is sufficient room for the expected attendance. If the regular meeting room is adequate for usual attendance, the public body is not required to seek larger quarters for a meeting that unexpectedly attracts an overflow crowd.

v. Geographic Location: Meetings of the council and other city bodies must be held within the city boundaries. ORS 192.630(4). A joint meeting with two or more governing bodies must be held within the geographic boundaries of the area over which one of those bodies has jurisdiction, or at the nearest practical location. This does not apply in the case of an actual emergency requiring immediate action. Additionally, the law permits public bodies to hold "training sessions" outside their jurisdiction, so long as no deliberation toward a decision is involved.

vi. Nondiscriminatory Site: Public bodies may hold public meetings in private places such as restaurants or residences, if *fully* adequate notice is given of the location so interested persons may attend, and if *fully* adequate arrangements are made for their convenient attendance. Municipal bodies may not meet at a place where discrimination based on race, creed, color, sex, age, national origin or disability is practiced. ORS 192.630(3). The Americans with Disabilities Act, 42 USC 12131 *et seq.*, prohibits discrimination against persons with disabilities by public entities, and by places of public accommodation for meeting sites owned by private entities.

B. Accessibility to Persons with Disabilities

ORS 192.630(5)(a) states:

> It is discrimination on the basis of disability for a governing body of a public body to meet in a place inaccessible to persons with disabilities, or, upon request of a person who is deaf or hard of hearing, to fail to make a good faith effort to have an interpreter for persons who are deaf or hard of hearing provided at a regularly scheduled meeting.

This statute imposes two requirements. First, public meetings must be held in places accessible to individuals with mobility and other impairments. Second, there must be a good faith effort to provide an interpreter for hearing impaired persons.

C. Public Attendance

The meetings law is a public attendance law, not a public participation law. Meetings are open to the public except for closed meetings specifically authorized. ORS 192.630. *The right of*

public attendance guaranteed by the Public Meetings Law does not include the right to participate by public testimony or comment.

Other statutes, rules, charters, ordinances, resolutions, and bylaws outside the meetings law may require the council and other city bodies to hear public testimony or comment on certain matters. In circumstances where such requirements do not apply, the public body may conduct a meeting without public participation. As noted above, Fairview's Charter allows for public comment before any ordinance is passed.

D. Control of Meetings

The presiding officer of any meeting has inherent authority to keep order and to impose any reasonable restrictions necessary for the efficient and orderly conduct of a meeting. If public participation is part of the meeting, the presiding officer may regulate the order and length of appearances and limit appearances to presentations of relevant points. Presiding officers need to ensure consistency in the application of whatever rules are imposed.

This authority extends to control over equipment such as cameras, tape recorders and microphones, but only to the extent of reasonable regulation. Members of the public may not be prohibited from unobtrusively recording the proceedings of a public meeting. The criminal law prohibition against electronically recording conversations without the consent of a participant does not apply to recording "public or semipublic meetings such as hearing before government or quasi-government bodies." ORS 165.540(6)(a).

Any person who fails to comply with reasonable rules of conduct and actually causes a disturbance may be asked or required to leave and upon failure to do so becomes a trespasser. *State v. Marbet*, 32 Or App 67 (1978). Cities should not eject an individual from a council meeting or otherwise prohibit free speech related activities, however, unless those actions actually disrupt the meeting. *See Norse v. City of Santa Cruz*, 629 F3d 966, 976 (9th Cir. 2010); *Acosta v. City of Costa Mesa*, 718 F.3d 800 (9th Cir. 2013).

E. Voting

All official actions by a public body must be taken by public vote. The vote of each member must be recorded. ORS 192.650(1)(c). Written ballots may be used, but each ballot must identify the member voting and the vote must be announced. *Secret ballots are prohibited.*

The failure to record a vote is not itself a ground for reversing a decision. Without a showing that the failure to record a vote was related to a manipulation of the vote, a court will presume that public officials lawfully performed their duties. *Gilmore v. Board of Psychologist Examiners,* 81 Or App 321, 324 (1986).

F. Minutes and Recordkeeping

ORS 192.650 requires that a sound, video or digital recording or the taking of written minutes be taken at all meetings, except for executive sessions. Meeting minutes shall include at least the following:

i. Members of the governing body present;
ii. Motions, proposals, ordinances, resolutions, orders and measures proposed and their disposition;
iii. Results of all votes and the vote of each member by name;
iv. The substance of any discussion on any matter; and
v. Subject to the Public Records Law (ORS 192.410 to 192.505), a reference to any document discussed at the meeting. This reference does not change the status of the document under the Public Records Law.

Minutes need not be a verbatim transcript, and the meeting does not have to be recorded unless otherwise required by law. The minutes must be a true reflection of the matters discussed at the meeting and the views of the participants. ORS 192.650(1).

The public body must prepare minutes and have them available within a "reasonable time after the meeting." ORS 192.650(1). After minutes are prepared, they are public records subject to disclosure under the Public Records Law. They may not be withheld from the public merely because they have not yet been approved. If minutes have not been approved, they may be so identified.

Executive session minutes may be kept in the form of a tape recording rather than written minutes. ORS 192.650(2). No transcription of executive session minutes must be made unless otherwise required by law. If disclosure of material in the minutes would be inconsistent with the purpose of the executive session that was held under ORS 192.660, the material may be withheld from disclosure. ORS 192.650(2).

The media has no right to the minutes or tapes of executive sessions greater than that of the general public.

Oregon's public meeting law gives members of the public the right to attend all meetings of governing bodies of public agencies with a few exceptions. The right to attend is not the same as a right to participate in the meetings. Governing bodies include all city councils, planning commissions, budget committees, citizen advisory committees, council committees, and others if their functions are advisory to a city council. The public meeting law does not apply to staff meetings.

Executive Sessions

A. Permissible Purposes

Public bodies may meet in executive sessions only in specified situations. ORS 192.660. An "executive session" is defined as "any meeting or part of a meeting of governing body that is

closed to certain persons for deliberation on certain matters." ORS 192.610(2) (emphasis added).

The public body may hold an open session even when the law permits it to hold an executive session. A public body is authorized to hold closed sessions regarding the following subjects:

- Real Property Transactions;
- Exempt Public Records;
- Legal Counsel to discuss litigation;
- City Employees; and
- Labor Negotiations.

B. Final Decision Prohibition

ORS 192.660(6) states: "No executive session may be held for the purpose of taking any final action or making any final decision." The public body may reach a consensus in executive session. The purpose of the "final decision" requirement is to allow the public to know the *results* of the discussions. Taking a formal vote in open session satisfies that requirement, even if the public vote merely confirms a decision made informally in closed session.

C. Method of Convening

An executive session may be called during a regular, special or emergency meeting for which notice has already been given in accordance with ORS 192.640. The person presiding at the meeting should announce the statutory authority for the executive session before going into closed session. ORS 192.660(1). When a meeting that will be solely an executive session is called, the statutory authority for the executive session must be set forth in addition to notice requirements for any other meeting.

D. Media Representation

The Public Meeting Law expressly provides that representatives of the news media *shall be allowed* to attend all executive sessions except for sessions involving deliberations with persons designated to carry on labor negotiations, *Barker v. City of Portland*, 67 Or App 23 (1984). (Note: although internet bloggers are gaining additional recognition as members of the "news media" they are not always necessarily entitled to statutory benefits, such as the right to attend executive sessions).

As stated above, the public bodies may consult with their attorney about pending litigation or litigation likely to be filed. The public body may exclude any member of the media from such a meeting if the member is a party to the litigation to be discussed or is an employee, agent or contractor of a new media organization that is a party to the litigation. ORS 192.660(5).

The public body may require the non-disclosure of specified information that is the subject of the executive session. ORS 192.660(4). The presiding officer should make the specification. Absent a specification, the entire proceedings may be reported and the purpose of the executive

session may be frustrated. The media may discuss the statutory grounds justifying the executive session.

The meetings law contains no sanction to enforce the requirement that a news representative not disclose specified information. Penalties may raise freedom of press and speech questions. The Attorney General has concluded, "'enforcement'... depends upon cooperation between public officials and the media." AGM 146.

Reporters have no obligation to refrain from disclosing information obtained at an executive session if the public body fails to specify that certain information is not for publication. Reporters may, but are not required to, inquire whether a public body's failure to specify was an oversight. Reporters are under no obligation to keep confidential any information the reporter independently gathers as the result of leads obtained in executive session. Reporters may disclose matters discussed in executive session that are not properly within the scope of announced statutory authorization of executive sessions.

The public body may request a news medium not to assign a particular representative to cover its meetings if the representative has irresponsibly violated a clearly valid nondisclosure requirement. That representative may be barred from future executive sessions because the meeting law purposes will be met by allowing attendance of another representative, and representatives from other news media.

E. Other Person's Attendance

The public body may permit others to attend executive sessions. Generally, executive sessions are closed to all except members of the public body, their staff, their attorney, persons reporting on the subject of the executive session or otherwise involved, and news media representatives. However, the law does not prohibit the public body from permitting other persons to attend.

Council communication and confidentiality

The public meetings law applies whenever a governing body convenes on any matter to make a decision or to deliberate toward a decision—this includes "conference call" telephone meetings. In general, meetings may not be held outside the city limits. Notice is required for all public meetings and must include the date, location, time and principle subjects to be considered.

V. PUBLIC RECORDS LAW

The Public Records Law (ORS 192.311 to 192.478) was enacted in 1973. It establishes state policy that the public is entitled to know how governments operate. The written record of public business is available, with some important exceptions, to any person.

Scope and purpose of the law

A. Right to Inspect

Under ORS 192.314 "every person" has a right to inspect any non-exempt public record. Any natural person, corporation, partnership, firm or association has this right. ORS 192.311(3). The identity, motive and need of persons requesting access to public records are irrelevant unless an exemption from disclosure allows consideration of those factors. Interested persons, news media representatives, people seeking access for personal gain, busybodies on fishing expeditions, persons seeking to embarrass government agencies, and scientific researchers all have equal footing. *See MacEwan v. Holm*, 226 Or. 27 (1961).

The identity and motive of the person seeking a specific public record may be relevant in determining if a record is exempt from disclosure under a conditional exemption. ORS 192.345 conditionally exempts certain records from disclosure "unless the public interest requires disclosure in the particular instance." Many exemptions in ORS 192.345 require balancing privacy rights, governmental interests, and other confidentiality policies against the public interest in disclosure. The identity of the requestor and the use to be made of the record may be relevant in determining the weight of the public interest in disclosure.

B. Records Covered

The definition of "public records" and the ORS 192.311 policy statement make it clear that the records law applies to all government records of any kind. Oregon public records laws define "public record" as:

- any information that is prepared, owned, used or retained by a public body;
- any document or retainable information that relates to an activity, transaction or function of a public body; and
- is necessary to satisfy the fiscal, legal, administrative or historical policies requirements or needs of a state agency or political subdivision.

The definition of public record was expanded during the 2011 legislative session to include social media communications including information found on Facebook or Twitter, etc.

Records need not be prepared originally by the city to qualify as public records. If records prepared outside government contain "information relating to the conduct of the public's business," and are "owned, used or retained" by the city, the records are within the scope of the records law. For example, letters written to the city, retained and used by the city are public records.

However, a document prepared by a private entity does not become a public record merely because a public official reviews the document in the course of official business. Materials prepared and owned by a private company do not become "public records" when they are in the temporary custody of a public official for the purpose of preliminary review.

Public records include any "writing" containing information relating to the conduct of public business. ORS 192.311(5). "Writing" is broadly defined by ORS 192.311(7) to include:

> handwriting, typewriting, printing, photographing and every means of recording, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, files, facsimiles or electronic recordings.

"Writing" thus includes information stored on computer tape, microfiche, photographs, films, tape or videotape recordings and virtually any other method of recording information.

Note that the Public Records Law does not require the city to *create* public records. This is especially important for computer-stored data. Although the data in computer programs and printouts generated for use by the city are public records, the city is not obligated to perform specific computer runs or manipulate computer data in a requested manner.

C. Inspecting and Obtaining Public Records

Under the records law, the "custodian" of the public records has the duty to make non-exempt public records available for inspection and copying. The Legislature has defined "custodian" as a public body mandated to create, maintain, care for or control the records. ORS 192.311(2). However, the public body that has custody of a public record as an agent for another public body is not the custodian, unless the record is not otherwise available. When the city is a custodian of public records received from another public body, it should consult with the other public body to determine whether the records may be exempt from disclosure. ORS 192.355(10).

The 2007 legislature amended ORS 192.329 to assure more timely disclosure to interested parties by requiring a response to requests as soon as practicable and without unreasonable delay. Additionally, as of January 1, 2008, all public bodies must make available to the public a written procedure for submitting the requests, including at least one person and address to which it can be delivered along with the methods that will be used to calculate the fees charged. Further, the public body must respond to a request within 5 business days of receiving to acknowledge the request and: (1) confirm it is the custodian of the record requested, (2) inform the requester it is NOT the custodian of the requested record OR (3) inform the requester that it is not sure if it is the custodian of the requested record. ORS 192.324. Within 10 business days of the date the public body must acknowledge the request, the public body must either provide the requested record or provide in writing a reasonable estimated date when the response will be complete. ORS 192.329(5)

The city may delay action on a public record disclosure request to consult with the city attorney. It is reasonable for a record custodian to obtain legal advice before responding to an extensive public record disclosure request when compliance could disrupt operations. It is also reasonable for a records custodian to consult with the city attorney about the disclosure of documents that appear to be exempt, in whole or in part, from disclosure requirements under law. Consultation with the city attorney should not be used merely to delay or frustrate the inspection process.

D. Individual Councilor Right to Review Exempt Records

While the public has the right to review certain "public records," there are exemptions under state law whereby a "public body" should not release specific records. A "public body" is defined under ORS 192.311(4) to include city governing bodies, but it does not include individual governing body members. Therefore, as the custodian of the record, the Council could potentially view otherwise exempt public records. However, individual councilors, without the consent of the entire governing body, are not entitled to view otherwise exempt public records. *See State ex rel Weldon v. Campbell, Fisher et al* (Linn County Case No. 11-1589).

If a councilor, in his or her personal capacity, wishes to view a public record, the councilor may submit a request to the city as a member of the public.

Public Records Exempt from Disclosure

A. Nature of Exemptions

The records law is primarily a *disclosure* law not a confidentiality law. Exemptions are limited in nature and scope because state policy favors public access to government records. When the city denies a records inspection request, it has the burden of proving that the record information is exempt from disclosure. Oregon courts interpret the records law exemptions *narrowly*, and the courts "presume" that exemptions do not apply.

Even though information may meet the test to qualify for exemption from disclosure, it does not necessarily mean that the city is prohibited from disclosing the information. In most cases, exemptions do not prohibit disclosure, and the city has discretion to disclose record information that qualifies for exemption under the law. In only rare cases may the city say, "This record is exempt from disclosure under the records law, and therefore we may not disclose it."

There are a few instances where a government is barred from disclosing information that is exempt from inspection under the records law. ORS 192.368 *prohibits* a public body from disclosing a home address or personal telephone number if the requirements of that section are met. The "catch-all" exemption in ORS 192.355(9) incorporates into the records law some other statutes that prohibit public release of certain types of information such as income tax information. In addition, the federal law exemption in ORS 192.355(8) incorporates some federal laws that bar public dissemination of certain types of records, such as student record information under 20 USC 1232. Release of personal privacy information exempt under ORS 192.355(2) is likely to result in claims against the city. The city attorney should be consulted before such information is disclosed.

B. Conditional and Unconditional Exemptions

Exemptions are generally found in ORS 192.345 and 192.355. There are two types of exemptions under Oregon law: conditional and unconditional exemptions. All the exemptions under ORS 192.345 are *conditional*; they exempt certain types of information from disclosure "unless the public interest requires disclosure in the particular instance." In addition, several ORS 192.355 exemptions are conditioned on the extent to which governmental and private

interests in confidentiality outweigh the public interest in disclosure. Conditional exemptions require the city to balance carefully confidentiality interests against public disclosure interests. Some of the exemptions in ORS 192.355 are unconditional, meaning that no balancing is required. The legislature has already balanced the competing interests and concluded that confidentiality interests outweigh public disclosure interests as a matter of law.

In determining whether an exemption applies, the identity of the requester and the circumstances surrounding the request are irrelevant. The circumstances of a particular request become relevant only if the requested information comes under exemption that requires a balancing of interests. In that context, the requester's purpose in seeking disclosure may be relevant to determining whether the public interest requires disclosure.

The 2011 legislature (SB 437) amended ORS 192.355(17)(a) to make records, communications and information submitted to the cities by applicants for investment funds, grants, loans, services or economic development moneys, support or assistance exempt from disclosure.

C. "Public Interest in Disclosure"

The public record law does not define "public interest in disclosure." However, the Oregon Court of Appeals stated, "[t]he Public Records Law expresses the legislature's view that members of the public are entitled to information that will facilitate their understanding of how public business is conducted." *Guard Publishing Co. v. Lane County School District,* 96 Or App at 468-69. It previously characterized the public interest in disclosure as "the right of the citizens to monitor what elected and appointed officials are doing on the job." *Jensen v. Schiffman,* 24 Or App 11, 17 (1976). The public's right to monitor public employees includes the right to inspect records of alleged misuse and theft of public property by public employees. *Oregonian Publishing Co. v. Portland School District,* 329 Or 393 (1999). The term "public" means that the "focus is on the effect of the disclosure in general, not disclosure to a particular person at a particular time." *Morrison v. School District No. 48,* 53 Or App 148, 156 (1981).

Special considerations: email, calendars, etc.

The city uses electronic mail (e-mail) for communications. E-mail is a public record. Even after e-mail messages are "deleted" from individual computer accounts, they generally continue to exist on computer back-up tapes that are also public records. The city must make non-exempt e-mail available for inspection and copying. It is recommended that councilors use their city e-mail for all communication on matters that concern the city. This will make it easier to respond to potential public records requests as the collection can be done by the city using the city servers.

If a state or local elected official claims a right to withhold disclosure of a public record, the claim is not subject to administrative review by the Attorney General or a district attorney. The person denied access to the record may immediately file legal action in the Multnomah County Circuit Court. ORS 192.324. The petitioner who prevails will be compensated for the cost of litigation, including attorney fees.

Destruction of Public Records

State laws and regulations govern the retention and destruction of public records. ORS 192.001 to 192.170. In order to comply with these laws, public employees and officials are required to identify public records and determine their retention period; retain records in compliance with records retention schedules promulgated by the State Archivist; and destroy those records that are non-public records and those that have reached their retention period. For purposes of the record retention and destruction laws, "public record" includes correspondence, including email, but excludes extra copies of a document preserved only for convenience. ORS 192.005(5)(d). Even public records exempt from disclosure are subject to the retention schedules. See Appendix C.

It is important to follow these requirements as state law makes it a crime to knowingly destroy, conceal, remove or falsely alter a public record. ORS 162.305.

VI. LOCAL BUDGET LAW

Oregon Budget Law

The Oregon budget law is found in ORS chapter 294. The Oregon Department of Revenue administers this law and publishes the *Local Budgeting Manual* that serves to guide the city budgeting process. The law sets standards for preparing, presenting and administering the budget. It requires citizen involvement through the budget committee and public hearings before the annual budget may be adopted by the Council.

City governmental accounting requires the recording of city financial transactions and reporting them back to city administration, the Council and the public. Governmental agencies must comply with generally accepted accounting principals (GAAP), as approved by the Government Accounting Standards Board (GASB).

Unlike private sector accounting, government accounting is on a fund basis. State law requires separate funds. There are specific requirements for separate funds for Bancroft bond debt service (ORS 223.285), and reserves (ORS 294.525).

ORS 294.100 makes it unlawful for any public official to expend money in excess of the amounts provided by law, or for any other or different purpose than provided by law. Any official that violates this law is civilly liable for the return of the money in a suit by the District Attorney or any city taxpayer, if the expenditure constitutes malfeasance in office or willful or wanton neglect of duty.

Budget Committee

The law requires the City Administrator, as the budget officer, to prepare a budget message. The budget message must be given at the first budget committee meeting when the budget is presented to the committee.

The budget committee is composed of the Council and an equal number of appointed citizens. The committee must elect a chair and secretary. Its function is to receive the budget message, hear public testimony on the proposed budget, prepare meeting minutes, request information from city staff, amend a budget for Council adoption and set the property tax levy. The Council is required to adopt a budget no later than each June 30, the last day of each fiscal year. The budget and related forms must be filed with the County Assessor by July 15.

APPENDIX A

CITY LEGAL AUTHORITY

Structure of City Authority

1. Oregon Constitution
   Home Rule – Art. XI, sec. 2 (1906)

2. City Charter
   a. General powers
   b. Powers vested in Council – legislative, administrative & quasi-judicial
   c. Council president
   d. Mayor authority & duties
   e. Quorum & vote
   f. City Administrator
   g. Ordinances – adoption procedures

3. Ordinances & City Code (legislative)
   a. Council meetings & decision practices
   b. Ordinance preparation
   c. Boards, commissions & committees
   d. Business licenses & regulations
   e. Buildings & construction
   f. Health & safety regulations
   g. Public peace, morals & welfare
   h. Zoning & community development

4. Resolutions (administrative)
   a. Council decisions, less formal
   b. Budget decisions
   c. Policy statements
   d. Political statements
   e. Council rules

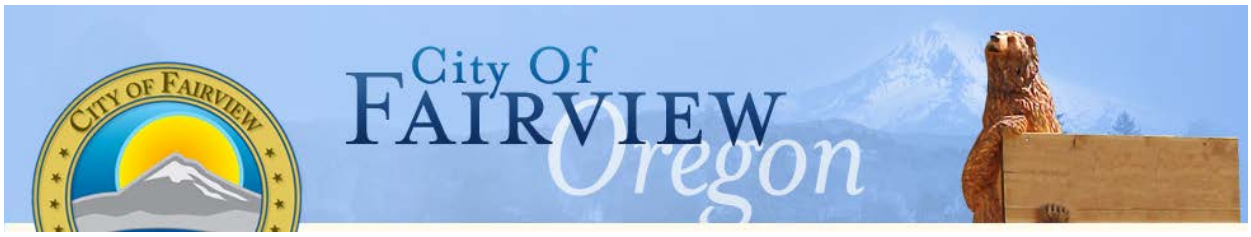
5. Orders (quasi-judicial)
   a. Decisions on appeals to & from Council
   b. Adoption of administrative rules (City Administrator or department head)

Limitations on City Authority

1. Federal Law
   a. U.S. Constitution
      i. Supremacy clause (federal / state / local hierarchy)
      ii. Commerce clause (protects interstate commerce)
      iii. Due process clause (procedural & substantive)
   b. Federal statutes – U.S. Code
      i. Civil rights acts

ii. Fair Labor Standards Act
iii. Environmental protection acts
iv. Cable Communications Act
v. Equal Employment Opportunity Act
vi. Americans with Disabilities Act
vii. Tax acts
viii. Transportation acts
ix. Many others

2. State Law
   a. Oregon Constitution
      i. Property tax limitations
      ii. Art. I, sec. 8 & other Bill of Rights provisions
      iii. Initiative & referendum
      iv. Recall
   b. Oregon Revised Statues (ORS)
      i. Public meetings – ORS 192.610 *et seq.*
      ii. Public records – ORS 192.311 *et seq.*
      iii. Land Use, Measure 37 & Measure 49 – ORS 197
      iv. Cities – ORS 221
      v. Local budget law – ORS 294
      vi. Public ethics law – ORS 244
      vii. Election law – ORS 250.255 *et seq.*
      viii. Public contracts – ORS 279
      ix. Public improvements – ORS 223
      x. Intergovernmental agreements – ORS 190
      xi. Urban service agreements – ORS 195
      xii. Workers compensation – ORS 656
      xiii. Criminal law, civil forfeitures & many other



Oregon Government Ethics

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Beery, Elsner & Hammond, LLP
707 NE Couch Street
Portland, OR 97232
503. 226.7191
www.gov-law.com

OREGON GOVERNMENT ETHICS

After the Watergate scandal in 1974, Oregon voters adopted a comprehensive ethics law for public officials. The law attempts to ensure that government officials promote general public interests rather than private financial interests. The policy states, "that service as a public official is a public trust, and that, as one safeguard for that trust, the people require all public officials to comply with the applicable provisions of this chapter." ORS 244.010(1).

ORS chapter 244 has six major parts: (1) abuse of office, (2) reporting requirements, (3) conflicts of interest, (4) nepotism, (5) the ethics commission and (6) penalties. The first four parts are of major importance to public officials and employees. The 2007 Legislature amended ORS 244 changing the commission name back to the Oregon Government Ethics Commission (OGEC).

The most significant changes were the broadened definition of “relative”, adding “members of household” to the reporting requirements for gifts and income, an aggregate gift value limit from those with an administrative or legislative interest and new quarterly filing requirements. While voicing many concerns and submitting some resignations, most public officials complied with the reporting requirements while waiting and working for legislative changes in 2009 that have now been realized. The 2009 Legislature further amended ORS 244 repairing many, if not all, of the perceived problems that arose from the 2007 session.

1. Abuse of Office

A. Who does the ethics law apply to?

The law applies to all "public officials" and in some cases to candidates for public office. The definition of "public officials" is broad and includes any person who serves state or local government as an officer, employee or agent. It includes council, committee and commission members, city attorneys, city employees and persons who work for the city on contract. It applies whether or not a public official is paid. ORS 244.020(14).

B. What does the ethics law prohibit?

i) Use of position

Public officials may not use or attempt to use their position to obtain financial gain or avoid financial detriment that would not otherwise be available but for the holding of the official position. This applies to public officials and "relatives" of public officials, which includes (1) the spouse, parent, step-parent, child, sibling, step-sibling, son-in-law and daughter-in-law of a public official; (2) the parent, step-parent, child, sibling, son-in-law and daughter in law of the spouse of a public official; (3) any individual that the public official has a legal obligation to support; and (4) any individual to whom or from whom the official provides or receives benefits from employment. ORS 244.020(15).

It is improper for a public official to lobby council, committee or commission members or public employees to award a contract to a business with which the official of any member of the household of the official is associated. Member of household is defined as any person who resides with the public official. ORS 244.020(10). In addition, public officials may not use their positions to avoid taxes, charges or fees paid by other residents.

The state law does not apply to official compensation, honoraria, reimbursement of expenses, or unsolicited award for professional achievement for a public official or relative. ORS 244.040(2).

Official compensation is not defined by the statutes. The OGEC has interpreted official compensation package as "wages and other benefits provided to the public official." To be part of the package, the wages and benefits must be specifically and formally approved by the public body. The benefits provided by contract or personnel policies must generally apply to public employees or other public officials. Official compensation also includes direct public body payment of a public official's expenses. OAR 199-005-0035(3).

Example: An SAIF official purchased a personal car as an "add-on" to the SAIF fleet purchase and saved about $1300. There was no additional cost to SAIF and no cost to the vehicle vendor.

Held: Ethical violation because official "availed himself of" financial benefit accessible only because of his status as a public official. Person would not have been benefited "but for" the official position. *Davidson v. Oregon Government Ethics Commission*, 300 Or 415 (1985).

Example: Public employees' personal use of employer's telephones, cellular phones, and computers (including Internet access).

Held: (a) Personal use of public telephones is not an ethical violation because "it is normal practice by both public and private employers to permit employees to use business telephones…" for personal business. However, personal long distance calls, even if employee reimburses public employer may be an ethical violation. (b) Use of a public computer on employee's own time may not be ethical violation. However, public computer use by employee to avoid a financial detriment is legally prohibited. This may include personal use to avoid private purchase of computer hardware or software. (c) Personal use of a public cellular phone does not violate ethics code where use is **directly** related to official duties, such as phone use to inform family of a late meeting or schedule change. However, personal uses beyond those necessary for public business or emergency would violate ethics code. This is the result even where an employee reimburses the employer for personal use. *Oregon Government Standards and Practices Commission,* Technical Advisory Opinion 98A-1003 (July 1998).

ii) Gifts

The law prohibits public officials, relatives of public officials and members of a public official's household from soliciting or receiving any gifts over **$50 TOTAL** in a calendar year from any source that has, or could reasonably be expected to have, a legislative or administrative interest in the public official's decisions or votes. ORS 244.025; OAR 199-005-0003.

A gift is anything of economic value, but the definition excludes things such as:

- gifts from relatives or members of the household of the public official;
- food / lodging / travel reimbursed by the public body when representing the public body;
- food / lodging / travel reimbursed by another government agency, organization, company or person when the official is representing the public body and under specific limited circumstances;[1]
- campaign and legal expense fund contributions;
- gifts in the form of tokens, plaques, trophies, or mementos with a resale value less than $25;
- publications, subscriptions, or other informational material related to the official's duties;
- waivers or discounts for continuing education for professional licensing;
- entertainment incidental to the main purpose of an event or when the official is acting in an official capacity and representing the public body for a ceremonial purpose.[2] ORS 244.020(6);
- gifts received as part of one's private business, employment or volunteerism; and
- gifts received that bear no relation to one's position or public office.

Example: A mayor, council president and city manager traveled to New York City to present the city's bond proposal to an investment rating service. The travel expenses of the officials' spouses were paid by the financial institution that prepared the city bond package.

Held: The food, lodging, and travel exemption does not apply to family household members. Payments of these expenses were illegal gifts because they were not "extended to others who are not public officials." Officials were fined twice the value of the reimbursed expenses. *Keller v. Oregon Government Ethics Commission*, 94 Or App 462 (1988), 106 Or App 727 (1991).

iii) Confidential information

Public officials may not further or attempt to further personal gain through use of confidential information gained in the course of or by reason of their official positions or activities in any way. Public officials often receive information that is not available to the general public. It is improper for an official to sell such information for use by another or to make use of such information for personal gain. ORS 244.040(4).

iv) Employment

A public official may not solicit or receive promises of future employment when there is any relationship or understanding that the promise will influence the official's actions. ORS 244.040(3).

2. Reporting Requirements

[1] The law was amended in 2007 and 2009. Under ORS 244.020(6)(b), reimbursement or payment of expenses for reasonable food, travel or lodging to a city official, and in some cases a relative, household member or staff member accompanying a city official, representing city government is not a gift, depending on the facts as they relate to ORS 174.111, 174.116 and 174.117.

[2] Reimbursement or payment of entertainment expenses to public officials, their relatives or household member are sometimes defined as gifts and in those instances, are allowed under ORS 244.025(4).

The regulation of the receiving of gifts, honorariums, expense reimbursements and certain forms of income is governed by a set of laws that apply to public officials, as defined in ORS 244.020(14), and includes "an elected official, appointed official, employee or agent, irrespective of whether the person is compensated for the services." However, state law only imposes the associated reporting requirements on some of these public officials including elected city officials, members of planning, zoning, and development commissions, the city administrator and as of April 15, 2010 each current candidate for any of these offices or positions. The remaining members of the staff and governing commissions and committees are not subject to the reporting requirements. ORS 244.050.

A. Annual Verified Statement of Economic Interest

The Annual Verified Statement of Economic Interest (SEI) must be filed by April 15 of each year and becomes a public record. The SEI is best characterized as a declaration of income, holdings, and business associations. The information to be included changed in 2009 and a brief description is:

- the businesses controlled or affiliated with the public official and members of their household;
- the sources of income for the official's household that produce 10% or more of the total annual household income;
- any real property owned by the household within the geographic boundaries of the jurisdiction of the public body with the exception of the primary residence. ORS 244.060;
- any expenses reimbursed with an aggregate value exceeding $50 and the name of the organizations or governments from which they were received;
- all honoraria received with a value exceeding $15; and
- each source of income in excess of $1,000 from an individual or business that could have a legislative or administrative interest in the public body. ORS 244.100.

A further requirement of the SEI only applies to those individuals or businesses that have done, or could reasonably be expected to do, business with the public body and has an administrative or legislative interest in the public body. If the foregoing is found to exist, then the official must also report the following as they relate to those individuals or businesses only:

- debts owed by the official in the amount of $1,000 or more;
- beneficial interest or investment by stocks or bonds by the official in excess of $1,000; and
- any fee for services in excess of $1,000. ORS 244.070.

3. Conflicts of Interest

A. What is an actual conflict of interest?

An actual conflict of interest exists whenever the effect of any action, decision or recommendation by a person acting as a public official **would** cause private pecuniary benefit or detriment for the person or the person's relative or any business with which the person or a relative is associated.

ORS 244.020(1). If public officials approve or recommend approval of applications involving their own land, award contracts or make purchases from persons to whom they owe money, or approve employment agreements with organizations for whom spouses work, then there is an actual conflict of interest. A conflict exists even if the official would lose money by taking a particular action. When an official's relative or a business associated with a relative would be affected by an official decision, there is also an actual conflict of interest.

B. What is a potential conflict of interest?

A potential conflict of interest exists whenever the effect of any action, decision or recommendation by a person acting as a public official **could** cause private pecuniary benefit or detriment for the person or person's relative or any business with which the person or a relative is associated. ORS 244.020(12).

Excluded from the definition of "business" is any nonprofit IRC 501(c) corporations where the associated public officials receive no remuneration. ORS 244.020(2). The statute excludes from the definition of potential conflict of interest "membership in or membership on the board of directors of a nonprofit corporation that is tax-exempt under section 501(c) of the Internal Revenue Code". ORS 244.020(12)(c).

There is a class exemption to the definition of a potential conflict of interest. Whenever the public official's action would affect other members of a large class the same way it affects the official, there is no legal potential conflict of interest. For example, if a city considers a storm water charge, then city officials who are city customers would have a potential conflict of interest were it not for the "class exemption." There are enough members of the class that the interest of each official is small compared to all the other members of the class. On the other hand, if the city official owns property about to be rezoned with other properties, a conflict of interest exists because the number of other property owners who are members of the class is small. ORS 244.020(12)(b).

C. What do I do if I have an actual or potential conflict of interest?

The simple answer is to disclose, disclose, disclose. Elected and appointed public officials serving on the council, committees, or commissions must announce publicly any potential conflicts of interest prior to taking any action. When there is an actual conflict, the official must announce publicly the nature of the actual conflict and refrain from participating as a public official in any discussion or debate on that issue. This official must not vote on the issue. ORS 244.120(2). An actual or potential conflict of interest must be declared at any meeting where the issue is acted upon, discussed, or considered in any manner.

The public body must record the actual or potential conflicts of interest in its public records when a public official gives notice of an actual or potential conflict. The notice and how it was disposed of may be provided to the OGEC within a reasonable period. ORS 244.130(1).

A council, committee, or commission member may not participate in any proceeding or action in which the following have a direct or substantial financial interest:

- member or spouse, brother, sister, child, parent, father-in-law, mother-in-law;

- any business in which the member is currently serving or has served within two years; and
- any business in which the member is negotiating or has an understanding concerning future partnership or employment.

Any actual or potential conflict of interest must be disclosed at the meeting where the action is being taken. ORS 244.135.

Appointed public officials must notify in writing the person who appointed them to office of the nature of the conflict. Notification must include a request that the appointing authority dispose of the matter giving rise to the conflict. The appointing authority then has the obligation to assign the matter to another person, or to prescribe a manner for the public official to dispose of the matter. ORS 244.120(1)(c).

4. Nepotism

This law applies to all public officials, members of household and relatives as previously defined under the law relating to gifts and expense reimbursement. Nepotism is favoritism based on kinship. The law states that a public official may not participate in the appointment, employment, promotion, discharge, firing, or demoting of a relative or member of the household. A public official must not participate in preliminary discussion of or interviews regarding any of these activities. There is an exception to these requirements for unpaid volunteer positions, but not for the public body the official serves. Reimbursable expenses for volunteers do not constitute nepotism. ORS 244.177.

Much like the law governing conflicts of interest, the public body is not prohibited from any of these activities provided the public official to whom the individual is related or is a member of a common household does not participate. ORS 244.177(4).

Public officials may not directly supervise a relative or member of the household either, with the same exceptions regarding unpaid volunteers and reimbursable expenses. A public body may adopt policies specifying further exceptions. ORS 244.179.

5. Oregon Government Ethics Commission

The Governor appoints all seven members of the Commission who are confirmed by the Senate. The Commission selects an executive director to administer the Commission and the Oregon Department of Justice provides legal counsel. ORS 244.250. The Commission's duties include training, advice, compliance and investigation. ORS 244.290. Advice is divided into staff advice, staff advisory opinions and commission advisory opinions.

Training is one of the highest priorities of the Commission and is available in presentations, the internet, topical written materials, and guidance in response to inquiries.

Advice can be requested and received in various forms, depending on the level of advice sought. Telephone, email, letters and written requests for written opinions are all accepted. Staff advice takes all of these forms, originates with Commission staff or the executive director and affords a

public official some protection should a penalty later be considered for an action taken on the advice received. ORS 244.284. Staff advisory opinions come from the executive director upon written request, may take 30 to 60 days to receive and generally afford an official with more protection than staff advice. ORS 244.282. Commission advisory opinions originate with the Commission itself based on adoption by a vote, may take 60 to 120 days to receive and provide an official with absolute protection if the advice is followed completely and the facts were accurately reported to the Commission in the initial request. ORS 244.280.

Another duty of the Commission is compliance and it refers to the review of the approximately 6,000 people and entities that must file annual and quarterly reports.

Investigations are in response to the receipt of written complaints alleging violations of Oregon Government Ethics law and follow strict procedure to determine whether wrongdoing has occurred. The process begins with a consideration of whether there is reason to believe there has been a violation. Next, there is a preliminary review phase to determine whether there is a finding of cause to initiate further investigation. The investigatory phase follows and the culmination of a case is a contested hearing if requested by the public official. ORS 244.260.

6. Penalties

Violations of public ethics laws may result in a civil penalty of up to $5,000 imposed by the Commission. This fine is in addition to any other penalty or sanction that may be imposed by any other law, including removal from office. ORS 244.350. If the OGEC finds a violation has occurred, the finding is prima facie evidence of unfitness where removal is authorized for cause by law. ORS 244.270.

In addition, public officials who financially benefit from a violation of any provision of ORS chapter 244 may be required to forfeit twice the amount of that profit. ORS 244.360.

Specific criminal statutes may also apply to public officials including receipt of a bribe by a public official, ORS 162.025, and misuse of confidential information for personal financial benefit, ORS 162.425.

CITY OF FAIRVIEW

LEGAL REQUIREMENTS FOR LAND USE DECISIONMAKING

January, 2021

I. WHAT IS A LAND USE DECISION?

A. "Land Use Decision" is Defined by Statute and Case Law

A simple definition of the term "land use decision" is a discretionary decision by a governmental body that applies the government's land use regulations, unless exempt under one or more of the statutory exceptions (discussed below). The statute that sets forth the definition and the exceptions is lengthy and is found at ORS 197.015(10)(a).

In simplified and non-exhaustive terms, a "land use decision" involves:

a) a final decision or determination;
b) made by a local government or special district (or state agency in limited circumstances);
c) that concerns the adoption, amendment or application of Statewide Planning Goals, a comprehensive plan provision, the local land use regulations.

B. "Limited Land Use Decision" as Defined by Statute

Oregon law distinguishes a "land use decision" from a "limited land use decision" in ORS 197.015(12). The key distinctions are: (1) a "limited land use decision" involves land within an urban growth boundary, and (2) procedural requirements are less cumbersome for a "limited land use decision."

Specifically, a "limited land use decision" involves:

a) a final decision or determination;
b) made by a local government regarding a site within an urban growth boundary;
c) that concerns the approval or denial of a tentative subdivision or partition plat, or the approval or denial of an application based on discretionary standards that regulate physical characteristics of an outright permitted use (e.g. site or design review).

Examples of limited land use decisions include tentative subdivision plats for land within an UGB,[1] plan review decisions and review of uses permitted outright based on discretionary standards, such as approval of residential use in a residential zone.

The review process for a limited land use decision is less formal and shorter than that of a land use decision. ORS 197.195 requires written notice to property owners within 100 feet of the site for which the application is made, a 14-day comment period, a written list of the applicable criteria upon which the decision will be made and notice of the final decision. A local government may, but is not required, to provide a hearing before the local government on appeal of the final decision. However, if a local hearing is provided, it must comply with procedural requirements in ORS 197.763. The final decision is not required to have complete or exhaustive findings and may take the form of a "brief statement" that explains the relevant standards and criteria, states the facts relied upon in reaching the decision and explains the justification for the decision based on the criteria, standards and facts. However, as a practical matter, the findings for a limited land use decision will look much the same as the findings for a standard land use decision.

Note, however, that a decision to approve a preliminary plat may not qualify as a limited land use decision when it involves other discretionary standards. For example, in *Wasserburg v. City of Dunes City*, LUBA determined that an application for City subdivision approval including a request for planned unit development approval (to allow the property to be divided in ways that the property could not be divided without planned unit development approval) meant the decision granting preliminary planned unit development subdivision approval was a land use decision, *not* a limited land use decision. 52 Or. LUBA 70, 78 (2006) (emphasis added).

In either case, approval of the *final* plat is not a land use decision. ORS 197.015(10)(b)(G), (12)(b).[2]

C. "Land Use Decision" Does Not Include…

One reason for the complexity of defining a "land use decision" in Oregon is that the statute provides an extensive list of what a "land use decision" does *not* include. The list below is not comprehensive but describes the actions you are most likely to encounter that are *not* land use decisions per ORS 197.015(10)(b). A local government decision is *not* a "land use decision" if it:

a) involves land use standards that do not require interpretation, or the exercise of policy or legal judgment (i.e. "ministerial" decisions);
b) approves or denies a building permit under clear and objective land use standards;
c) is a limited land use decision;

[1] *See Barrick v. City of Salem*, 27 Or. LUBA 417, 419 (1994), holding that a tentative subdivision plat within an UGB is a limited land use decision.
[2] This statutory provision was adopted in 2007 in response to Oregon Court of Appeals decision in *Homer v. City of Eugene*, 202 Or. App. 189 (2005).

d) involves a transportation facility that is otherwise authorized by and consistent with the comprehensive plan and land use regulations;
e) is an expedited land division as described in ORS 197.360; or
f) approves or denies approval of a final subdivision or partition plat, or determines whether a final subdivision or partition plan substantially conforms to the tentative plan (as noted above).

II. LAND USE BASICS

A. Local Government Authority

In Oregon, there are several levels of government that simultaneously regulate land use — the state, city, county and special districts. A local government, such as a city or county, adopts its own land use plan as well as regulations to implement the plan. However, the local government's plan and regulations must be consistent with and implement state policies that are set forth in the Statewide Planning Goals and Oregon Administrative Rules (OAR). Additionally, those cities and counties located within Metro must meet regional requirements established by Metro.

Oregon law requires coordination between cities and counties. Except for cities and counties within Metro, counties are responsible for coordinating all planning activities affecting within the county, including planning activities of cities, special districts and state agencies.[3] Within Metro's boundary, Metro is designated by statute to coordinate planning activities.

State law imposes substantial procedural requirements for local land use decisions, depending on the type of land use decision that is being made. Due to the complexity involved in determining what type of decision is being made, the Planning Department staff and City Attorney will generally evaluate the nature of the particular decision in any given case.

B. State's Role in Local Land Use

(1) Land Conservation and Development Commission (LCDC).

The Oregon Land Conservation and Development Commission (LCDC) adopts the statewide land use goals and administrative rules, assures local plan compliance with applicable land use laws, coordinates state and local planning, and manages the coastal zone program. LCDC is comprised of seven appointed volunteer members and meets about every six weeks to direct the work of the Department of Land Conservation and Development (DLCD).

DLCD is the state agency that administers the state's land use planning program. DLCD works under and provides staff support for LCDC. DLCD is organized into five divisions: Community

[3] *See* ORS 195.025 regarding regional coordination of planning activities, ORS 197.175 pertaining to cities' and counties' planning responsibilities, and ORS Chapter 197 on comprehensive land use planning coordination requirements.

Services, Planning Services, Ocean and Coastal Services, Measure 49 Development Services and Operations Services.

Under ORS 197.090(2), DLCD is authorized to participate in local land use decisions that involve statewide planning goals or local acknowledged plans or regulations. With LCDC approval, DLCD may initiate or intervene in the appeal of a local decision when the appeal involves certain pre-established factors laid out in ORS 197.090(2) to (4). DLCD is also involved in reviewing and acknowledging local comprehensive plans.

When "good cause" exists,[4] LCDC may order a local government to bring its plan, regulations, or decisions into compliance with statewide planning goals or acknowledged plans and regulations. This is known as an "enforcement order" and can be initiated by LCDC or a citizen but is infrequently used. LCDC may also become involved in a local government action if a petitioner requests an enforcement order and LCDC finds there is good cause for the petition. If LCDC determines there is good cause, LCDC will commence proceedings for a contested-case hearing under ORS 197.328. Failure to comply with an enforcement order under ORS 197.328 may result in the loss of certain public revenue, including state shared revenue.

(2) Land Use Board of Appeals (LUBA).

Most appeals of a local land use decision go to the Land Use Board of Appeals (LUBA). LUBA is comprised of three board members who are appointed by the governor and confirmed by the state senate. Anyone who participated in a local land use decision may appeal the decision to LUBA within 21 days of the date the decision becomes final. It is important to note that the date the decision becomes "final" is when it is put in writing and signed by the decision-maker (e.g. Planning Commission Chair, Mayor, or Hearings Officer). Alternatively, a city may specify in its code when the decision becomes final, such as the date the decision is mailed. In any case, it is not the same as the date the decision becomes *effective*, which may be much later.

Once notice of appeal is served, the local government must compile and submit the record of the decision to LUBA within 21 days. LUBA is required to issue a decision on the appeal within 77 days after the record is transmitted, though there are some exceptions to this deadline. Finally, LUBA's decision may be appealed to the Oregon Court of Appeals.

An important aspect of an appeal is that LUBA's review is limited to the contents in the record. Therefore, it is important that the City Council ensure that all applicable criteria, goals, arguments, staff reports, studies, etc. are included in the record in the event of an appeal. Such care can impact the outcome of any appeal.

For example, the Oregon Court of Appeals found that the interpretation of a local code provisions was not a "new" issue and prohibited the appellant from raising the issue on appeal

[4] See ORS 197.320, which lists indicators of "good cause" such as: (1) a local government comprehensive plan or land use regulation that is not in compliance with goals by the date set in statute; (2) a local government does not make satisfactory progress toward coordination; or the local government has engaged in a pattern or practice that violated the comprehensive plan or a land use regulation.

because, even though the provision was not specifically referenced in the City's notice of hearing the record showed that a member of the City Council raised the provision at the hearing, thus, placing the provision in the record. *Stewart v. City of Salem,* 231 Or. App. 356 (2009).

Because of the specific procedural requirements for an appeal to LUBA, the City Council and Planning Department staff work closely with the City Attorney on any appeals. It is important to notify the City Attorney immediately upon receipt of an appeal.

C. Statewide Planning Goals[5]

The purpose of the Statewide Planning Goals is to implement and consistently apply state land use policies throughout Oregon. The Statewide Planning Goals emphasize citizen involvement, a public planning process, management of growth within UGBs, housing and preservation of natural resources and specific types of lands called resource lands.

Most of the goals are accompanied by "guidelines," which suggest how to apply a goal but are not mandatory. The goals have been adopted as administrative rules and are located in OAR Chapter 660, Division 015. As noted, the City's comprehensive plan and development code must be consistent with the goals and are periodically reviewed by LCDC for compliance.

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[5] Oregon's 19 Statewide Planning Goals are:

Goal 1: Citizen Involvement
Goal 2: Land Use Planning
Goal 3: Agricultural Lands
Goal 4: Forest Lands
Goal 5: Natural Resources, Scenic and Historic Areas, and Open Spaces
Goal 6: Air, Water and Land Resources Quality
Goal 7: Areas Subject to Natural Hazards
Goal 8: Recreational Needs
Goal 9: Economic Development
Goal 10: Housing
Goal 11: Public Facilities and Services
Goal 12: Transportation
Goal 13: Energy Conservation
Goal 14: Urbanization
Goal 15: Willamette River Greenway
Goal 16: Estuarine Resources
Goal 17: Coastal Shorelands
Goal 18: Beaches and Dunes
Goal 19: Ocean Resource

III. TYPES OF LAND USE DECISIONS

A. Quasi-Judicial Process and Appeals

(1) Overview.

A quasi-judicial decision typically applies pre-existing criteria to an individual person or piece of land. Determining whether a proceeding is "quasi-judicial" turns on whether the decision displays the characteristics of such decisions identified by the Oregon Supreme Court in *Strawberry Hill 4 Wheelers v. Benton County Bd. of Commissioners*, 287 Or. 591, 601 P.2d 769 (1979). First, the proceeding must be "bound to result in a decision." *Id*. at 775. Second, the local government must be "bound to apply preexisting criteria to concrete facts." *Id*. Third, the decision must be "directed at a closely circumscribed factual situation or a relatively small number of persons." *Id*. While the court held that no single factor is determinative, the more closely a local decision comes to meeting these criteria, the more likely the decision is quasi-judicial. Typical examples of a quasi-judicial decision include design review, partition and subdivision, a zone change for a small number of lots or parcels, development permits and variances.

In Oregon, a quasi-judicial decision must comply with general standards of due process. This requirement arises from Oregon Supreme Court's decision in *Fasano v. Washington County Commission*, 264 Or. 574 (1973). Due process standards typically include an opportunity to be heard, an opportunity to present and rebut evidence, an impartial decision-maker and a record and written findings adequate to permit judicial review. *Id*. The mechanics of meeting the due process requirement are deeply embedded in state law and in some local codes.

(2) State law procedural requirements.

The procedures that apply to the City's review of a quasi-judicial application are largely determined by ORS 197.763. A copy of that statute is attached to these materials. For example, at the "initial evidentiary hearing," the City must read a statement that lists the applicable criteria in the City development code; ask that testimony and evidence be directed at the applicable criteria (or other criteria in the plan or development code the person believes apply to the decision); and stating that the failure to raise an issue with sufficient specificity to allow the City and other parties an opportunity to respond prohibits an appeal to LUBA based on that issue. The applicant must also be advised of the requirement to raise any constitutional claims at the beginning of the hearing under ORS 197.796. Typically, these statements are included in a script for the presiding officer but also may be presented by staff or legal counsel.

The City must provide a description of the applicable standards that is "clear enough for an applicant to know what he must show during [the] application process." *State ex. Rel. West Main Townhomes, LLC. V. City of Medford*, 234 Or. App. 343, 346 (2010). Generally referencing local code provisions is not enough to satisfy ORS 197.763(3)(b) and (5)(a), (governing the content of mailed notices and statements at the commencement of the hearing, respectively).

At the close of the "initial evidentiary hearing," *any* participant may request that the record be held open in order to allow additional evidence regarding the application. The City can either hold the record open for a specific period to allow additional written evidence, or continue the hearing to a specific date, time and place at least seven days in the future. It is the City's choice whether to continue the hearing or leave the record open, which may depend on the nature of the evidence to be submitted and the time available in which to render a final decision.

If new written evidence is submitted at the continued hearing, a person may request that the record be left open for at least seven days to submit additional written testimony/evidence. Then, after all of the written evidence has been submitted and the record is closed to all other parties, the applicant is allowed at least seven days to submit a final written argument in support of the application.

Approval or denial of a quasi-judicial land use application must be based on standards and criteria that are set forth in the City's development code. ORS 227. 173. The City's interpretation of its own code must be consistent with the express language of the code. *Siporen v. City of Medford*, 231 Or. App. 585 (2009). The courts will defer to a City's interpretation of its own code, provided the interpretation is made by the City Council. Conversely, the courts do not defer to an interpretation made by a lower body such as the Planning Commission or a hearings officer.

The City's final decision must include a brief description of the criteria, a description of the evidence that addresses each criterion, and the reasoning for approving or denying the application. ORS 227.173 (3). This part of the decision is generally referred to as the "findings." The legal requirements that apply to the City's findings are addressed in separate training materials but suffice it to say that they may not be cursory or conclusory.

(3) Local code requirements.

Under ORS 227.170(1), a city may establish its own hearing procedures provided they are consistent with ORS 197.763. Fairview's code addresses hearings and appeal procedures throughout Chapter 19 –Development Code, specifically under subchapters 19.412-413.

B. Final decision (Quasi-Judicial)

ORS 227.173(4) requires the final decision on a "permit" application be made in writing and sent to "all parties to the proceeding." A "permit" is defined at ORS 227.160(2) as a discretionary approval of development, excluding limited land use decisions (which have their own statutory process). The Fairview Municipal Code in Chapter 19.413 details the City procedures for issuing a final decision for different types of decisions, specifically quasi-judicial decisions under Section 19.413.030. Finally, ORS 227.175(12) requires that the final order include notice of appeal procedures.

Finally, under ORS 227.178(1), a final decision must be made within **120 days** of the date the application was "deemed complete," including "resolution of all [local] appeals." While ORS 227.178(5) allows *the applicant* to extend the deadline in writing, the total of all extensions may not exceed 245 days. Accordingly, the City must reach a final decision on an application for a "permit, limited land use decision or zone change" within one year from the date the application is deemed complete.

C. Legislative Process

The procedural requirements for a legislative land use decision differ from the procedural requirements for a quasi-judicial decision. Legislative decisions typically involve the adoption of more generally applicable policies, standards, etc., that apply to a variety of factual situations, and a broad class of people. Examples include amending the comprehensive plan, a zone change that applies broadly to large areas, or changes to the text of the development code to include or delete specific uses in a zoning classification. Because a legislative decision is the expression of City policy, the City is not required to reach a decision on a legislative proposal and may table the issue or decline to review it altogether.

In Fairview, revisions and amendments to the comprehensive plan are processed as a legislative decision under Subchapter 19.413.040 of the Code.

IV. EX PARTE CONTACTS, CONFLICTS OF INTEREST AND BIAS

A. Right to an Impartial Decision

The purpose of declaring ex parte contacts, bias and conflicts of interest is to ensure that *quasi-judicial* land use applications are decided by an impartial hearing body. Declaring ex parte contacts, bias, or conflict of interest is required prior to conducting a hearing on any quasi-judicial land use decision.[6] It is important to note that, as a resident of the community, City Councilors frequently have personal beliefs, business associations, membership with organizations, and relatives living and working within the community who may be affected directly or indirectly by issues presented by a land use application. Disclosing these beliefs or associations is required only where such beliefs or associations will affect the ability of the hearing body member to render an impartial decision. The exception to this general rule is ex

[6] Because the rights of the applicants in a quasi-judicial proceeding require additional protection relative to a legislative decision, in general ex parte contacts and bias are less important in the legislative context. As a result, open discussions with members of the community and expressions of opinion on proposed amendments to the code that affect the community as a whole rather than a narrow class or limited number of property owners generally do not require disclosure. *Casey Jones Well Drilling, Inc. v. City of Lowell*, 34 Or. LUBA 263 (1998). Where there is an actual conflict of interest that will result in a financial benefit to a public official, the statutory provisions *prohibit* participation in that decision. See discussion provided herein. In addition to the conflict of interest provisions that protect the community from special interests, ORS 244.040(1) prohibits a public official from using his or her office as a means of financial gain. To that extent disclosure protects both the individual commissioner and the community.

parte contacts. In a quasi-judicial setting, regardless of whether the ex parte contact affects the impartiality of a decision maker, it must be disclosed.[7]

Once a hearing body member discloses an ex parte contact, bias or conflict of interest and announces publicly his or her ability to render an impartial decision, the burden shifts to the public to prove that the person is not capable of making an impartial decision. However, a mere possibility that an improper ex parte contact occurred is not sufficient for the public to meet its burden. *Dahlen v. City of Bend*, 57 Or. LUBA 757, 765 (2008).

With respect to bias or a conflict of interest, a Planning Commission or City Council member may step down and not participate in a decision if the person believes that bias or a potential conflict of interest will prevent the person from being impartial. The decision to step down is up to the person based on whether he or she believes the particular contact or conflict gives an appearance of impropriety rather than a direct financial benefit. Where a hearing body member (including relatives and business associates) will financially benefit from the decision, ORS 244 prohibits the person from participating in the decision unless a class exception exists. Bias and conflict of interests are discussed in more detail below.

Although not required, a person who recuses himself from the decision may step down from the dias and join the general public seating during the discussion and decision. There is no legal requirement that prevents a person who steps down from participating as an interested citizen, although, when there is an actual financial benefit, a decision maker is discouraged from participating as a citizen to preserve the integrity of the process.

B. Ex Parte Contacts

An ex parte contact is commonly understood as a meeting, written communication (including email), or telephone conversation between a member of the hearing body and an interested party, outside of the public hearing process. While this is true, the scope of ex parte contacts is actually much broader—encompassing any evidence relating to a pending application relied on by a hearing body member in making a final decision that is not fully disclosed. The purpose of disclosure is to provide interested parties an opportunity to consider and rebut evidence.

It is important to note that ex parte contacts are not unlawful. While contact with interested parties to broker a behind-the-scenes deal on a particular decision is often a political disaster, legally such contact is a problem only where the substance of the meeting is not disclosed during a public hearing and recorded as a part of the public record. In most cases, the better approach is to rely on City staff to work directly with interested parties and avoid the risk of engaging in ex parte discussions.

(1) Statutory Provisions.

[7] However, where the disclosure reveals either that the public official did not rely on that information in making a final decision or that the information is not relevant to the applicable criteria, the public official may participate in the decision without undermining the validity of the final decision

ORS 227.180(3) provides the legal framework governing ex parte contacts and is discussed in greater detail below.

(a) Full Disclosure

Ex parte contact does not render a decision unlawful so long as there is full disclosure. ORS 227.180(3). Disclosure must occur at the earliest possible time in the decision-making process. *Horizon Construction v. City of Newberg*, 114 Or. App. 249, 834 P.2d 523 (1992) (Declaration of ex parte contact after the hearing at a meeting before making the final decision was ephemeral and required remand). There are two components to full disclosure: (1) placing the substance of the written or oral ex parte contact on the record and (2) a public announcement of the ex parte contact. ORS 227.180(3)(a) & (b). Both requirements are satisfied by disclosure at the initial public hearing (public announcement that is included as a part of the record). In addition, the presiding officer of the hearing body is required to provide the general public with an opportunity to rebut the substance of the ex parte contact.[8]

(b) Communications with Staff

Under ORS 227.180(4) communications with City staff are not considered an ex parte contact. However, City staff may not serve as a conduit for obtaining information outside of the public process unless that information is disclosed. In practice, decision makers may freely discuss issues and evidence with staff. Where an interested party requests staff to communicate with a decision maker or other evidence is obtained through staff that the decision maker relies on without disclosure (or is not otherwise included as a part of the public record such as the staff report), an ex parte contact problem occurs. Because an ex parte contact is a procedural error, the party appealing a decision must show that the ex parte contact was prejudicial. In general, evidence that a relevant ex parte contact was not disclosed should be regarded as enough to require remand of a decision.

(2) Common Sense.

Common sense judgment can go a long way in deciding what should be disclosed. Generally, a decision maker's instincts about whether information is relevant to the decision and should be included as a part of the record through disclosure are correct. The ex parte contact rules should not be viewed as an impediment to the hearing body's ability to conduct business. The majority of information used to form general opinions that existed prior to but which may impact a decision are not subject to disclosure. Specific information obtained in anticipation of or subsequent to an application being filed that is directly relevant to the decision and unavailable to the rest of the interested parties should always be included in the public record through disclosure.

[8] Often the opportunity to rebut or object to the decision maker's participation occurs prior to opening the public hearing. Depending on the extent of the rebuttal, the body may allow rebuttal during the public hearing or during the open record period following the initial hearing if requested by the objector.

(3) Scope of Ex Parte Contacts.

As indicated, ex parte contacts are not limited to conversations with interested parties or other members of the community. The concept of ex parte contacts is much broader. For example, consider:

- A site visit is not in itself an *ex parte* contact unless it involves communication between a decision maker and a party or other interested person. *Carrigg v. City of Enterprise*, 48 Or. LUBA 328 (2004). However, site visits do invoke procedural requirements of disclosure and opportunity to rebut. *Id.* If a site visit is conducted and conversations take place between decision makers and applicants and/or opposition that are then used in making the final decision, or give the appearance of so, the content of those conversations must be disclosed or the decision will be remanded. *Gordon v. Polk County*, 50 Or. LUBA 502 (2005).

- Communications with staff where the staff member is acting as a conduit for the transfer of information from persons for or against the proposal, or where the contact occurs after the record closes. See *Nez Perce Tribe and City of Joseph v. Wallowa County*, 47 Or. LUBA 419 (2004) (staff submittal of evidence after the record closes could prejudice parties' substantial right to rebut evidence and requires remand).

- Allegations that the planning staff, who were not the final decision makers, were biased in favor of an application are insufficient, even if true, to demonstrate that the final decision makers were biased. *Hoskinson v. City of Corvallis*, 60 Or. LUBA 93 (2009).

- Newspaper articles, television or radio broadcasts.

- All other outside discussions of a pending application.

(4) Example – another potential for ex parte communications.

Addressing Ex Parte Contacts on Remand. The Land Use Board of Appeals remanded a decision of the City of Portland where a commissioner spoke with an interested party during a recess and failed to disclose the conversation. On remand, the commissioner entered a statement on the record that he could not recall the nature of the conversation, and the decision was again appealed and remanded by LUBA. On appeal, the Court of Appeals agreed with LUBA that the City is required to adopt a decision based on fully disclosed information subject to the opportunity for rebuttal. Although a full hearing on remand is not generally required, the court found in this case that "[t]he remedy should be tailored to rectify the evil at which it is directed, in light of the particular circumstances of the case." *Opp v. City of Portland*, 171 Or. App. 417, 423 (2000).

C. Conflict of Interest

The Government Ethics Commission oversees the implementation of the conflict of interest statutes under ORS Chapter 244.

(1) Actual vs. Potential Conflict of Interest.

An actual conflict of interest is defined under ORS 244.020 as any decision or act by a public official that would result in a "private pecuniary benefit or detriment." An actual conflict extends not only to financial gain or loss to the individual public official but also to any relatives, household member or any business with which the official or relative is associated.

A potential conflict of interest is distinguished from an actual conflict of interest in that the benefit or detriment could occur while in an actual conflict of interest situation, the benefit or detriment "will" occur. ORS 244.020(1), 244.020(12).

In the case of an actual conflict of interest, the official must both:

- Announce the actual conflict of interest; and
- Refrain from taking official action.

For example, in *Catholic Diocese of Baker v. Crook County*, LUBA determined that a county commissioner's wife's testimony and the county commissioner's attendance at a planning commission hearing had no bearing on whether the commissioner's participation in the matter would result in a private pecuniary benefit or detriment to the commissioner. Neither did the fact that the commissioner owned property within 700 feet of the subject property; instead, ownership was indicative of a potential conflict of interest only, which the commissioner announced at the public meeting. 60 Or. LUBA 157, 164 (2009)

In the case of a potential conflict of interest, the official must announce the conflict, but may take action on the issue. The disclosure requirements for both potential and actual conflicts do not apply to class exceptions.

(2) Class Exceptions.

Often a land use decision has at least some indirect financial impact on an individual hearing body member and other members of the community. For example, legislative rezoning and code amendments often entail changes to the development rights of property owners throughout the City. To address this issue, a class exception to a conflict of interest is created under ORS 244.020(12)(b). Where a hearing body member is part of a class that consists of a larger group of people affected by a decision, no conflict exists. There is no hard and fast rule on the size or type of class to which the conflict exemption applies and ultimately that determination is up to the Oregon Government Ethics Commission. In general, legislative rezoning decisions that affect the community as a whole are exempt. The class exemption depends on the facts of each case. Several examples are provided below.

(3) Examples.

Disclosure of Proximity to Property Being Developed. Councilors living within proximity of an application for the continuance of a nonconforming mining operation failed to disclose the location of their residences during the local process. LUBA remanded requiring disclosure. *ODOT v. City of Mosier*, 36 Or. LUBA 666 (1999).

GSPC Staff Opinion No. 00S-008. Councilor Rod Park is a member of the Metro Council. Metro was developing an ordinance that would require local governments to adopt limitations on development in proximity of streams and other water bodies. Councilor Park is owner of property that includes an intermittent stream that will be impacted by the ordinance. Because Councilor Park is one of approximately 10,000 landowners affected by the ordinance, he clearly falls within the class exception.

GSPC Staff Opinion No. 01S-018. Sherwood City Councilor Cathy Figley owns commercial property in the City of Sherwood. The City was considering establishing an urban renewal area that includes 260 acres of land. Councilor Figley owns two tax lots of approximately 122 acres of commercial area within the proposed urban renewal area. Here the state pointed out the class exemption applies so long as the benefits from the urban renewal area apply equally to all owners.

GSPC Staff Opinion No. 98S-005. Creswell City Councilor Sharlene Neff requested an opinion as to whether she could actively oppose an application for a 19.5 acre development of a manufactured home park. Councilor Neff owns property that will be directly impacted by traffic from the proposed development. In this case, the state found that the number of property owners impacted by the development was of a sufficient size to trigger the class exception. NOTE: This staff opinion does not address the issue of bias at all. Although the GSPC found that there was no class exception, there is a very real chance that the councilor's participation with an opposition group is evidence of actual bias that would preclude her participation in the final decision.

D. Bias

A biased decision maker substantially impairs a party's ability to receive a full and fair hearing. *1000 Friends of Oregon v. Wasco Co. Court*, 304 Or. 76, 742 P.2d 39 (1987). Bias can be in favor of or against the party or the application. Generalized expressions of opinions are not bias. *Space Age Fuels v. City of Sherwood*, LUBA No. 2001-064 (2001).

Local quasi-judicial decision makers are not expected to be free of bias but they are expected to (1) put whatever bias they may have aside when deciding individual permit applications and (2) engage in the necessary fact finding and attempt to interpret and apply the law to the facts as they find them so that the ultimate decision is a reflection of their view of the facts and law rather than a product of any positive or negative bias the decision maker may bring to the process. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or. LUBA 697 (2005).

(1) Actual Bias.

Actual bias means prejudice or prejudgment of the parties or the case to such a degree that the decision maker is incapable of being persuaded by the facts to vote another way.
This can include:

- Personal bias;
- Personal prejudice; or
- An interest in the outcome.

The standard for determining actual bias is whether the decision maker "prejudged the application and did not reach a decision by applying relevant standards based on the evidence and argument presented [during quasi-judicial proceedings]." *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or. LUBA 440, 445 (2000), *aff'd* 172 Or. App. 361, 19 P.3d 918 (2001). Actual bias strong enough to disqualify a decision maker must be demonstrated in a clear and unmistakable manner. *Reed v. Jackson County*, 2010 WL 2655117, LUBA No. 2009-136 (June 2, 2010).

The burden of proof that a party must satisfy to demonstrate prejudgment by a local decision maker is substantial. *Roberts et. al. v. Clatsop County*, 44 Or. LUBA 178 (2003), *see also Becklin v. Board of Examiners for Engineering and Land Surveying*, 195 Or. App. 186 (2004). The objecting party need not demonstrate that a majority of the decision makers were influenced by the bias of one decision maker to warrant a remand; the bias of one City Councilor is enough. *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or. LUBA 702 (2001).

(2) Appearance of Bias.

Appearance of bias will not necessarily invalidate a decision. *1000 Friends of Oregon v. Wasco County Court*, 304 Or. 76, 742 P.2d 39 (1987). However, the appearance of bias may call into question a decision maker's ultimate decision. *Gooley v. City of Mt. Angel*, 56 Or. LUBA 319, FN6 (2008) (LUBA did not opine on whether City Councilors were biased, but noted that "even the most fair-minded decision maker is likely to have some difficulty deciding…a matter based solely on the applicable criteria, when a very close relative is party to the matter"). The main objective is to maintain public confidence in public processes.

(3) Examples.

General Expressions of Opinion Do Not Invalidate Decisions. "While on a personal basis, I think the Council and I * * * don't want these businesses in the community, the fact is our personal [feeling] versus our obligation as elected officials to uphold the law is very different, and so we can't base any decisions tonight based on content." Mayor Drake commenting on a proposed adult video store in Beaverton. *Oregon Entertainment Corporation v. City of Beaverton*, 38 Or.

LUBA 440 (2000). Statements by City officials that they would prefer a privately funded convention center, rather than a publicly financed one, do not demonstrate that the City decision makers are biased and incapable of making a decision on the merits. *O'Shea v. City of Bend*, 49 Or. LUBA 498 (2005).

Mere Association with Membership Organization Not Enough. For instance, an applicant for a dog raising farm alleged that a chairperson was biased by association with Clatsop County Friends of the Animals. Applicant speculated that the chairperson gave money to this organization and that opponents to the application were also members of the association. LUBA found that there was no evidence provided of any communications and that adequate disclosure was provided by the chairperson. *Tri-River Investment Company v. Clatsop County*, 37 Or. LUBA 195 (1999).

Also, where a land use decision maker is a member of a church congregation and the church has applied for a land use permit, and the decision maker has expressed concern regarding the impact proposed conditions of approval would have on church operations but nevertheless declares that she is able to render a decision regarding the church's application based on the facts and law before her, that decision maker has not impermissibly prejudged the application. *Friends of Jacksonville v. City of Jacksonville*, 42 Or. LUBA 137 (2002).

City May Adopt Applicant's Findings In Support of Decision. A hearings officer accepting, reviewing and adopting findings from the applicant is not evidence of prejudgment or bias. *Heiller v. Josephine County*, 23 Or. LUBA 551 (1992).

Prior Recusal Does Not Prohibit Participation In Subsequent Hearing. LUBA found no error where a County Commissioner failed to excuse himself from a decision even though the commissioner voluntarily withdrew from a prior hearing involving the same matter because of his friendship with an opponent of the proposed change. *Schneider v. Umatilla County*, 13 Or. LUBA 281 (1985).

Councilor Prejudged Application. In the City of Depoe Bay, a councilor's prior actions and written statements amounted to prejudgment of an application for a business license to operate a real estate office within a residential planned unit development. In this case, the councilor wrote a letter to the mayor stating that there was no legal basis for permitting the office. Subsequent correspondence also revealed the antagonistic relationship between the councilor and the applicant. The Land Use Board of Appeals found that "[i]n view of his history of actively opposing the siting of a real estate sales office within the Little Whale Cove PUD, it is clear that he had prejudged the application and was incapable of rendering an impartial decision based on the application, evidence and argument submitted during the City's proceedings on the application." *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or. LUBA 702 (2001).

Councilor May Not Seek Additional Evidence. In the City of Cottage Grove, two councilors sought and obtained additional evidence not in the record and relied on that evidence to make a decision on a permit application. The Land Use Board of Appeals noted, "The role of the local government decision maker is not to *develop* evidence to be considered in deciding a quasi-

judicial application, but to impartially consider the evidence that the participants and City planning staff submit to the decision maker in the course of the public proceedings." *Woodard v. Cottage Grove*, 54 Or. LUBA 176 (2007) (emphasis in original).

City's prior interest in purchasing subject property does not create bias. In the City of Oregon City, the fact that the City had inquired about purchasing property which became the subject of an application for a new Wal-Mart store was held to be insufficient to demonstrate bias. LUBA was unwilling to open the record for an evidentiary hearing. The Wal-Mart applicant did not allege that any member of the City Council had a personal financial interest in the property; rather, the applicant's allegation of bias "is based solely on its belief that the City as a municipal entity was interested in purchasing the subject property for future development of City buildings…" Such general allegations do not counter the City's argument that its City Commission was still capable of making an impartial decision. *Wal-Mart Stores, Inc. v. City of Oregon City*, Order on Motion to Take Evidence, LUBA No. 2004-124 (2005).

Postscript: The Oregon City Wal-Mart case went to the Court of Appeals on unrelated procedural matters. The Court of Appeals upheld the City's decision denying the application; the Oregon Supreme Court denied Wal-Mart's petition for review.[9]

[9] 204 Or App 359, review denied, 341 Or 80 (2006).

APPENDIX A

197.763 Conduct of local quasi-judicial land use hearings; notice requirements; hearing procedures. The following procedures shall govern the conduct of quasi-judicial land use hearings conducted before a local governing body, planning commission, hearings body or hearings officer on application for a land use decision and shall be incorporated into the comprehensive plan and land use regulations:

(1) An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.

(2)(a) Notice of the hearings governed by this section shall be provided to the applicant and to owners of record of property on the most recent property tax assessment roll where such property is located:

(A) Within 100 feet of the property which is the subject of the notice where the subject property is wholly or in part within an urban growth boundary;

(B) Within 250 feet of the property which is the subject of the notice where the subject property is outside an urban growth boundary and not within a farm or forest zone; or

(C) Within 500 feet of the property which is the subject of the notice where the subject property is within a farm or forest zone.

(b) Notice shall also be provided to any neighborhood or community organization recognized by the governing body and whose boundaries include the site.

(c) At the discretion of the applicant, the local government also shall provide notice to the Department of Land Conservation and Development.

(3) The notice provided by the jurisdiction shall:

(a) Explain the nature of the application and the proposed use or uses which could be authorized;

(b) List the applicable criteria from the ordinance and the plan that apply to the application at issue;

(c) Set forth the street address or other easily understood geographical reference to the subject property;

(d) State the date, time and location of the hearing;

(e) State that failure of an issue to be raised in a hearing, in person or by letter, or failure to provide statements or evidence sufficient to afford the decision maker an opportunity to respond to the issue precludes appeal to the board based on that issue;

(f) Be mailed at least:

(A) Twenty days before the evidentiary hearing; or

(B) If two or more evidentiary hearings are allowed, 10 days before the first evidentiary hearing;

(g) Include the name of a local government representative to contact and the telephone number where additional information may be obtained;

(h) State that a copy of the application, all documents and evidence submitted by or on behalf of the applicant and applicable criteria are available for inspection at no cost and will be provided at reasonable cost;

(i) State that a copy of the staff report will be available for inspection at no cost at least seven days prior to the hearing and will be provided at reasonable cost; and

(j) Include a general explanation of the requirements for submission of testimony and the procedure for conduct of hearings.

(4)(a) All documents or evidence relied upon by the applicant shall be submitted to the local government and be made available to the public.

(b) Any staff report used at the hearing shall be available at least seven days prior to the hearing. If additional documents or evidence are provided by any party, the local government may allow a continuance or leave the record open to allow the parties a reasonable opportunity to respond. Any continuance or extension of the record requested by an applicant shall result in a corresponding extension of the time limitations of ORS 215.427 or 227.178 and ORS 215.429 or 227.179.

(5) At the commencement of a hearing under a comprehensive plan or land use regulation, a statement shall be made to those in attendance that:

(a) Lists the applicable substantive criteria;

(b) States that testimony, arguments and evidence must be directed toward the criteria described in paragraph (a) of this subsection or other criteria in the plan or land use regulation which the person believes to apply to the decision; and

(c) States that failure to raise an issue accompanied by statements or evidence sufficient to afford the decision maker and the parties an opportunity to respond to the issue precludes appeal to the board based on that issue.

(6)(a) Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to paragraph (b) of this subsection or leaving the record open for additional written evidence, arguments or testimony pursuant to paragraph (c) of this subsection.

(b) If the hearings authority grants a continuance, the hearing shall be continued to a date, time and place certain at least seven days from the date of the initial evidentiary hearing. An opportunity shall be provided at the continued hearing for persons to present and rebut new evidence, arguments or testimony. If new written evidence is submitted at the continued hearing, any person may request, prior to the conclusion of the continued hearing, that the record be left open for at least seven days to submit additional written evidence, arguments or testimony for the purpose of responding to the new written evidence.

(c) If the hearings authority leaves the record open for additional written evidence, arguments or testimony, the record shall be left open for at least seven days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the hearings authority shall reopen the record pursuant to subsection (7) of this section.

(d) A continuance or extension granted pursuant to this section shall be subject to the limitations of ORS 215.427 or 227.178 and ORS 215.429 or 227.179, unless the continuance or extension is requested or agreed to by the applicant.

(e) Unless waived by the applicant, the local government shall allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. The applicant's final submittal shall be considered part of the record, but shall not include any new evidence. This seven-day period shall not be subject to the limitations of ORS 215.427 or 227.178 and ORS 215.429 or 227.179.

(7) When a local governing body, planning commission, hearings body or hearings officer reopens a record to admit new evidence, arguments or testimony, any person may raise new issues which relate to the new evidence, arguments, testimony or criteria for decision-making which apply to the matter at issue.

(8) The failure of the property owner to receive notice as provided in this section shall not invalidate such proceedings if the local government can demonstrate by affidavit that such notice

was given. The notice provisions of this section shall not restrict the giving of notice by other means, including posting, newspaper publication, radio and television.

(9) For purposes of this section:

(a) "Argument" means assertions and analysis regarding the satisfaction or violation of legal standards or policy believed relevant by the proponent to a decision. "Argument" does not include facts.

(b) "Evidence" means facts, documents, data or other information offered to demonstrate compliance or noncompliance with the standards believed by the proponent to be relevant to the decision. [1989 c.761 §10a (enacted in lieu of 197.762); 1991 c.817 §31; 1995 c.595 §2; 1997 c.763 §6; 1997 c.844 §2; 1999 c.533 §12]