Frequently Asked Questions to the City Attorney

Table of Contents

Announcements of Community Interest 2
Commissions and Boards 2
Ethics and Conflict of Interest 3
Follow-Up Questioning of Persons Testifying on Agenda Items 4
Late Additions to Agenda for Business Meeting 5
Restrictions on Political Campaigning by Public Employees 7
What Constitutes a Meeting and Colloquy Clarification 7

Announcements of Community Interest

Change. Council members appeared to reach rough agreement on a trial period of three months in which the "Other Business from Council Members" portion of the agenda may be used by Councilors to briefly notify the Council and the public about matters of current community interest. These notifications/announcements are to be limited to two minutes each and only about matters that are not subjects of community controversy. The Mayor/Presiding Officer is to be responsible for enforcing these guidelines, prompted, if necessary, by a Councilor's point of order.

Implementation. While such announcements by Councilors have not regularly been a part of Council agendas in recent years, they are not contrary to Council rules. Similar announcements have been allowed in the "Mayor's Announcements", "Special Presentations and Awards", and "Public Forum" sections of the agenda. Allowing such announcements is well within the prerogative of the Mayor/Presiding Officer, and no formal action need be taken to implement this three-month trial period.

Commissions and Boards

A Councilor serving as Council liaison to a commission has an official function which precludes personal advocacy at meetings of the commission to which he/she has been assigned. One cannot avoid this limitation with a statement that he/she is temporarily relinquishing that official function and speaking only as a private citizen. That is one cannot merely by unilateral recital temporarily set aside the authority and responsibilities of a public role one has been chosen to fill and has accepted. Stated differently, one cannot serve in a public role and then arbitrarily suspend inherent public obligations by purporting to temporarily assume a private role.

Analogy: A regular citizen is free to advocate for actions that benefit his/her pocketbook. But a public official cannot avoid application of conflict of interest rules by purporting to speak only as a private citizen.

If a Councilor were to permanently give up his/her role as liaison to a particular commission, the Councilor could attend the commission meetings and speak his/her mind as a private citizen. But as designated Council liaison to a commission, the Councilor plays an official role which places some limits on personal advocacy.

Further commentary includes:
AMC 2.04.100 Council Liaisons to City Advisory Boards and Commissions

A. Role and Responsibilities of Council Liaisons

   2. City Councilors serve as liaisons to the City's Regular and ad hoc advisory bodies and are expected to represent the full City Council objectively and accurately in interacting with such entities. *Commentary: This provision addresses Councilor conduct at meetings of advisory boards to which the Councilor has been assigned the official role of liaison. This provision would serve no purpose if a Councilor could temporarily relinquish that role at will by merely making a declaration. Such as interpretation of this provision would render it unnecessary and therefore surely would be invalidated by court.*

   3. City Councilors may attend meetings of the City's Regular and ad hoc advisory bodies as citizens of Ashland. When attending as a citizen, Council members must identify their comments as personal views or opinions not a representation of City Council policy. *Commentary: This provision addresses Councilor conduct at meetings of advisory bodies to which Councilors are not assigned the official role of liaison. It distinguishes that*

circumstance from the one described in the subsection immediately above, thereby reinforcing the notion that assuming the official duty of Council liaison inherently limits one's conduct at those advisory bodies to which is serving as Council liaison. This provision would serve no purpose if AMC 2.04.100A(2) were interpreted to mean a Council liaison could temporarily relinquish that role by merely making a declaration. Again, such an interpretation of AMC 2.04.100A(3) would render it superfluous and therefore surely would be invalidated by a court.

C. Deliberations
The City Council values diversity of opinion. A significant role of an advisory body is to represent many points of view in the community and to provide the Council with advice based on a full spectrum of concerns and perspectives. <u>Accordingly, Council liaisons to City advisory bodies should not attempt to direct debate, lobby, or otherwise influence the direction or decisions of any advisory bodies to which they have been assigned</u>. Council liaisons are encouraged to field and answer questions as appropriate for an ex-officio member of the advisory body. Undue influence over the decisions of any City advisory body shall be grounds for removal of a Liaison assignment under paragraph H below. *Commentary: The above underlined sentence in this provision unequivocally prohibits trying to influence the direction or decisions of the advisory body if one has been assigned as liaison to that advisory body. It leaves no room for inference that one may step outside that role and temporarily become an advocate. Moreover, it reinforces the distinction made in AMC 2.04.100A(2) and (3). The underlined sentence would be superfluous if a Council liaison were able to participate as an ordinary citizen-advocate in the deliberations of the advisory body to which he/she is appointed merely by claiming to be momentarily wearing a different hat. The last sentence of this provision is even broader: It implies <u>any</u> attempt by a Councilor to significantly influence the direction or decision of an advisory body is inappropriate. Presumably, the underlying notion is that Council members already get to make final determinations when a matter comes before Council and should not try to gain advantage for their personal views by attempting to shape the recommendations supposedly independent advisory bodies make to Council.*

Ethics and Conflict of Interest

Question: A citizen commented on the proposed provision for Councilors' announcements about community events at Council meetings and asked for analysis of the citizen's inquiry as to whether the City or state code of ethics proscribed a particular Councilor's announcement at a recent Council meeting about an upcoming fundraiser for the AHS football team's trip to Japan, given that the Councilor's son is on the team.

Opinion: In the City Attorney's opinion (which would not be a shield if the Ethics Commission had a different opinion), the announcement did not violate either City ordinances or state statutes on ethics.

Reasoning:

- The City's ethics code on this issue is the same as the state's.
- There is no question that such an announcement from the witness table during Public Forum would be unobjectionable – even if it were a Councilor making the announcement. Being elected Councilor means taking on certain responsibilities over above those of ordinary citizens, but it does not mean losing some of the rights available to ordinary citizens.

- Even if the Council were considering taking an official action – for example, a vote on whether to officially support fundraising event by allowing a banner over Main Street – the Councilor would not have been required to declare a conflict (potential or actual) or to refrain from participation. This is because the entire class of potentially financially affected persons (members of the football team and their families) would have been affected to the same degree. In this instance, a conflict of interest question (at least as a legal matter) does not even arise because no official action was under consideration, and members of the public were free to ignore the announcement without consequence.
    - This analysis relies on the "class exception" in ORS 244.020(14)(b) which exempts "[a]ny action in the person's official capacity which would affect to the same degree a class consisting of all inhabitants of the state, or a smaller class consisting of an industry, occupation or other group including one of which or in which the person, or the person's relative…is associated, is a member or is engaged."
        - A 2006 opinion (Staff opinion No. 06S-012) from the staff of the predecessor of the state Ethics Commission, the Government Standards and Practices Commission, addresses whether members of Pinehurst School District school board would be met with a conflict of interest in participating in official action that would provide middle school students, including some of their own children, the opportunity to purchase a laptop computer at a discounted price. Four of the ten of the students who would be eligible for the discounted price in the initial year were children of two members of the district's school board. The opinion concluded that if the official action of the school board would financially impact all of the middle school students to the same degree, the entire group was a "class" and a conflict of interest therefore did not exist.
- Although making such Councilor announcements does not present a conflict of interest or other legal problem, the Council is free to preclude them for any other reasons, including saving time or focusing only on official business. As I understand it, the three-month trial period was intended to give the Council a taste of such announcements to ascertain what benefits and problems they might entail.

Follow-Up Questioning of Persons Testifying on Agenda Items

Change. Council members appeared to reach rough agreement on a trial period of six months in 2013 in which follow-up questioning of persons testifying on agenda items would be allowed in accordance with the following guidelines:

- Questions are to be only seek clarification or additional specific information.
- Questioning is to be limited to no more than two minutes and limited to the subject area of the agenda item on which the person has testified.
- Questioning is not to be used as a means of either emphasizing or challenging points made by the person who presented testimony.
- No Councilor may ask more than one follow-up question of a person who presented testimony until every other member other Council has had the opportunity to ask that person a question.
- Except with Council consent, no Councilor may pursue follow-up questioning of more than two persons who have presented testimony on a particular agenda item.

- The Mayor/Presiding Officer may postpone follow-up questioning until after all the regular public testimony on a particular agenda item has concluded.
- The above limitations do not apply to the questioning of City staff or persons with specialized knowledge on the agenda topic who have been specifically invited to testify by City staff or the Council.
- Except with Council consent, follow-up questioning of persons testifying during the "Public Forum" section of the agenda is not allowed.
- Such follow-up questioning is not to be allowed when a motion has been made and is under consideration, except after a successful motion to suspend the rules.
- The Mayor/Presiding Officer is to be responsible for enforcing these guidelines, prompted, if necessary, by a Councilor's point of order.

Implementation. Allowing such follow-up questioning is within the prerogative of the Mayor/Presiding Officer and certainly is permissible with Council consent. No formal action need be taken to implement this six-month trial period. The Rules of City Council in AMC 2.04, however, address procedures at a level of detail similar to that of the guidelines outlined above. Accordingly, after the trial period, the Council may want to amend AMC 2.04 to include a provision on follow-up questioning, incorporating whatever insights may have been learned during the trial period.

Late Additions to Agenda for Business Meeting

ORS 192.640 states that public notice is required for late additions to agendas for the business meeting. Special notice is still required for executive sessions, special, or emergency meetings. The governing body of a public body shall provide for and give public notice, reasonably calculated to give actual notice to interested persons including news media which have requested notice, of the time and place for holding regular meetings. The notice shall also include a list of the principal subjects anticipated to be considered at the meeting, but this requirement shall not limit the ability of a governing body to consider additional subjects.

The Attorney Generals Manual on public meetings states:
The Public Meetings Law does not require that every proposed item of business be described in the notice. The law requires a reasonable effort to inform the public and interested persons, including news media, of the nature of the more important issues ("principal subjects") coming before the body. And the governing body may take up additional "principal subjects" arising too late to be mentioned in the notice.

AMC 2.04.030C states that during a meeting a topic may be added to the agenda by a majority vote of the Councilors present. Generally, these items should be limited to items of timeliness or emergencies.

At the Study Session held on March 18, 2013, the Council discussed two provisional modifications of procedures for regular Council meetings: (1) Allowing the "Other Business from Council Members" portion of the agenda to be used by Councilors to briefly notify the Council and the public about matters of current community interest; and (2) Allowing limited follow-up questions by Council members following public testimony.

Council members expressed various views on these two subjects. To give Council members the opportunity to provide feedback on staff's attempts to summarize Councilors' intent, this memo outlines what appeared to be a rough consensus on each subject. This memo also discusses implementation theses provisional procedural innovations.

Question: What is the procedure for a Councilor to get an item added to the agenda for a particular Regular Meeting of the Council?

Answer: A Councilor can get a topic added to the agenda of a Regular Meeting of the Council in any one of the ways discussed in the scenarios below. (Note: The ways for those other than Councilors to get items added to an agenda and the procedures for setting Study Session agendas are not addressed here.) In Scenarios 1, 2, and 4, an affirmative vote of the Council majority is required. The Mayor or presiding officer has discretion to change the order of business: The May can determine when in the course of a meeting the Council will decide whether to take up consideration of a matter or when the Council will make a decision on the matter itself once the matter has been added to the agenda. But the Mayor cannot unilaterally prevent either decision from being taken up at some point in a meeting which has that matter on its agenda (including an agenda modified at the meeting to include that matter). While the Mayor can have items put on the agenda themselves, with respect to a Councilors effort to get an item on a Regular Meeting agenda, and then decided upon, the Mayor can unilaterally decide on WHEN in the course of the meeting – no WHETHER.

Scenario 1: By a majority vote of the Councilors present, any item can be added to any agenda. The item added can be a decision on any substantive or procedural matter. The Code says this procedure for adding an agenda item "generally" should be limited to "items of timeliness or emergencies". This limitation is an admonition, not a requirement. Presumably, the admonition is to serve as a reminder that under public meetings law, the public is to get advance notice of topics to be addressed at a meeting unless unexpectedly urgent action is called for. In the normal order of business, a motion to add an item to the agenda for the current meeting or a future meeting should be made in the time designated for a "Other Business from Council Members", but the Mayor can change the order of business. Bottom line: One motion on adding an item to the agenda and if that motion prevails and Council action is sought, another motion on the item itself.

Scenario 2: If the item a Councilor wishes to add to a meeting agenda would require major policy research or drafting of an ordinance, the Councilor can propose by motion in the time designated for "Other Business for Council Members" that the item be added to a future meeting agenda, and the Council can determine by a majority vote whether to do so. No staff work of more than two hours can be spent on the matter prior to Council's decision on whether to add it to a future meeting agenda. Bottom line: One motion on adding item to the agenda and if that motion prevails and Council action is sought, another motion on the item itself.

The other two ways to add an agenda item require advance action by the City Administrator. The City Administrator has sole responsibility for preparation of the advance agenda for each Regular Meeting of the Council. The City Administrator cannot decline a Councilor's request to add an agenda item and has limited influence as to WHEN an agenda item requested by a Councilor is to be scheduled.

Scenario 3: If a Councilor requests that the City Administrator include an item on the agenda for a particular Regular Meeting of the Council, the City Administrator must do so provided (1) the Councilor makes the request no later than noon of the Wednesday preceding the subject meeting; and (2) the matter "does not involve staff time, policy research or drafting of an ordinance". The requirement that the proposed agenda item "not involve staff time" means "not more than two hours of any staff time". The City Administrator may request deferral of the matter to a later

meeting in light of an already lengthy agenda for the upcoming meeting, but cannot require deferral. Bottom line: One timely request to City Administrator and, if Council action is sought, one motion on the item itself.

Scenario 4: A Councilor seeking addition of an agenda item that would require more than two hours of staff work on major policy research or drafting of an ordinance may request that the City Administrator include on the agenda for a particular meeting a decision on whether to add that item to a subsequent meeting agenda. Such a request must be made no later than noon of the Wednesday preceding the meeting at which the decision on addition of the item to a subsequent agenda is to be made. The City Administrator may request that this decision on adding the item to a subsequent meeting agenda be deferred to a later meeting in light of an already lengthy agenda for the upcoming meeting, but cannot require deferral. No staff work of more than two hours can be spent on the matter prior to Council's decision on whether to add it to a future meeting agenda. Bottom line: One timely request to City Administrator; one motion on adding item to the agenda; and, if that motion prevails and Council action is sought, another motion on the item itself.

Scenario 5: After a citizen presents an item to the Council during public forum, a Councilor may request the item be placed on a future agenda pursuant to the procedures described in Scenarios 1 through 4, depending on the nature of the item.

Restrictions on Political Campaigning by Public Employees

According to ORS 260.432 Solicitation of Public Employees, public employees are restricted from helping elected officials with campaigning, as stated below.

> The restrictions imposed by the law of the State of Oregon on your political activities are that "No public employee shall solicit any money, influence, service or other thing of value or otherwise promote or oppose any political committee or promote or oppose the nomination or election of a candidate, the gathering of signatures on an initiative, referendum or recall petition, the adoption of a measure or the recall of a public office holder while on the job during working hours. However, this section does not restrict the right of a public employee to express personal political views."
>
> It is therefore the policy of the state and of your public employer that you may engage in political activity except to the extent prohibited by state law when on the job during working hours.

Go to https://www.oregonlaws.org/ors/260.432 to read the full restrictions outlined in ORS 260.432.

What Constitutes a Meeting and Colloquy Clarification

Engaging more than two other members of the Council (including the Mayor as the minimum necessary for a quorum counts the Mayor) in colloquy about City business would constitute as an unlawful meeting, even if each conservation (or email exchange) were between you and other council member one or two at a time.

Sending an email to all the other members of the Council (or any subset) without engaging in colloquy is permissible. That is, an outbound communication alone does not violate the open meetings rule. Back and forth communication violates the statute as currently interpreted. The safest way to send an outbound communication is to include a reminder not to reply all or to blind copy (bcc) email addresses.

When a constituent sends an email to a Council member, with copies to the rest of the Council, a Council member's response that is also sent to the other members of the Council does not constitute as impermissible serial meeting under the public meetings law, provided that Council members refrain from commenting on each other's responses (e.g. replying to another Councilor's reply). Such communication is not "deciding on or deliberating" toward a decision because it is not a "back and forth" conversation among Council members. However, because this interpretation involves a fairly fine conceptual distinction that might be disputed in a court, a safer course would be to reply solely to the constituent, avoiding the "Reply All" response. Assuming the topic is a matter of public business, the City Administrator, Executive Assistant, City Attorney, or City Recorder should be copied on the direct response to the constituent, so it is automatically kept as a public record without your having to save it on your computer.

If one feels a compelling need to share his/her response with the other Council members, the preferred course would be to bcc the other Council members. This would prevent a subsequent "Reply All" response from being sent unintentionally to the recipients of the blind copy and potentially being deemed to be a "back and forth" conversation. Again, the City Administrator, Executive Assistant, City Attorney, or City Recorder should be copied on the email correspondence to avoid the possibility of having to conduct a search of your computer in response to a public records request.