Planning Commission Agenda

Note: Anyone wishing to speak at any Planning Commission meeting is encouraged to do so. If you wish to speak, please rise and, after you have been recognized by the Chair, give your name and complete address for the record. You will then be allowed to speak. Please note the public testimony may be limited by the Chair.

July 11, 2023
REGULAR MEETING
AGENDA

I. **CALL TO ORDER:** 7:00 p.m., Civic Center Council Chambers, 1175 E. Main Street

II. **ANNOUNCEMENTS**

III. **CONSENT AGENDA**

1. **Approval of Minutes**
   a. June 13, 2023, Regular Meeting

IV. **PUBLIC FORUM**

Note: To speak to an agenda item in person you must fill out a speaker request form at the meeting and will then be recognized by the Chair to provide your public testimony. Written testimony can be submitted in advance or in person at the meeting. If you wish to discuss an agenda item electronically, please contact PC-publictestimony@ashland.or.us by July 11, 2023 to register to participate via Zoom. If you are interested in watching the meeting via Zoom, please utilize the following link: https://zoom.us/j/95965534636

V. **OTHER BUSINESS**

A. Oregon's Land Use Planning Program
   - Decision Making & Meeting Procedure
   - Public Meeting Law
   - Commission Functions

B. Discussion of City Council and Planning Commission Coordination

VI. **OPEN DISCUSSION**

VII. **ADJOURNMENT**

Next Scheduled Meeting Date: July 25, 2023 (TBD)

Planning Commission Minutes

Note: Anyone wishing to speak at any Planning Commission meeting is encouraged to do so. If you wish to speak, please rise and, after you have been recognized by the Chair, give your name and complete address for the record. You will then be allowed to speak. Please note the public testimony may be limited by the Chair.

June 13, 2023

REGULAR MEETING

***DRAFT* Minutes**

I. CALL TO ORDER:

Chair Verner called the meeting to order at 7:00 p.m. at the Civic Center Council Chambers, 1175 E. Main Street. She welcomed Commissioners Gregory Perkinson, Russell Phillips, and Susan MacCracken Jain. Commissioner MacCracken Jain was unable to attend the meeting.

Commissioners Present:	**Staff Present:**
Lisa Verner	Brandon Goldman, Community Development Director
Kerry KenCairn	Derek Severson, Planning Manager
Doug Knauer	Aaron Anderson, Senior Planner
Eric Herron	Michael Sullivan, Executive Assistant
Gregory Perkinson	
Russell Phillips	
Absent Members:	**Council Liaison:**
Susan MacCracken Jain	Paula Hyatt

II. ANNOUNCEMENTS

Community Development Director Brandon Goldman made the following announcements:

- The City received a $1.58 million grant to be used for the acquisition of a homeless and inclement weather shelter. The grant was provided by the Jackson County Continuum of Care.
- The City Council approved the City's 2024-2025 biennium budget, and also approved some consumer-price index-based increases for planning fees. These will go into effect July 1, 2023.
- Townmakers, LLC has updated the City regarding their development of the Croman Mill Site. The Department of Environmental Quality (DEQ) has collected site samples and will have the results of the tests in July, 2023. The application from Townmakers, LLC will be dependent upon the level of cleanup necessitated based on the results of those tests, and staff expects the group to apply for a preapplication conference over the summer. This item could come before the Commission again if the Commission requests it.
- The June 27, 2023 Commission Study Session has four items to discuss: a Chamber of Commerce Economic Diversification Study; an update from the Climate & Environmental Policy Advisory Committee regarding a natural gas ordinance update; a draft review of a Climate Friendly Area (CFA) study; and a discussion on where to hold the 2023 annual

Commission retreat and the items to be discussed.

Commissioner Knauer expressed interest in hearing the presentation given by Townmakers, LLC, and Mr. Goldman responded that staff would contact them.

III. CONSENT AGENDA

A. Approval of Minutes

1. May 9, 2023, Regular Meeting

Commissioner Knauer noted that test results included on page 12 of the packet were not seen at the May 9, 2023 meeting. Mr. Goldman noted that those numbers were part of a digital presentation that was given at the meeting that didn't show up in the infographic, but appeared in document form.

Commissioners KenCairn/Knauer m/s to approve the consent agenda as presented. Voice Vote: All AYES. Motion passed 6-0.

IV. PUBLIC FORUM - None

V. UNFINISHED BUSINESS

A. Approval of Findings for PA-T2-2023-00040, 1111 Granite St.

Commissioners Knauer/KenCairn m/s to approve the findings as presented. Voice Vote: All AYES. Motion passed 6-0.

B. Approval of Findings for PA-T2-2023-00042, Clear Creek Dr. Parcel 7 - 391E09AB TL 6700 & 391E09AA TL 6200

Commissioners KenCairn/Knauer m/s to approve the findings as presented. Discussion: Commissioner Herron asked if changes were made to the findings. Chair Verner noted that the Commission had suggested changes, which Mr. Goldman stated were included on pages 90-91 of the findings. **Voice Vote: All AYES. Motion passed 6-0.**

VI. TYPE II PUBLIC HEARING - CONTINUED

A. PLANNING ACTION: PA-T2-2023-00041
SUBJECT PROPERTY: Tax Lot 404 Clinton St.

OWNER: Magnolia Heights LLC
DESCRIPTION: A request Performance Subdivision Outline Plan approval for a 12-lot, 11-unit residential subdivision. The application also includes requests for an Exception to Street Standards, and a Tree Removal Permit for four significant trees. Additionally, the applicant has applied for a minor amendment to the adopted Physical and Environmental Constraints map to effectively remove a drainage way form the map that is not extant on the property. And finally, the applicant has addressed the applicability standards of the Water Resource Protection Zone WRPZ by providing a wetland determination demonstrating that there are no regulated wetland resources on the subject property. **COMPREHENSIVE PLAN DESIGNATION:** Single Family Residential**; ZONING:** R-1-5; **MAP:** 39 1E 04 DB; **TAX LOT:** 404 ***(PLEASE NOTE: The record and public hearing are closed on this matter. The Planning Commission's consideration of this item will be limited to their deliberation and decision. No further submittals (evidence or argument) will be accepted into the record.)***

Chair Verner read aloud the guidelines for a Type II Public Hearing. She reminded the Commission that was item was continued from the May 9, 2023 meeting. No further submittals or comments will be submitted or accepted at this meeting. The Public Hearing was closed, but the Public Record was left open and allowed for submitted comments to be received for two weeks.

Chair Verner stated that comments were received during this period, though no comments or materials were received after May 30, 2023 (see attachment #1). Chair Verner also noted that Commissioners Perkinson and Phillips were not present at the May 9, 2023 meeting when this item was first heard. She stated that both Commissioners could participate in the continued discussion if they could attest to having thoroughly reviewed the packet materials for the May 9th and June 13th meetings, and have watched the recording of the May 9 meeting. Commissioners Perkinson and Phillips attested that they had done so.

Ex Parte Contact
No ex parte contact was reported. Chair Verner conducted a site visit.

Discussion and Deliberation
Commissioner Perkinson thanked staff for making changes to the findings, and asked if these revisions changed staff's recommendation. Mr. Goldman responded that it did not, pointing out that a new condition was added requiring that the final plan application include the Department of State Lands' concurrence with the submitted wetlands report. Mr. Goldman noted several other changes made to provide further clarification to the findings (see attachment #2).

Commissioner Knauer inquired about whether a Water Resource Protection Zone (WRPZ) always correlates to a wetland. Mr. Goldman responded that the designation of a wetland or a WRPZ along creeks is based on whether they are intermittent or ephemeral, and that staff determined that there

was no ephemeral creek on that site, as was previously mapped. Commissioner Knauer asked how the City could conclude that an ephemeral creek did not exist given its intermittent nature. Mr. Anderson answered that the wetland delineation report showed that there was no wetland present, and that a visit to the site shows no physical drainage, therefore the WRPZ standards are not applicable. Commissioner KenCairn commented that developments over the last few decades have changed or removed many wetlands and ephemeral areas. She added that the development of the site could also provide any necessary drainage from the site in the event of high precipitation.

Commissioners Perkinson/Phillips m/s to approve staff's recommendation of PA-T2-2023-00041 with the updates provided by staff on June 13, 2023. Roll Call Vote: All AYES. Motion passed 6-0.

VII. OTHER BUSINESS

A. Election of Officers

Commissioner Perkinson motioned to elect Commissioner Verner as Chair. Voice Vote: All AYES. Motion passed 6-0.

Commissioner Herron/KenCairn m/s to elect Commissioner Knauer as Vice Chair. Voice Vote: All AYES. Motion passed 6-0.

VIII. OPEN DISCUSSION

Councilor Hyatt spoke to the ongoing work at the Croman Mill Site by Townmakers, LLC, emphasizing the role that the Commission will play in that process and the importance of their recommendation that they will make to the Council.

Commissioner Perkinson spoke to the amount of information contained in the Housing Production Strategy (HPS) report, stating that he may have questions about it in the future. Mr. Goldman responded that the Commission would review a number of items contained in the HPS, and that staff will begin reviewing the first of those items in July, 2023 before bringing them to be reviewed by the Commission in the form of a study session.

Commissioner Herron stated that he would not be able to attend the July 25, 2023 study Session.

The Commission discussed when to hold its annual retreat, though no date was decided. Mr. Goldman stated that staff would sent out a poll in order to determine an appropriate date and time.

Commissioner Knauer inquired how the Croman Mill project would be financed, what risks would be shared with the City, and what the plans looked like for mixed housing. Councilor Hyatt responded that there is no written plan yet, and that the Commission would likely not see any updates regarding this project until the "no further action" notice from the Department of Environmental Quality is lifted. Mr. Goldman added that the applicants have multiple plans for residential, mixed-use, and commercial buildings on the site, and that the development will require code amendments to take place. Once the applicants complete a pre-application they will provide the Commission with a conceptual plan, but the Commission will not review the application until it comes before them in the formal Public Hearing process.

IX. ADJOURNMENT

Meeting adjourned at 7:41 p.m.

Submitted by,
Michael Sullivan, Executive Assistant

Next Meeting Date: June 27, 2023

From: Aaron Anderson
To: planning
Subject: FW: Planning Acton PA-T2-2023-0041; Tax Lot 404 Clinton St.
Date: Monday, May 15, 2023 8:19:36 AM

All: Please see below.
This was sent directly to me and copied to mayor and (most of) council (it appears that she missed cc'ing to councilor Dahle).

Front office: please reply letting Betsy and all parties originally cc'ed that this has been received and placed in the record.
I will take care of forwarding to Gill and Amy.

Thank you.

Aaron Anderson CFM, Sr. Planner

From: Betsy A. McLane <clumb3@yahoo.com>
Sent: Sunday, May 14, 2023 6:17 PM
To: Aaron Anderson <aaron.anderson@ashland.or.us>
Cc: Bob Kaplan <bob@council.ashland.or.us>; Dylan Bloom <dylan.bloom@council.ashland.or.us>; Gina DuQuenne <Gina.DuQuenne@council.ashland.or.us>; Tonya Graham <tonya@council.ashland.or.us>; Eric Hansen <eric@council.ashland.or.us>; paula.hyab@council.ashland.or.us
Subject: Planning Acton PA-T2-2023-0041; Tax Lot 404 Clinton St.

[EXTERNAL SENDER]
Dear Aaron and Ashland City Council,

I am writing to urge that the Planning Commission reject the proposal submitted for building on the above referenced tax lot. I attended the PlanningCommission meeting on this subject via Zoom and was appaled at the lack of clarity and information provided in the proposal.

The most simple google search reveals that the company proposing the development has almost no experience in successfully building anything and is run out of a private home This is reflected in lack of care evident in the proposal. Below are just some of the problems that were apparent to me:

The proposed development includes:

A plan for 11 buildable lots, for a total of 21 new residences with one lot size open space. The State of Oregon allows that land zoned for single family housing can have two dwelling units on it. The submitted proposal shows these to be three bedroom duplexes. The developer recently created a new business as a property rental firm. This could mean 80-132 rental occupants. These could be short term housing for air b&bs, tourists, or students and/or longer term rentals. In either case,

this could easily overwhelm streets with traffic and noise and completely change the character of the neighborhood.

The proposal includes plans to cut down at least four large significant trees, because the developer does not want to pay to build a retaining wall and handrail. It also includes a requested waiver to change the normal sidewalk to be built on Clinton. If approved, there will likely be no parkrow as we now have in Riverwalk.

No plan for preservation of wetland or a riparian area. The proposal uses a temporary wetlands sample with no final ruling as to whether there is wetland here. Since this property is adjacent to Bear Creek, special care should be taken to protect plants and wildlife.

No adequate drawings of the look of the housing

No mention of fire wise planning.

No study of traffic mitigation was presented. It appears that Briscoe would be most affected since the proposal includes extending Briscoe and Ann into the development and traffic would move to and from Mountain via Briscoe and to and from Hersey via Ann. Ann is already a dangerous very steep street. There is potential for up to 100 vehicles trips using Briscoe every day.

Complete disregard for the Riverwalk subdivision CC&R's which state that one of our goals is to preserve property value.

These are only the most obvious dubious elements of the proposal. During the meeting the Commission refused to address the issue of stop signs and street lighting stating that those questions "should be directed to the city department that deals with streets." Obviously, city departments are not sharing information in collegial ways.

Believing as I do that residents of Ashland have a right to transpanency in our government, I find that the proposed project is the opposite of transparent. It seems that a development is somehow being ramrodded into a single family home community with no regard for community values. I ask that the City Council investigate this proposal more thoroughly and that the planning commission reject it.

I am an owner at 419 Clinton.

Most sincerely,

Betsy A. McLane, Ph.D.

Betsy A. McLane
clumb3@yahoo.com

From: Aaron Anderson
To: planning
Subject: FW: Magnolia Heights subdivision
Date: Tuesday, May 23, 2023 8:22:22 AM

Front Office please reply to Mr. Longhurst that we have received his email Thank you

Aaron Anderson CFM, Sr. Planner

-----Original Message-----
From: Gordon Longhurst <gordonlonghurst7580@gmail.com>
Sent: Saturday, May 20, 2023 12:55 PM
To: Aaron Anderson <aaron.anderson@ashland.or.us>
Subject: Magnolia Heights subdivision

[EXTERNAL SENDER]

Hi Aaron,

I attended the public hearing on May 9th regarding the Magnolia Heights subdivision and spoke about a few concerns I had.
You and I spoke after the meeting about how the state mandate to allow duplexes on land zoned single family homes superseded local zoning restrictions.

This letter is to request that traffic study be done (required?) to assess the impacts the added residences will have on neighborhood traffic and safety. The proposal states that no traffic study is required because there will be less than 50 trips, but does not indicate whether that estimate is based on 11 residences or 22. Even if the number of trips doesn't require a traffic study it would still be useful to determine how best to deal with two already problematic intersections that will be made moire so by increased traffic; Ann St at Hersey and Phelps at Patterson.

Please enter this letter in the record.

Thanks,
Gordon Longhurst
515 Ann St
Ashland 97520

From:	Aaron Anderson
To:	planning
Subject:	FW: PLANNING ACTION: PA-T2-2023-00041
Date:	Tuesday, May 23, 2023 8:23:37 AM

Front Office, Please reply to Dean below,
Thank you

Aaron Anderson CFM, Sr. Planner

From: Dean Ichikawa <deanichikawa@gmail.com>
Sent: Sunday, May 21, 2023 10:07 PM
To: Aaron Anderson <aaron.anderson@ashland.or.us>
Subject: PLANNING ACTION: PA-T2-2023-00041

[EXTERNAL SENDER]
PLANNING ACTION: PA-T2-2023-00041
SUBJECT PROPERTY: Tax Lot 404 Clinton St
OWNER: Magnolia Heights LLC

Hi Aaron Anderson,

My apologies, I missed the public hearing on May 9th, but hoping you can consider my concerns, if someone hasn't already raised them. When I read the application–unless I missed it–the applicant isn't taking into account anything regarding N Mountain Ave. I live right on N Mountain Ave (521) and I can tell you that it is already quite busy. It's also a pretty long stretch of road with no stop signs in between. This allows for cars to often go well above the speed limit. And with the park right across the street, I have an 11-year old daughter who crosses the street quite a bit and the majority of cars do not stop for her when she stands waiting at the crosswalk to cross the street.

This new development is likely to increase the number of cars traveling on N Mountain Ave and I'm concerned that the additional traffic will cause issues, especially as cars attempt to make a left turn on N Mountain Ave towards I-5 without any stop signs or traffic control. As it is, cars honk their horns at cars trying to turn in and out of the neighborhood and in and out of the park on an almost daily basis. I don't think they should be allowed to add so many new dwellings without addressing this issue by contributing to a new intersection or some type of traffic control.

Otherwise, they will just be adding to a problem and won't be responsible if an accident should happen or other disturbances result.

Thank you so much for hearing my concerns!

—Dean Ichikawa
(650) 703-9578

Eric Elerath
419 Clinton St.
Ashland, OR 97520
(310) 429-8093

May 23, 2023

Ashland Planning /Community Development
City of Ashland
51 Winburn Way
Ashland, OR 97520
(541) 488-5350

Douglas M. McGeary, City Attorney
City of Ashland
20 East Main Street
Ashland, OR 97520
(541) 488-5305

PLANNING ACTION: **PA-T1-2023-00041**
SUBJECT PROPERTY: **Tax Lot 404 Clinton St.**
OWNER: **Magnolia Heights LLC**

SUBJECT: **OBJECTIONS TO PLANNING ACTION**
REQUEST FOR STAY OF DECISION

Dear Ashland Planning / City of Ashland:

Mr. Elerath renews his objection to approval of the above Planning action on the grounds that such approval and development would be in violation of Mr. Elerath's rights under the takings clause of the 5th Amendment, and that approval of the proposed project would set an adverse precedent which could be nearly impossible to challenge or reverse. He now requests a stay of any decision by the Planning Commission and the City Council which would grant approval of the project as proposed, so as to allow prior judicial review.

Mr. Elerath specifically alleges:

Despite the terms of HB2001 and its effect on Oregon State law, the subdivision project as submitted violates Ashland Municipal Code §13.9.050 because it proposes the permitting of duplexes on property zoned R-1-5 in a unit density twice that of the unit density allowed under the ordinances. The result would be 22 dwelling units, apparently designed for shorter-term rental, instead of the 11 dwelling units currently allowable in R-1-5 and which are typically sold to owner-occupants. The proposed density and rental occupancy is intended for projects in zones designated for high density multifamily use, not the R-1-5 zone intended for single family dwellings.

One effect of the proposed development with that density increase and change of use will be to lower Mr. Elerath's appraised property value in a significant amount not yet determined and which can only be estimated now or determined by future appraisal after the fact.

Wherever the City's interest lies in controlling the cost of rental housing to end users and tenants, lowering the property values of owner-occupants who have made an investment in property for their own security during end-of-life years, and who have an established right to maintain those property values, is not a legitimate use of the city's police powers.

Mr. Elerath respectfully asks that approval for this project be stayed until review can be had in federal court.

Regards,

Eric Elerath
419 Clinton St.

BEFORE THE PLANNING COMMISSION

JUNE 13, 2023

IN THE MATTER OF PLANNING ACTION PA-T2-2023-00041 A REQUEST FOR OUTLINE PLAN APPROVAL FOR A 12 LOT, 11 RESIDENTIAL UNIT SUBDIVISION. INCLUDED IN THE APPLICATION IS A REQUEST FOR AN EXCEPTION TO STREET STANDARDS, A TREE REMOVAL PERMIT FOR TWO SIGNIFICANT TREES AND A MINOR MAP AMENDMENT TO THE ADOPTED PHYSICAL AND ENVIRONMENTAL CONSTRAINT MAP.	)	**AMENDED FINDINGS.**
OWNER MAGNOLIA FINE HOMES **APPLICANT:** ROGUE DEVELOPMENT SERVICES	)	

2.8 The Planning Commission notes that the Water Resource Protection Zone applicability at AMC 18.3.11.020 (full text set out above) puts the burden on the property owner that the regulations of AMC 18.3.11 "are met or are not applicable" to a proposed development. The Planning Commission notes, as mentioned above, that the application included a wetland delineation pending acknowledged by the Department of State Lands (DSL) concluding that there is no regulated wetland on the subject property. The Planning Commission notes that there were concerns raised during the initial evidentiary hearing regarding the possible existence of wetlands in the southeast corner of the subject property. Absent other expert testimony, the Planning Commission must rely on the conclusions of both the Shotts and Associates report and the DSL. The Planning Commission finds, based on the above, that the regulations at AMC 18.3.11 are not applicable to the present development.

7) That the Final Plan application shall include:

a) Final electric service, utility and civil plans including but not limited to the water, sewer, storm drainage, electric, street and driveway improvements shall be submitted for the review and approval of the Planning, Building, Electric, and Public Works/Engineering Departments with the Final Plan submittal. The street system plan shall include full street designs with cross-sections consistent with the City's Street Design Standards for the proposed residential neighborhood streets and alleys, as approved, except that no parkrow planting strip is required in the area of the approved exception as detailed in section 2.5 above ~~on the bridge over Beach Creek~~. …

h) The approved Tree Protection Plan, ~~Water Resource Protection Zone Mitigation and Management Plans~~, and accompanying standards for compliance shall be noted in the CC&Rs. The CC&Rs must state that deviations from the approved Tree Preservation and Protection Plan ~~or Water~~

~~Resource Protection Zone Mitigation and Management Plans~~ shall be considered violations of the Planning approval and subject to penalties described in the Ashland Municipal Code.

i) That a final DSL concurrence regarding the wetland report is received.

8) That a final survey plat shall be submitted within 12 months of Final Plan approval and approved by the City of Ashland within 18 months of this approval. Prior to submittal of the final subdivision survey plat for signature:

e) Irrigated street trees selected from the Recommended Street Tree Guide and planted according to city planting and spaces standards shall be planted along the full project frontage in all parkrows and behind the sidewalk where parkrows are not present ~~North Mountain Avenue of the subject property~~, inspected and approved by the Staff Advisor.

DISCUSSION ITEMS

Oregon's Land Use Planning Programs

State Of Oregon

Understanding Oregon's Land Use Planning Program
Training for Local Officials and the Public

https://www.oregonlandusetraining.info/

Excerpt

Chapter 4: Making Land Use Decisions

Welcome to Chapter 4 – Making Land Use Decisions. In this section, we discuss the different types of land use decisions made by city and county government, time requirements for these decisions and the public hearing and appeals processes. We have divided them into specific sections for easy reference.

It is important to note that this chapter is only a general summary of planning procedures and requirements. For information about a specific statute, legal precedent, goal or rule, cities and counties should contact the appropriate governmental agency. If you have legal issues or concerns, consult an attorney who specializes in land use law.

Local Land Use Decisions

According to state law, there are three main types of land use decisions: legislative, quasi-judicial and ministerial. In most cases, public notice is required. Public hearings are required for certain types of decisions. Although local governments must establish procedures and requirements consistent with state statutes, they have considerable flexibility in assigning responsibility for decisions. For example, in many cases, staff makes the initial decision, subject to appeal to the planning commission. Some planning commission decisions may be appealed to the governing body. Some jurisdictions employ hearings officers to make certain types of land use decisions which are then subject to appeal to the planning commission or governing body. In all cases, local government land use decisions may be appealed to the Land Use Board of Appeals, or LUBA. All decisions must be consistent with state statutes, the statewide planning goals, case law and other applicable legal requirements.

Limited land use decisions and expedited land divisions are special categories of local decisions that are subject to specific procedures and standards outlined in state statutes.

Legislative Land Use Decisions

Legislative decisions establish local land use policies. They typically become part of the comprehensive plan or zoning code. In the case of map designations, legislative decisions are applicable to broad geographical areas rather than single properties or sites. In most communities, proposed legislative amendments to the comprehensive plan or zoning code are considered first by the planning commission, which holds one or more public hearings. The commission’s recommendation is then considered by the governing body which holds at least one public hearing before taking final action.

Quasi-Judicial Land Use Decisions

Local governmental bodies make quasi-judicial decisions when they apply existing policies or regulations to specific situations or development proposals. Other quasi-judicial decisions amend the zoning or comprehensive plan map, policies or regulations in relation to a specific development proposal. Additional examples of quasi-judicial decisions are conditional use permits, variances, partitions, subdivisions, annexations and road and street vacations.

Ministerial Land Use Decisions

Ministerial land use decisions are made by local planning staff based on clear and objective standards and requirements applicable to a specific development proposal or factual situation. Examples include building permits for a use permitted by code or a determination that a proposed structure meets setback or height requirements. Ministerial decisions do not require a public notice or hearing.

Limited Land Use Decisions and Expedited Land Divisions

To streamline approval of relatively minor actions within an urban growth boundary, or UGB, the legislature has approved two other kinds of decisions. The first, limited land use decisions, are made by the locally designated decision-maker and are subject to procedures and notice requirements outlined in state statutes. Examples include tentative partitions, tentative subdivisions, site review and design review.

The second, expedited land divisions for residential uses within a UGB, are made by planning staff after public notice. They are subject to procedures and requirements outlined in state statutes. The local government may not hold a hearing on such an application and must make its decision within 63 days of the application. Decisions may be appealed to a referee hired by the local government and finally to the State Court of Appeals according to state law.

Process

Procedures for legislative and quasi-judicial land use decisions are outlined in statutes and interpreted through case law. These procedures are ultimately incorporated into local plans and ordinances. Legislative procedures are generally more flexible than quasi-judicial procedures because they deal with relatively broad public policy issues. Quasi-judicial procedures are often more complex and specific, and require "due process." This is a legal term that entitles all affected parties prior notification of a proposed action and the opportunity to present and rebut evidence before an impartial tribunal. For quasi-judicial decisions, governing body members, hearings officers and planning commission members should avoid or limit communications outside of the formal public hearing process. They are required to disclose any contact outside the public hearing regarding a specific case in order to provide an opportunity for rebuttal or other corrective action. The local government must maintain a record of the proceedings and adopt findings of fact regarding the reasons for their decision. Within UGBs, this process must be completed within 120 days. Outside UGBs, the process must be completed within 150 days. In both cases, there are specific provisions to extend the time limit.

Land Use Application

Legislative land use decisions are subject to post acknowledgment plan amendment (PAPA) requirements contained in state statutes. For quasi-judicial land use decisions, the 120- or 150-day review process begins after the planning staff receives required application forms and supporting

information that advocate for a certain land use or proposed development. Many local governments will schedule pre-application conferences with the prospective applicant.

Public Notice

Notice for legislative land use decisions must be provided to the public as outlined in local procedures and must be forwarded to the Director of DLCD as required by the state statute. DLCD provides notice to those who have requested to be included on the agency's notice list.

For quasi-judicial decisions, specific parties must be notified at least 20 days prior to the public hearing: the applicant; property owners within 100 feet of the property if within a UGB, within 250 feet if located outside a UGB and within 500 feet if located within a farm or forest zone; and any neighborhood or community organizations whose boundaries include the site. Some local governments also require that notice be posted on the property.

Public Hearing

For legislative decisions, the planning commission usually holds initial hearings on a proposal before forwarding its recommendation to the governing body. Legislative decisions require final action by the governing body. Hearing procedures are relatively flexible and there are no limitations on outside contact between decision makers and the public.

For quasi-judicial decisions, most cities and counties hold at least one hearing before the planning commission or hearings officer prior to forwarding a recommendation or allowing an appeal to the governing body. At the hearing, the presiding officer summarizes the procedures and planning staff describes the case, including the applicable criteria in the comprehensive plan or zoning code, and its recommendation.

Applicants then present their case for approval and others may support them. Opponents then have the opportunity to challenge the applicant's case. All parties have the right to present and rebut evidence directed toward the applicable criteria. Failure to raise an issue orally or in writing in advance of or during the hearing precludes appeal to LUBA on that issue. This is commonly referred to as the "raise it or waive it" requirement. Under state law, some types of land use decisions may be made without a hearing if notice is provided and no party requests it.

Decision and Findings

Legislative decisions require a record and findings, but the requirements are less rigorous than for quasi-judicial decisions. The record must be adequate to show that the legislative action is within the legal authority of the city or county. The record must show that the jurisdiction followed applicable procedures. Legislative decisions must be consistent with substantive requirements in state statutes and the statewide planning goals. For example, an updated housing element must be consistent with ORS 197.303-314 and Statewide Planning Goal 10 (Housing).

After hearing the staff report and public testimony on an application for a quasi-judicial decision, the hearings body makes its decision. As noted before, this must be based only on applicable criteria in the local code and relevant evidence and testimony. There are four choices of action: approve the application; approve the application subject to specific conditions; deny the application; or continue the review process to obtain additional information. In this case, the applicant may need to agree to a time extension.

The final decision must include findings of fact and conclusions of law that are adequate to explain the basis for the action. Draft findings are often prepared by staff and may be available in advance of the hearing. Adoption of findings may occur immediately following the hearing and include any modifications to the draft, based on additional evidence and testimony. In some cases, the prevailing party, legal counsel or staff are asked to prepare the final version of the findings which are then adopted at a separate meeting before the time limit expires. The final decision must be based on what is known as "substantial evidence" that a reasonable person would rely on in reaching the decision.

Appeals

Local ordinances specify how initial decisions by local staff, a hearings officer, or the planning commission can be appealed to the local governing body. Certain appeals are limited to evidence submitted to the initial decision-maker and may include an opportunity for additional oral or written argument.

As we have noted before, only parties that have stated their case before the local government have 21 days to file a Notice of Intent to Appeal with LUBA. Following this filing, and during a timeframe prescribed by law the local government must provide the complete record of the proceedings with the board. Once the record is filed and accepted, the petitioner and respondent(s) file their briefs with the board. LUBA will hear oral arguments from the parties and issue a written opinion that either affirms, reverses, or remands the decision for additional consideration. The board’s decision may be appealed to the Court of Appeals, or finally, to the Oregon Supreme Court. Specific timelines in state law provide for a speedy review of land use decisions and increase certainty for both the community and applicant.

Alternatives to formal appeals include mediation, which can save all parties time and money. For more information on mediation assistance, contact DLCD.

Staff Role

Planning staff are usually the first individuals an applicant meets. They are responsible for explaining all procedures and requirements, reviewing the application for completeness and preparing the staff report. Staff presents its report and recommendation to the decision maker. Often, the staff recommendation is accepted with or without conditions. Staff generally prepares the final decision documents and findings of fact documenting the reasoning to support the decision.

A pre-application conference with prospective applicants may help them understand the procedures and requirements for the land use proposal, including any additional research or information that may be needed. In some cases, applicants may be encouraged to meet with neighborhood groups or other affected parties to review their proposal.

Staff prepares a public notice for proposed land use decisions that describes the location of the subject property, the nature of the application and the proposed use. The notice also explains: criteria from the comprehensive plan and land use regulations that pertain to the application; the date, time, and location of the public hearing; the name of a local government representative to contact; and requirements for public testimony and how the hearing is conducted. When a staff report is prepared, it must be made available to all interested parties seven days prior to the public hearing. In some cases, the staff report includes draft findings explaining the reasoning for the recommended decision.

As noted earlier, LUBA may remand or return a case to the local government for additional review. If a decision is remanded, the local government must decide whether to proceed, based on the existing record or to allow additional evidence and testimony. Legal requirements related to remand may be

complicated. Staff should work with their legal counsel to define procedures and requirements before the remand is formally considered.

Ex Parte Contact, Bias and Conflicts of Interest

Ex Parte Contact

An ex parte contact occurs when a decision-maker receives information, discusses the land use application or visits the site in question outside the formal public hearing. This does not include discussions with and information received from staff. Failure to disclose such contact may result in reversal or remand of the decision. If ex parte contact does occur, the decision-maker must disclose it on the record at the hearing, describe the circumstances under which it occurred and present any new evidence introduced through that contact. The presiding officer must give parties the opportunity to rebut the substance of the ex parte contact. State statutes clearly delineate requirements for ex parte contacts.

Bias

Bias occurs when decision-makers have a prior judgment of the case that prevents them from making an objective decision based on the facts. Such decision-makers should excuse themselves from the proceedings. Even though bias is often subjective, not all personal views or positions are actual bias in the eyes of the law. While it is not unusual for decision-makers to have a perspective or background, the threshold test is if this will influence their decision. Decision-makers should carefully consider any issues related to their personal bias and be prepared to step aside if necessary.

Conflict of Interest

A conflict of interest occurs if any action by public officials results in financial gain or loss to themselves or a relative or business associate. According to state law, it must be disclosed. There are two types of conflicts of interest, actual and potential. An actual conflict of interest is one that would occur as a result of the decision. If that is likely, the decision-maker must disclose it and not participate in the decision. A potential conflict is one that could occur as a result of the decision. In that case, disclosure is still required, but the decision-maker may participate in the decision.

Legal Issues Related to Ex Parte Contacts, Bias or Conflicts of Interest

Decision makers should consult with the local government’s legal counsel if they have any questions or concerns regarding Ex parte contacts, Bias or Conflicts of Interest.

Oregon Planning Commissioner Handbook

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APA OR

Planners Training Team

ACKNOWLEDGEMENTS

With the deepest thanks, the Department of Land Conservation and Development and the Oregon Chapter of the American Planning Association would like to thank the members of the Planners Training Team – John Andersen, AICP; Carole Connell, AICP; and Ardis Stevenson – for allowing us to reprint their Planning Commissioners Training Manual. This document is based almost entirely upon their work – updated and reformatted to be able to link the digital version of this document to the vast amount of information that is now available via the internet.

This manual is designed to assist those who deal with Oregon's land use program including planning commissioners, city and county governing bodies, members of advisory committees (design review boards, historic landmark commissions etc.), professional staff, and interested citizens. Its purpose is to serve as an initial introduction to newly elected or appointed officials and be a useful reference for those with more experience.

Additional information regarding statewide planning is available from the Department of Land Conservation and Development at www.lcd.state.or.us and from the Oregon Chapter of the American Planning Association at www.oregonapa.org.

*The **Department of Land Conservation and Development** helps communities and citizens plan for, protect, and improve the built and natural systems that provide a high quality of life. In partnership with citizens and local governments, we foster sustainable and vibrant communities and protect our natural resources legacy.*

Visit us at www.lcd.state.or.us.

*The **Oregon Chapter of the American Planning Association** is an independent, statewide, not-for-profit educational organization that provides leadership in the development of vital communities by advocating excellence in community planning, promoting education and citizen empowerment, and providing the tools and support necessary to meet the challenges of growth and change.*

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CHAPTER THREE: Roles and Responsibilities

SUMMARY OF ROLES AND RESPONSIBILITIES

Responsibilities of the various participants in local land use planning are discussed in detail in following pages of this chapter. However, this list has been developed over the years by participants in planning commission training sessions and is included at the request of many of those participants.

Planning Staff

- Administer the land use process (including staff reports and notices)
- Advise and assist planning commission
- Educate and assist the public
- Know laws and ordinances
- Long range planning (including studies and analysis)
- Negotiate and facilitate
- Coordinate with other departments and units of government
- Enforcement of conditions
- Continuity (policy, documents, people)

Governing Body

- Represent constituents
- Set policy and enact ordinances
- Set budget
- Hire and fire the manager
- Appoint planning commission
- Act on recommendations and appeals

Planning Commission

- Reflect community values
- Recommend policies
- Interpret and apply ordinances
- Educate public/provide forum
- Do homework
- Make land use decisions
- Communicate with staff, elected officials
- Visioning/long range planning

Planning Commission Chair

- Conduct meeting (the only task that is the sole responsibility of the chair)
- Diffuse hostility
- Elicit relevant testimony
- Keep commission on track
- Ensure participation among all commissioners
- Lead commission to conclusions
- Define issues
- Promote planning
- Set agenda (often a staff function)

ROLES AND RESPONSIBILITIES

Land use planning, as described earlier, is a process by which factual information is applied to a particular issue or set of land use issues in a rational manner and within a public forum, in order to achieve the best possible long-term outcome. This process can be summarized in the following seven steps:

1. Gather facts
2. Determine goals
3. Identify alternatives
4. Select preferred alternative
5. Implement
6. Evaluate
7. Return to Step 3

Planning commissioners, elected officials, citizens, and staff all have roles in this process. The preparation and update of a plan is an integral part of the process, but often the only portion of planning seen by the public is the permitting on the lot next door. Part of the responsibilities of participants in the community's planning process is to help the public better understand planning, and that understanding needs to begin with you. Your job of making land use decisions will be made easier with some understanding of the groups with whom you will work and the roles and responsibilities of each.

RESPONSIBILITIES OF THE GOVERNING BODY

Duties of city and county governing bodies include:

1. Adopt and amend comprehensive plans and implementing ordinances and approve related ordinances and policies (such as for parks, public facilities, transportation, and economic development). At the local level planning primarily involves the city or county elected officials, the professional staff (public

employees or contract consultants) and the appointed planning commission. Each fills a different but vital role.

2. Establish planning commissions, hearing officer positions, standing and ad hoc committees, and other bodies as needed, and appoint members to them.
3. Adopt and provide adequate support for a public involvement program.
4. Hear and decide appeals of staff or planning commission decisions, if so provided by local ordinances.
5. Support the planning program with an adequate budget and monitor local planning and development activities.

Another way of looking at the responsibilities of the elected officials is to consider them in terms of their affect on the planning commission:

Role of Elected Body	Effect on Planning Commission
Represent Constituents	Because they are elected, they are "political," therefore, responsive to local concerns and political pressure.
Adopt Plans & Ordinances	Only the elected body can enact plans, etc. Know when the PC has final authority and when it recommends.
Hear Land Use Appeals	Know if appeals are "de novo" or "on the record". If de novo, know the governing body may hear different information. If on the record, make adequate findings and conclusions to support PC's decision.
Adopt Local Budget	Budget decisions affect the quality and quantity of staff, ability to enforce conditions of approval, opportunities for professional development, etc.
Hire City/ County Manager	The manager's attitude about planning can affect staff levels. The manager, not the PC, hires/fires staff.
Appoint Planning Commissioners	For appointed planning commissioners, this may be the most important role. For PCs with vacancies, there may be a concern about governing body responsibilities.

Working Relationships

As a planning commissioner, do you feel that too may of your recommendations or decisions are overturned by the elected officials? Or, as an elected official, do you wonder what "wild" direction the planning commission will take next? The following eight ideas to improve working relationship focus on what planning commissions can do, but also apply to city councils and county boards.

1. Clearly understand the responsibilities and authority of the planning commission.
2. Clearly understand the responsibilities and authority of the governing body.
3. Remember that the planner's first responsibility is to the manager or other supervisor.
4. Make sound decisions with adequate findings to insure that the reasons for your actions are clear to the elected officials.
5. Ask for clarification of the governing body's policies or actions that are unclear.
6. Include questions or points of view that are not obvious in your decisions and findings in the planning commission minutes.
7. Request annual joint work sessions to discuss priorities, communications, etc.
8. Recognize the elected officials' responsibilities to the voters.

PLANNING STAFF RESPONSIBILITIES

The planning staff plays a vital role in the land use planning process and the effectiveness of the planning commission. It is the staff's responsibility to perform the tasks associated with administering the land use regulations. The staff performs necessary research, prepares plans and reports, as well as distributing and explaining the results of that work.

As professional planners, they have been trained to perform research, write reports, make public presentations and carry out the routine tasks of their jobs. They will do this utilizing their training in economics, geology, landscape design, law, statistics or other education and experience. All of this talent is ready to serve your needs – if you know how to use it.

To be really effective, the planning commission and staff must work as a team. The commission provides perspective on community needs and attitudes points out work that needs to be done and gives endorsement to plans, reports, and recommendations.

The staff provides technical advice on procedure and content and keeps the commission informed of developments in the community. Planning commissioners can expect that minutes accurately reflect your deliberations and actions, and that

staff reports are readable and are received with adequate time for review (but recognize that sometimes flexibility is need if things are to be accomplished).

To work well as a team, both groups must treat each other with respect and consideration. Demeaning or rude behavior from either side creates tension and unproductive work environments.

As a commission member, do not hesitate to call on the staff for research information, advice on law, history, land use or other pertinent information. But remember, the staff has real time and budget restraints and must deal with the attitudes and priorities of the governing body and the bureaucracy in city hall or the courthouse. (Small hint: if you see an error or omission in a staff report, tell the staff about it before the public meeting. If you wait for the meeting to bring it up, you may appear rude, embarrass the staff, and discredit the professionalism of your community's planning program.)

Consider the staff's advice and, if you reject it, give your reasons so that everyone can learn from the experience. In quasi-judicial situations, give your reasons for changes to the staff report to assure adequate findings.

Do not hesitate to tell staff your perceptions of community needs, attitudes, concerns and priorities. The staff needs that information, although they may not always like to hear it. Candor and honesty help to establish a lasting, cooperative team.

Finally, remember, the staff is human too. They have good days and bad. Treat them as you wish to be treated.

The affects the staff and its work may have on Planning Commission include the following:

Staff Role	Effect on Planning Commission
Explains land use at the counter	Staff's explanation and attitude affect the tone and content of testimony to PC
Accepts/rejects applications	Staff insuring that applications are complete saves time and confusion at PC meetings
Prepares staff reports	Staff provides identification of issues and criteria that assists PC with decisions and citizens with testimony
Handles public notice and other administration	Avoids legal challenges to PC decisions; reduces "no one notified me" claims at public hearings
Stays current on regulations court cases, rulings, etc.	Prevents PC errors from lack of current information

Clear understandings by the planning commissioners and staff of one another's roles will increase the effectiveness of both. Be sure that everyone has the same expectations.

PLANNING COMMISSION RESPONSIBILITIES

State statutes and local charters or ordinances define the authority and responsibilities of planning commissions – duties, number of commissioners, terms and manner of appointment, etc. Planning commissions should also have bylaws that provide further detail. Beyond these legal requirements, planning commissioners have roles which, when fulfilled, enhance their individual and collective effectiveness.

The role of planning commissions is to develop, maintain, and implement the comprehensive plan, to protect the integrity of your community's planning process, and to foster the community's long-term interests.

Planning commissioners roles, as defined by more than 1,000 land use officials at past training events, are these:

- **Understand land use planning:** Know that planning is evolving and ongoing. Know about the statewide land use program and local land use history. Be aware of interrelationships of planning to community goals, priorities and budget constraints.
- **Reflect the values of the community:** As a volunteer who obviously is committed to your community, you can see or sense what is needed. Use your unique position (separate from the elected "political" process and from the government payroll) to articulate local values.
- **Educate the public on land use:** Planning commission meetings often are citizens' first contact with local government and with land use. Act in ways that increase understanding and respect for the responsiveness of government.
- **Understand opportunities and limits of PC authority:** Recognize that you can be proactive – the initiator of new or changed policies -- and that there are limits to what you can do. Be clear about when your role is advisory and when it is that of the final decision maker.
- **Understand the legislative and quasi-judicial processes:** See the "Land Use Decisions" chapter.
- **Interpret and apply zoning ordinance provisions. Apply facts to criteria:** Your planning staff and legal counsel and the information in this manual will assist you.
- **Make decisions/recommendations:** Be courageous. Don't avoid hard decisions.

APPLICANT RESPONSIBILITIES

Applicants for land use approvals have significant

responsibilities just as do the planning commission, elected officials, and staff. The applicant bears the burden of proof!

If what the applicant wants to do with the land were allowed outright, there would be no need for an application. The request (for a zone change, conditional use permit, etc.) is for a change in what is customarily allowed. The one asking for the change is responsible for demonstrating that the request conforms with your comprehensive plan and ordinance requirements.

Property owners who are unfamiliar with the land use process may be daunted by the requirement that they prove their case. Generally staff works hard to help applicants understand the criteria on which a decision will be based and offer advice on the kind of information to present.

HEARING OFFICER RESPONSIBILITIES

Some local jurisdictions hire a hearings officer to conduct quasi-judicial land use hearings while the planning commission considers legislative issues.

Generally, the hearing officer is an attorney with land use experience. It is this individual's job to weigh an application against the local comprehensive plan and ordinances, determine the findings of fact, and require appropriate conditions of approval. There are several benefits to having a hearings officer:

- Planning Commissions in communities with high levels of land use activities can be freed of time-consuming quasi-judicial hearings to concentrate on long-range planning and updating of plans and ordinances.
- Jurisdiction in which land use is a hot political issue can benefit from transferring controversial issues to a trained legal practitioner.
- Some decisions may be made more quickly when only one person (the hearings officer) rather than several (the planning commission) needs to approve a final order.

ROLES AND RESPONSIBILITIES OF OTHERS

Others – in addition to staff, elected and appointed officials – often are concerned with land use decisions. Being aware of who these interests are can assure better decisions.

State and federal agencies often are involved in local decisions. Frequently, state and federal regulations require their involvement. For example, the Oregon Department of Transportation cares when a land use action involves access to a state highway. Development in natural resource lands may involve the Corps of Engineers, Department of State Lands, or the Oregon or U.S. Department of Fish and Wildlife. There are many other examples. These agencies have missions to carry out that are affected by local land use decisions, so they may participate in hearings.

Neighboring property owners are entitled to mailed notice if their property is within a certain distance of the site for which a quasi-judicial land use action is proposed. State law sets the distances for various types of proposals. In addition, voters approved an amendment to the Oregon Constitution that establishes requirements for mailed notice. Legislative rezones now require notice to every affected property owner.

City-county coordination is required for land use actions that involve urban growth boundaries or unincorporated land within the urban growth boundary. Coordination is desirable in many instances even when it is not required. Overlooking this coordination and ignoring mutual interests usually will cause problems.

Citizens and neighborhood groups can be strong advocates or opponents of an application. They also can create political pressure for their positions.

LCDC Goal 1 (Citizen Involvement) and Goal 2 (Planning Process) are good starting points for decisions on what groups to involve in land use actions and how to do it. DLCD offers two useful publications: *How to Put the People into Planning* and *Collaborative Approaches to Decision Making and Conflict Resolution*.

In addition, see the "Effective Participation Citizen Involvement" section of this manual.

Characteristics of Quality Planning Commissions

- A conviction that planning is important
- The ability to make decisions
- Time and energy to devote to the commission
- Ability to accept the will of the majority
- Courage
- Professional respect for the staff
- Ability to communicate well

These characteristics apply to successful government bodies too. Planning commissioners and elected officials become ineffective when they:

- Become involved in office administration
- Allow personal feelings towards peers or staff to affect their judgment
- Allow personal interest to control public policy interests
- Neglect their duties
- Are afraid to make decisions or take firm stands
- Adopt an arrogant or paternalistic attitude toward the

public or staff

BUILD A BETTER COMMISSION

Finally, in this discussion of roles and responsibilities, the Institute for Education in Local Government at Berkeley, California, offers these 14 ways to build a better planning commission:

1. Develop and adopt bylaws and procedures and stick to them.
2. Develop good and reliable information, data, and maps and make them available to anyone who wants them.
3. Prepare and maintain an adequate general plan, refer to it, make decisions that are consistent with its policies, and implement them.
4. Annually reexamine what you are doing as a commissioner, how well you are doing it and how to do it better.
5. Outline a year's work on active planning and stick to it. Do not confuse development permit processing (reactive planning or plan review) with real planning.
6. Ask to participate in preparing the planning agency's budget.
7. Meet periodically with your city council or county board to exchange ideas and to assess your mutual objectives.
8. Consider a public forum every year or so. Ask people ("your clients") how things are going and what they want done (if anything)
9. Tell your staff what you want, how you want materials presented to you, etc. Do not be a passive commission that waits for "the experts" to tell you what to do next.
10. Attend some short courses on new planning techniques or the latest in land use law, and expect your staff to do the same.
11. Tour about as a commission to see what others are doing. Sometimes you will be uplifted to find out how many light years ahead of your neighbors you really are, and sometimes you'll get some ideas worth borrowing.
12. Appoint a commission representative to appear before the elected body when it is necessary to explain or sell an action. Don't expect staff to do your job.
13. Lobby for good planning. If you won't, who will?
14. Take time to orient new commissioners to the job. (Remember how tough it was to get the hang of it when you were a new member of your commission)

CHAPTER 4: Making Land Use Decisions

A newly elected or appointed official often takes his or her seat on the decision-making body under the belief that land use decisions are made based on each individual's opinion. That is, each person votes according to what he or she thinks is in the best interest of the community. It is a surprise to learn that state law requires that there be standards or criteria against which the decision must be made and procedures that must be followed. Consequently, jurisdictions must make their decisions accurately and consistently. This section outlines the role of the comprehensive plan, the classification of land use decisions, how to make a decision correctly, and the essential steps in conducting a public hearing.

THE ROLE OF THE COMPREHENSIVE PLAN

The comprehensive plan and the zoning code play important roles in each land use decision. However, zoning code is often seen as the controlling document. Nevertheless, three Oregon court cases confirmed that the plan is the legally controlling document.

The courts have stated that the comprehensive plan controls land use decisions. Zoning controls only to the extent that it is in accord with the plan. In summary:

- The comprehensive plan is the controlling document.
- Zoning cannot allow more intense use of the site than the plan allows, but it can limit the use to less intense use. This is often done where the services are not available.
- The plan policies control over the plan map and zoning map, unless specifically exempted by the Oregon Legislature.

It is important to ensure that the comprehensive plan and the zoning code are consistent with each other.

TYPES OF LAND USE DECISION

The first step in making a decision is determining what type of decision the request involves. The statutory definition of a "land use decision" is long, detailed, and legalistic (see ORS 197.015(10)). To summarize for our purposes here, a land use decision is a final decision that concerns the adoption, amendment or application of the Statewide Planning Goals, a comprehensive plan provision, a land use regulation; or a new land use regulation and that requires the use of discretion.

Land use decisions are either "legislative" or "quasi-judicial." Approval of a use based on clear and objective standards (i.e., one that does not require discretion) is "ministerial" and is not a land use decision. (See the chart on the following page for definitions.) Each of these types is covered in some detail in this manual.

Law provides for two other types of decisions: limited land use decisions and expedited land divisions. They are mentioned here for completeness but, since they are seldom used, this manual does not cover them in detail.

Limited land use decisions apply inside urban growth boundaries (UGBs) and are a final decision made by the local government. This type of decision can apply to preliminary subdivision and partition plats and to discretionary design standards that apply to an outright permitted use (ORS 197.020). Limited land use decisions are similar to a quasi-judicial decision because of process and notice, but appeals of local decisions bypass LUBA and go straight to the Court of Appeals.

Expedited land divisions (ORS 197.360) apply to partitions of residential land inside a UGB, when the action creates parcels at 80 percent of the maximum allowed density or higher, and satisfies street standards. These are considered neither a land use nor a limited land use decision. Decisions must be made within 63 days and no hearing is required. A special appeal process is provided.

Quasi-judicial Versus Legislative Land Use Decisions

What are the differences between a quasi-judicial and a legislative decision? The Oregon Supreme Court set this three-part test for a quasi-judicial decision: It is quasi-judicial if:

- The process is bound to result in a decision
- The decision is bound to apply pre-existing criteria to concrete facts.
- The action is directed at a closely circumscribed factual situation involving a relatively small number of persons.

Many cases are not clear-cut. The more definitively the above factors are answered in the negative, the more likely the decision is legislative. Otherwise, the decision is quasi-judicial. No single answer controls.

The second factor – whether the decision is bound to apply pre-existing criteria – is present to some extent in most land use decisions, so it is given less weight by the courts. Generally, if the first and third factors are answered negatively, it is a legislative decision.

Kinds of Decisions and Their Characteristics

	Legislative	Quasi-Judicial	Ministerial
Who makes the decision?	Elected officials Planning Commission makes recommendations	Staff, hearings officer, or planning commission Local appeals go to hearings officer, planning commission, and/or elected officials	Staff
Subject of the decision	Adoption and amendment of policies and ordinances and, on appeal of a quasi-judicial decision, the definitive local interpretation of those policies and ordinances	Application of pre-existing criteria and requiring the exercise of discretion Usually initiated by an application from a property owner	Implementation of zoning provisions by applying pre-existing criteria that require no exercise of discretion
Scope	Large geographic area Many ownerships	Single or few ownerships	Usually site specific
Action required?	No	Yes	Yes
Examples	Comprehensive Plan text amendment such as a new policy or an updated transportation system plan New or amended ordinance implementing the plan such as adding or deleting a permitted use or changing a height limitation	Zone change for one or a few properties Permits such conditional use and variance Land divisions	Site plan review Building permit Enforcement
Public involvement and notice	Substantial, with published notice, and with multiple public hearings by multiple bodies; mailed notice under certain circumstances	Opportunity for at least one public hearing with mailed notice to area property owners and to neighborhood associations	None
Decision-maker considerations	No limits on contacts State ethics laws apply	Declare ex-parte contacts No bias or actual conflicts Unlimited staff contact	No limits on contacts

Quasi-Judicial Land Use Decisions

Oregon Supreme Court decisions provide the basis for quasi-judicial procedural requirements. These requirements establish the framework for the land use hearings process and the rights to which the parties are entitled. The rights are:

Procedural requirements:

1. An opportunity to be heard
2. An opportunity to present and rebut evidence
3. A right to an impartial tribunal having had no pre-hearing or ex-parte contact concerning the land use action at issue
4. A right to findings of fact, and
5. A right to a record of the proceedings

The right to an impartial tribunal has been modified by the legislature. The statutes provide that no decision shall be invalid due to an ex-parte contact or to bias resulting from an ex-parte contact with a member if the member:

- Places on the record the substance of a written or oral ex-parte communication concerning the decision, and
- Has made a public announcement of the content of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication is related.

Applicable Standards and Criteria

Statutes require a land use decision to be based on approval criteria. The decision must apply the approval criteria to the facts. The decision-maker must apply the adopted criteria for approval that are contained in the zoning code. If the applicant demonstrates compliance with these criteria, the application must be approved even if the decision-maker disagrees with the criteria, or believes that additional, un-adopted criteria should be applied. Conversely, if the applicant fails to demonstrate compliance with the applicable criteria, the decision-maker must deny the application even if it believes that the applicable criteria are unreasonable.

Regarding interpretation of criteria, if the wording is clear and unambiguous, it must be followed regardless of legislative intent. A hearing body may not insert what has been omitted or omit what has been inserted. If two provisions conflict, the more specific provision controls. For example, if a property is located in a zone that allows certain uses, but is subject to an overlay zone that restricts several of those uses, the overlay zone restrictions will control.

Findings

Findings are statements of the relevant facts as understood by the decision-maker and a statement of how each approval criterion is satisfied by the facts. A brief statement that explains the criteria accompanies approval or denial and standards considered relevant to the decision, states the facts relied upon and explains the justification for the decision.

The purposes of findings are to:

- Ensure that the hearings body applied the criteria prescribed by statute, administrative rule, and its own regulations and did not act arbitrarily or on an ad hoc basis.
- Establish what evidence the reviewing body relied on in making the decision
- Inform the parties why the hearings body acted as it did and explain how the conclusions are supported by substantial evidence.
- Demonstrate that the reviewing body followed proper procedures.
- Aid careful consideration of criteria by the reviewing body.
- Keep agencies within their jurisdictions.

Statutes require:

- An explanation of the standards considered relevant to the decision.
- A statement of the facts supporting the decision.
- An explanation of how the standards and the facts dictate the decision.

The words "brief statement" indicates the legislative intent that the statement need not be exhaustive, but rather that it contain a summary of the relevant facts. No particular form is required, and no magic words need be employed. Judicial review will look for:

A clear statement of what the decision-making body found, after hearing and considering all of the evidence, to be the relevant and important facts upon which its decision is based and

The reasons these facts support the decision based on the relevant criteria. Conclusions alone are not sufficient.

The findings must address all of the applicable criteria. Failure to make a required finding creates a void in the record and renders the order legally insufficient. It is a defect that alone will result in a remand.

A remand takes time and adds expense because it generally requires gathering more evidence, mailing additional notice, and holding another hearing. In addition, the local government may decide to change the decision after a remand if the record cannot be developed to support the original decision. Such delays or reversals are costly. The best course of action is to determine whether the criteria can be satisfied before the initial hearing is held. This requires the applicant to submit a complete application.

The best way to prepare findings is to:

1. Identify all of the applicable criteria
2. Start with the first criterion and deal with each element separately; for example, "The criterion is that the property is not subject to landslides, floods, or erosion."
3. State the criterion as a conclusion; e.g., "The property is not subject to landslides because…"
4. State the fact that leads to the conclusion the property is not subject to landslides; e.g., "…because the topography on the property has a 0% grade and the property is located on a lava bed."
5. Repeat the process for each element of every applicable criterion.
6. Where there is a criterion or element of a criterion that is not applicable, state why it is not applicable.
7. Where there is conflicting evidence, the safest course is to state there was conflicting evidence, but the hearings body believed certain evidence for certain reasons. This however, is not required.

Common problems with findings include:

- Failure to identify all applicable standards and criteria.
- Failure to address each standard and criterion.
- Deferring a necessary finding to a condition of approval.
- Generalizing or making a conclusion without sufficient facts.
- A mere statement that the criteria have been met.
- Simple restatement of the criterion.
- Failure to establish causal relationship (direct observation, reports from other people), between facts and ultimate conclusions.

To survive a legal challenge, keep these tips in mind:

- State all assumptions.
- Articulate the link between the project impact and the conditions being imposed.
- If project is modified, add new findings.
- Make sure findings address criteria.
- Avoid findings that restate the law.
- Put in clear, understandable language.
- Make sure it is not class-specific discrimination (or PC may be liable).

Past Decisions as Precedent

A planning commission is not bound by an interpretation of a provision made in a prior case, as a matter of law, unless the particular provision has been construed by LUBA or the courts. As a matter of policy, however, consistent application of the same rules is desirable. Be mindful of the need to be consistent, but do not let consistency blind you to arguments that a clearly erroneous past interpretation should be corrected. Do not perpetuate a mistake!

Although the governing body also is not bound by its past interpretations of a provision, the planning commission should heed interpretations by the elected officials and let the disagreeing party argue to the governing body that it should change its mind.

Evidence

The applicant has the burden of proof. The applicant must introduce evidence that shows that all of the approval criteria are satisfied. The opponents, on the other hand, have the duty to show that the applicant's facts are incorrect or that the applicant has not introduced all of the facts necessary to satisfy the burden of proof. The questions that arise are:

- What is relevant evidence in the record?
- How much evidence is required to support a finding; that is, what does substantial evidence mean?
- How does the reviewing body address conflicting evidence in the findings?

The decision must be based on **relevant evidence** in the record. Evidence in the record is evidence submitted to the reviewing body. The reason for limiting the basis for the decision to evidence in the record is to assure that all interested persons have an opportunity to review the evidence and to rebut it.

A reviewing body may support an application in concept or members may have personal knowledge of facts that would satisfy the approval criteria, but it cannot approve the application on that alone. There must be substantial evidence in the record. Personal knowledge is not evidence in the record. In reality, such applications are approved but they will be remanded if appealed to LUBA. It is also important to note that an application cannot be denied on the basis of facts not in the record.

Relevant evidence is evidence in the record that shows an approval criterion is or is not satisfied. Testimony about effects on real estate values is not relevant unless the approval criteria require a finding on the effect on real estate values.

A statute provides that LUBA may reverse or remand a local government decision when the local government has "made a decision not supported by **substantial evidence** in the records as whole." The term "substantial evidence" does not go to the volume of evidence. Substantial evidence consists of evidence that a reasonable mind could accept as adequate to support the conclusion.

Where the evidence is such that reasonable persons may fairly differ as to whether it establishes a fact, there is substantial evidence to support the decision. In other words, what is required is enough evidence to show that an approval criterion is satisfied. If two people agree that there is not substantial evidence, there is not enough evidence.

When the applicant's evidence is countered by the opponents, there is **conflicting evidence**. Where there is conflicting testimony based on different data, but any of the data is such that a reasonable person might accept it, a conclusion based on any of the data is supported by reasonable evidence. That is, the hearings body may select any of the information for its decision provided it is reasonable that a person would accept the data as correct. The best course of action is for the hearings body to state what evidence it believes and why when it prepares its findings of fact.

The Decision

The job of the reviewing body is to ascertain the facts and to apply the approval criteria to the facts. The decision (due

within 120 days of complete application for cities and 150 days for counties) will take one of three forms:

1. **Approval.** The reviewing body found that the facts in evidence indicate the criteria are satisfied
2. **Approval with conditions.** The reviewing body has found that the facts in evidence to not demonstrate the criteria are fully satisfied, but, through the application of conditions, the criteria can be satisfied. This assumes the ordinance authorizes the application of conditions for approval
3. **Denial.** The reviewing body has found that the facts in evidence have not demonstrated that the criteria are satisfied and the application cannot be made to comply with conditions attached to it.

Conditions of Approval

Many decisions come with a list of conditions tied to the approval. Once the conditions have been satisfied, the land use or building permit may be issued. Jurisdictions should exact conditions carefully, based on local or statutory authority. Conditions should not be a replacement for adequate findings of fact. Conditions or exactions should have a clear relationship to the applicable standards and criteria. They should relate to the evidence relied upon for the decision. The conditions should be enforceable by the administrator. The original approving body should typically make any changes to conditions.

Conditions or exactions should also meet the traditional constitutional tests of the Fifth and Fourteenth Amendments (due process and civil rights). Two important U.S. Supreme Court cases, Nollan v. California Coastal Commission, 1987, and Dolan v. City of Tigard, 1994, provide guidelines for the constitutional limits test.

The Nollan case said there must be a connection (a "rational nexus") between the condition and the applicable regulations and that there must be a legitimate public purpose for the condition. Most importantly, the public purpose must be related to the impact of the specific proposal. The Nollan case involved a building permit for a beachfront residence and the California Coastal Commission's requirement that the applicant dedicate a 10-foot wide pedestrian easement across the parcel's beach frontage. The condition was based on a finding that the house would block the view of the beach and would be a "psychological barrier" because the public could not see the beach. The court held the trail dedication constituted a taking. Nollan tells local governments that there must be a connection between the condition and the applicable regulations.

The Dolan case also provides a constitutionality test and said there must be a "reasonable proportionality" between the exaction and the condition based on an individualized determination of the property's impact. The case involved the doubling of an existing 9000 square-foot plumbing supply store and addition of 39 paved parking spaces. The city required a 7000 square-foot dedication for storm water and a bicycle path, based on drainage and bicycle master plans, under the assumption customers and employees could use the path and it would offset some traffic impact. The city held that flood protection and reduction in traffic congestion are legitimate public purposes and that the conditions would substantially advance those purposes. The U.S. Supreme Court held that:

> *We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development….*

Both cases reinforce a shifting of the burden to the local governments when it comes to developing exactions.

The Final Order

The preparation of a final order can be time-consuming and costly to local governments. There are three ways to reduce the time and costs:

1. Require the applicant to submit a complete application, which includes facts relevant to each of the approval criteria.
2. Limit the preparation of in-depth detailed final orders to those matters that are anticipated to be appealed.
3. Require the winning party to prepare the final order.

Minor or less complex decisions can be made at the hearing based on findings and the hearings body official must sign them.

Appeals of Quasi-Judicial Decisions

The law requires that notice of a quasi-judicial decision be sent to all parties to a proceeding. Local zoning codes provide for internal appeals (for example, from the planning commission to the board of commissioners) before the decision is final. In that case, the applicant has a certain number of days from the time of receiving the notice of decision in which to file notice of appeal, but any internal appeal procedure must be completed within 120/150 days from the time a complete application was filed.

Several variations and levels of review exist among Oregon's cities and counties. The scope of your jurisdiction's appellate review is defined by local ordinances, and can range from a

review of the previous hearing record to a de novo hearing, which is held as if the prior decision had not been rendered. The latter has the advantage of providing an opportunity to correct bad decision or procedural errors. But it can be costly, repetitious and time-consuming.

A final quasi-judicial land use decision can be appealed to the Land Use Board of Appeals. Notice of an appeal to LUBA must be filed within 21 days of a final decision. A person may appeal if he or she appeared at the local level, either orally or in writing, and was entitled to notice and a hearing or has interests adversely affected by the decision.

Tort Liability

Sovereign immunity is a common law doctrine based on the theory that "the king can do no wrong" and under this doctrine, government cannot be sued unless it consents to it. The Oregon Tort Claims Act enacted by the Legislature in 1967 is consent to be sued, and it abolished sovereign immunity in Oregon. There is however, a second kind of common law immunity, not to be confused with sovereign immunity, called public official immunity. The Tort Claims Act does not abolish it. Rather, it is specifically incorporated into the Act in the provisions of ORS 30.265(2).

The rationale underlying the public official immunity is based on a public policy favoring freedom of action. Public officials would be unduly hampered and intimidated in the discharge of their duties if they were continually subject to suit. The threat of vexatious lawsuits might discourage public service and might influence decisions.

Immunity is given because there is no way to determine guilt or innocence without a trial and, in the words of Judge Learned Hand, "Subjecting an official to the burden of a trial and to the inevitable danger of its outcome would dampen the ardor of all but the most resolute or the most irresponsible, in the unflinching discharge of their duties. Again and again, the public trust calls for action which may turn out to be founded on a mistake, in the face of which an official may find himself hard put to it to satisfy a jury or his good faith."

Judges and legislators are granted absolute immunity while they are acting within the scope of their duties. Absolute immunity means they are immune no matter the motivation for their action. The question is whether this immunity extends to lesser legislative bodies and whether it extends to quasi-judicial bodies.

Planning commission members and elected officials have public official immunity while acting on planning matters in their official capacity. Acting in their official capacity means acting on a land use matter in a public meeting called for the purpose of deliberating toward a decision on the matter. Public official immunity does not extend to actions taken outside a public meeting.

The Public Hearing

Many applicants and most citizen opponents have never before testified at a hearing. They come to the hearing with no knowledge of how the hearing will be conducted, what they should do and say, and how the decision will be made. They find it very confusing and the confusion leads to frustration and hostility and, in some cases, suspicion about how the decision was made.

The situation is further complicated by the testimony being irrelevant and repetitious. The reviewing body members find it difficult to concentrate on the testimony, and people leave feeling they weren't heard. This further convinces them that "you can't fight city hall."

These problems can be overcome by having a chairperson give a thoughtful and careful explanation of the hearings process. The explanation should explain:

- How the hearing will be conducted
- Parties' rights and responsibilities
- How the decision will be made
- What constitutes relevant testimony

Regarding relevant testimony, state statute requires that a statement be made at the outset of the hearing that:

1. Lists the applicable substantive criteria
2. States that testimony, arguments and evidence must be directed toward those criteria or other criteria in the plan or land use regulation that the person believes to apply to the decision
3. States that failure to raise an issue in enough detail to allow the decision-maker and the parties an opportunity to respond to the issue precludes appeal to the board based on that issue ("raise it or waive it").

The explanation of relevant testimony is supported if the approval criteria are posted on the wall. The chairperson should read the approval criteria – usually by section number, but if they are few they can be recited in full – and then give examples of relevant and irrelevant testimony. Relevant testimony relates to whether one of the criteria is satisfied. People often want to talk about property values. If maintenance of property values is not a criterion, testimony on this subject would be irrelevant. In other words, any testimony that does not show that one of the criteria is or is not satisfied is irrelevant testimony.

Imposition of time limits is another factor that creates hostility. It is at the discretion of the chairperson whether to impose them. Often, a simple explanation that they can be

imposed will cause people to limit their testimony.

State land use law does not provide detailed hearing procedures, but following the outline below will ensure that the process is fair and that the general requirements will be satisfied. Once the opponents hear the staff report and applicant's presentation, they have an understanding of the probable outcome. In some situations, the opponents at this point realize it is in their interest to focus on recommending conditions of approval that will make the proposal an integral part of the neighborhood. The end result is a better decision and a project that through its design takes into consideration the needs of the community.

State law is quite specific regarding parties' rights to present and rebut evidence and to have the record left open for additional testimony. Before the chair closes the hearing, any participant may request an opportunity to present additional evidence or testimony regarding the application. The reviewing body must grant the request by continuing the public hearing or by leaving the record open for additional written evidence or testimony.

If the reviewing body 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 hearing. An opportunity to present and rebut new evidence or testimony must be provided at the continued hearing. If new written evidence is submitted at the continued hearing, anybody 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 or testimony for the purpose of responding to the new written evidence.

If, after the initial hearing, the reviewing body leaves the record open for additional written evidence or testimony, the record must be left open for at least seven days. Any party 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 reviewing body must reopen the record.

Unless the applicant waives its right, the reviewing body must 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.

Outline for Conduct of a Quasi-Judicial Public Hearing

1. Chair opens hearing
2. Chair describes procedures for testimony, evidence, and making the decision, including required statements
3. Declare actual or potential conflicts of interest, ex parte contact or personal bias
4. Staff report
    a. Approval criteria
    b. Proposed findings
    c. Conclusion and recommendation
5. Applicant's testimony
6. Proponents' testimony
7. Opponents' testimony
8. Neutral testimony
9. Applicant's rebuttal
10. Consider requests for continuance or for the record to be left open

If the hearing is continued, the process starts again at step 1 at the commencement of the next hearing. Step 3 does not need to be repeated.

11. Close the hearing

If the hearing is not continued, but the record is left open for further testimony or evidence, the initial meeting will end here.

12. Discussion
13. Motion and second
14. Deliberation, amendments to motion (if any)
15. Vote

It is common that discussion will commence prior to the motion, but there should always be an opportunity for deliberation of the motion before the vote. The chair should restate the motion on the table to make sure the members understand it.

LEGISLATIVE LAND USE DECISIONS

As explained earlier in this chapter, legislative proceedings relate to policy issues or matters that affect a broad area, or both. An amendment to the text of the comprehensive plan or zoning code is nearly always a legislative matter. A plan or zoning map amendment may be legislative depending on its scope and whether it is initiated by an applicant or the local government. The procedures for hearing a legislative matter are different from those for a quasi-judicial proceeding. The laws are less detailed and the hearings less structured.

Notice of Legislative Decisions

Individual mailed notices must be sent to all property owners whose property would be rezoned by a legislative action. This includes a change to the base zoning designation and a change to text "in a manner that limits or prohibits land uses

previously allowed in the affected zone." This is commonly referred to as "Measure 56 notice." The individual notice specifically must inform the owner that a rezoning "may reduce the value of your property." If no property is to be rezoned, local legislative hearing notice requirements need to be followed.

Legislative Hearings

In a quasi-judicial setting, there are always proponents and often opponents to the proposal. In a policy matter, an individual may support part of the proposal and object to others. Parties may support the objective but disagree with some of the wording. Therefore, testimony at a legislative hearing is more open. There is no "raise it or waive it" requirement. Segmenting testimony into "proponents" and "opponents" is inappropriate.

Since legislative matters affect policy or a broad area, an individual's rights are handled differently from a quasi-judicial process. There are no limits on ex parte contact so there is no time set aside for ex parte declarations at the commencement of the hearing.

While the Statewide Planning Goals and perhaps statutes apply to many legislative matters, criteria are not as central to these hearings as they are in quasi-judicial matters. Since the planning commissioner is not applying facts to criteria, bias and objectivity are not as tightly controlled. The correct policy is what matters, not whether a criterion is satisfied. Decision-maker opinions in this arena are acceptable – even expected. Conflicts of interest still matter, however.

A planning commission does not decide a legislative matter, but rather makes a recommendation to the elected body. However, as the dedicated planning body for the jurisdiction, the elected officials depend on the planning commission to fully consider matters and forward thoroughly evaluated, reasoned recommendations.

Outline for Conduct of a Legislative Public Hearing

1. Chair opens hearing
2. Chair describes procedures for testimony and outcome of the hearing
3. Staff report
4. Testimony from citizens, interest groups, state agencies, and other units of government

Requests to continue the hearing do not need to be observed, but the planning commission may continue a legislative hearing as needed. If the continuance is to a date, time, and place certain, no new notice is required.

5. Close the hearing
6. Discussion
7. Motion and second
8. Deliberation, amendments to motion (if any)
9. Vote on a recommendation

APPEALS AND TIMING

The "120-Day Rule"

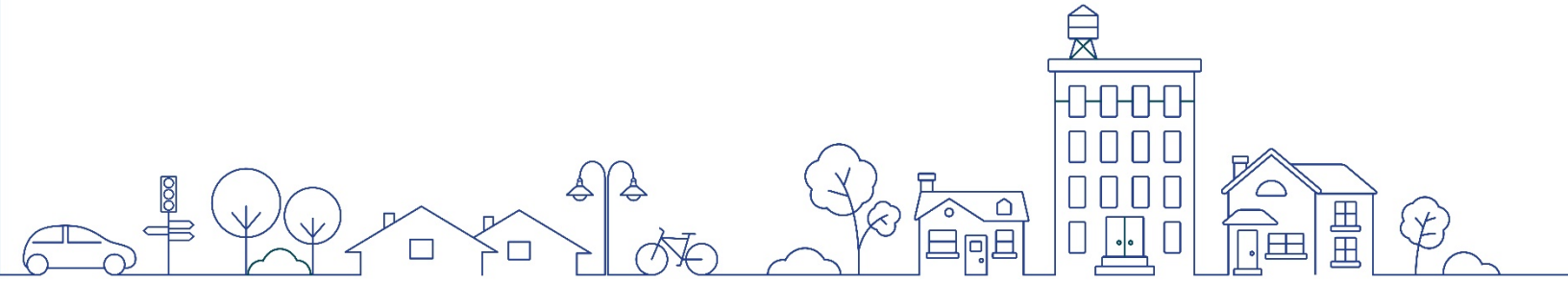
A city's final land use decision must be made within 120 days from acceptance of a complete application including time needed for appeal. Most city ordinances allow the staff 30 days to determine that what was submitted is complete and then to send written notice to the applicant. Date of that notice starts the 120-day clock. Counties face similar requirements but are allowed 150 days rather than 120 for cases outside UGBs.

If a decision cannot be made within the time limits, the local government can ask the applicant if he or she will waive the rule. Often that is agreeable since the alternative may be denial of the application. If the clock runs out and the deadline has not been waived, the applicant may ask the court to grant a writ of mandamus. If granted, the writ allows the application to proceed without local government approval.

Appeals

The final consideration in a legislative or quasi-judicial decision is the potential of an appeal – from a staff decision to the planning commission or hearings officer, from the planning commission to the governing body or from the elected officials to LUBA. Time frames for these actions are set out in state law and local ordinances.

CHAPTER 9:
PUBLIC MEETINGS LAW



League of Oregon Cities

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Table of Contents

Chapter 9: Public Meetings Law

The purpose of the Oregon Public Meetings Law (OPML) is to make decision-making of state and local governing bodies available to the public. This policy is stated expressly in the law: "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 [this law] that decisions of governing bodies be arrived at openly."[1]

That policy is given effect through various substantive provisions contained under ORS 192.610 to ORS 162.690, discussed below.[2] Although compliance with these provisions might reduce the speed and efficiency of local decision-making, local residents benefit from a better understanding of the facts and policies underlying local actions. The required process and formality also can make it easier for cities to justify a decision if one is later challenged in an administrative or judicial proceeding.[3]

This chapter will touch on the basic requirements of the law, beginning with the criteria for what gatherings constitute "meetings" and what organizations constitute "governing bodies" under the OPML.[4] Where applicable, the OPML generally requires that meetings be open to the public unless an executive session is permitted, that proper notice be given, and that meeting minutes and votes be recorded.[5] The OPML also governs the location of meetings.[6] Finally, the OPML includes enforcement provisions for when these provisions are violated.[7]

Please note that this chapter is meant to provide LOC members with an overview of the OMPL. LOC members with specific questions are encouraged to contact their city's attorney. Further, note that this chapter of the Handbook is based extensively on material in the Oregon Attorney General's Public Records and Meetings Manual (2019). LOC strongly recommends that cities purchase the print version of this manual, which is updated every two years. A free online version is available at https://www. doj.state.or.us/oregon-department-of-justice/public-records/attorney-generals-public-records-and-meetings-manual/. Finally, note that the Oregon Department of Justice (ODOJ) reserves its legal advice for the state of Oregon and its agencies; as such, cities with specific questions on the OPML again should consult their legal counsel.

[1] ORS 192.620.
[2] *Id.*
[3] *See, e.g.*, ORS 192.650. By recording the minutes of any meeting, including the "substance of any discussion on any matter," cities build a record that shows the basis for their actions. This record can dispel claims that a city's action is arbitrary, discriminatory, retaliatory, etc.
[4] ORS 192.610.
[5] ORS 192.630 to ORS 192.660.
[6] *Id.*
[7] ORS 192.680.

I. COVERED ENTITIES

Understanding the scope of the OPML is critical for ensuring compliance with the law. In short, the OPML applies to **(A)** governing bodies of a public body that **(B)** hold meetings for which a quorum is required to make a decision or deliberate toward a decision on any matter.[8] The first of those elements addresses the *who* of the OPML — that is, which entities are subject to the law. The second of those elements addresses the *what* of the OPML — that is, what types of meetings are subject to the law. This section addresses the first of those elements.

A. Governing Bodies of Public Bodies

The OPML applies only to the "governing bodies" of a public body."[9] A public body includes state bodies, any regional council, a county, a city, a district, or any other municipal or public corporation.[10] A "public body" also includes a board, department, commission, council, bureau, committee, subcommittee, or advisory group of any of the aforementioned entities.[11] A "governing body," meanwhile, does not just mean city council; it means two or more members of any public body with "the authority to make decisions for or recommendations to a public body on policy or administration."[12] The following subsections examine in more detail the authority to make decisions and recommendations, and what entities might in turn qualify as a "governing body."

Examples:

A city is a public body under ORS 192.610(4), and a five-member city council is a governing body of the city. Further, a planning commission of a city is also a public body, and a three-member board of commissioners is a governing body of the planning commission. ORS 192.610(3).

i. A body that makes decisions for a public body

A body with the authority to make decisions for a public body on "policy or administration" is a governing body.[13] For instance, cities are public bodies and their governing bodies are city councils. Sometimes, cities delegate decision-making authority to lower bodies, such as planning commissions; these too are governing bodies for the purposes of the OPML.

[8] ORS 192.610(5); ORS 192.630(1).
[9] ORS 192.630(1).
[10] ORS 192.610(4).
[11] *Id.*
[12] ORS 192.610(3).
[13] ORS 192.610(3).

ii. A body that makes recommendations to a public body

A body that has the authority to make recommendations to a public body on policy or administration is itself "a governing body" under the OPML.[14] These recommending bodies are sometimes called "advisory bodies."[15] From time to time, a local government agency or official may appoint a group or committee to gather information about a subject. If this "advisory body" makes a recommendation to a governing body, then it shares the title of governing body and becomes subject to the OPML.[16]

For cities, common examples of bodies that make recommendations to a governing body include subcommittees of the city council and city boards and commissions. The OPML applies to local advisory bodies and all of their members, including private citizens. The language of the OPML is not limited to public officials; rather, it applies to all "members" of a body making decisions or recommendations to a public body, even if all of the members are private citizens.[17]

B. Governing Bodies of Certain Private Bodies

Technically, only "public bodies" are covered by the OPML.[18] However, it is at least possible that some private bodies might fall under the gamut of the law if they assume clear public functions.

There is no test for determining whether or when a private entity should be considered a "public body" for purposes of the OPML. Therefore, cities should consult their attorney when in doubt about whether a private body is covered by the law. Note that the Oregon Supreme Court follows a six-part test for determining when a private entity is the "functional equivalent" of a "public body" under Oregon's Public Records Law.[19] Those factors include (1) the entity's origin, (2) the nature of the functions, i.e., whether the function performed is traditionally private or public, (3) the scope of authority exercised by the entity, (4) whether the entity receives financial support from the government, (5) the degree of government control over the entity, and (6) the status of the entity's offices and employees.[20] That said, the OPML has its own definition of "public body," and so it is not clear whether these factors apply in the meetings context.[21]

[14] ORS 192.610(3).
[15] ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 138 (2019).
[16] ORS 192.610(3).
[17] ORS 192.610(3).
[18] ORS 192.610.
[19] *See* Marks v. McKenzie High School Fact-Finding Team, 319 Or 451, 463-65 (1998) (interpreting ORS 192.311).
[20] *Id.*
[21] ORS 192.610(4).

II. Covered Meetings

The previous section explained that the OPML applies to the "governing bodies" of a public body."[22] Not every action that a governing body takes, of course, is subject to the OPML. Only a "meeting" of a governing body of a public body is subject to the law.

The OPML defines a meeting as **(1)** the "convening of a governing body" in order to **(2)** "make a decision or deliberate toward a decision" and for which **(3)** "a quorum is required."[23] Taken together, a meeting only occurs where a governing body convenes, reaches a quorum, and discusses or deliberates on city matters.[24] This section examines each of these elements under the OPML and how courts have interpreted them.

Before reviewing the meeting elements, please note that at least two categories of gatherings that might otherwise qualify as "meetings" under the OPML have been exempted by statute.[25] As such, these gatherings are not "meetings" for the purposes of the OPML.

- The on-site inspection of any project or program; and

- A gathering of any national, regional, or state association to which the public body or its members belong. This includes any monthly, quarterly, or annual gatherings of the League of Oregon Cities or National League of Cities.

A. 'Convening' a Meeting

For governing bodies, the most natural method of convening is in person. Of course, modern technology provides many other ways for members of a governing body to convene with one another. Because convening might occur by accident, members of governing bodies need to be mindful about how they communicate with each other and staff to avoid holding a "meeting" under the OPML.

Outside in-person meetings, the OPML applies to teleconferences, web conferences, and more generally to "telephone or electronic communications."[26] Moreover, the OPML applies in exactly the same way to these meetings as it does to in-person meetings.[27] Inherent in this are

[22] ORS 192.630(1).
[23] ORS 192.610(5).
[24] *Id.* Under the OPML, a decision is any action that requires a "vote of the governing body." ORS 192.610(1).
[25] ORS 192.610(5).
[26] ORS 192.670.
[27] *Id.*

logistical issues, such as guaranteeing public attendance to the meeting and ensuring that the medium of communication can accommodate everyone who wishes to attend. Local governing bodies must solve these issues and comply with all other OPML requirements if they hold a meeting that it is not in-person.[28]

It may be possible for a governing body to convene through serial communications on a topic.[29] In 2015, the Oregon Court of Appeals found that three county commissioners — a quorum of the governing body — had violated the OPML by using a series of phone calls and emails to reach a county decision.[30] While the Oregon Supreme Court reversed the ruling, the court did not express an opinion one way or the other on serial communications.[31] Therefore, that portion of the Court of Appeals ruling still holds at least some weight.

The Court of Appeals noted "not all private, serial communications among members" are OPML violations.[32] Just as it is with meeting in person, members of a governing body may correspond through email or voicemail on topics unrelated to city business. These serial communications may become an issue only when they are "conducted for the purpose of deliberation or decision."[33]

B. Meeting 'Quorum'

By law, a meeting cannot take place without a "quorum" of the governing body.[34] Oddly enough, the term "quorum" is not defined in the OPML. For cities, quorum requirements often are set by charter, bylaws, council rules, or ordinance. In the absence of a specific definition, the general definition of "quorum" under state law is a majority of the governing body.[35]

If a quorum of members convenes, then the OPML will apply unless the subject matter discussed is completely unrelated to a city decision or recommendation. Conversely, if less than a quorum convenes, then a "meeting" has not taken place, as that term is defined in the law.

Quorum is a technical requirement. As a practice, cities should take care not to deliberate toward decisions or recommendations in small groups. Gatherings that are below quorum and

[28] *Id.*
[29] See Handy v. Lane County, 274 Or App 644, 664-65 (2015), *reversed on other grounds*, 360 Or 605 (2016).
[30] *Id.*
[31] *See generally* Handy v. Lane County, 360 Or 605 (2016).
[32] *See* Handy, 274 Or App at 664-66 (2015).
[33] *Id.* The Court of Appeals noted that a plaintiff likely needs "some evidence of coordination, orchestration, or other indicia of a purpose…to deliberate or decide out of the public eye." *Id.*
[34] ORS 192.630.
[35] ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 142 (2019).

clearly deliberations violate (if nothing more) the policy of OPML, which is to include the public in the decision-making process.[36]

Significantly, meetings that do not require a quorum are not "public meetings" under the OPML. As such, meetings with staff generally do not constitute public meetings. A single city council member may meet with staff to discuss city business because staff are not members of the city council.

C. Meeting for a 'Decision'

By law, members of a governing body only meet for purposes of the OPML if they are making or deliberating toward a "decision."[37] The OPML defines a "decision" as the following:

> 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.[38]

In other words, only topics that relate to the business of the governing body trigger the OPML. This subject matter requirement means that members of a governing body are free to gather to discuss a number of topics — sports, television, literature — as long as these do not concern the work of the governing body. Similarly, if a quorum of a governing body meets to discuss matters on which it has no authority to make a decision, it is not a "meeting" under the OPML either.[39]

Social Gatherings? A quorum of a governing body is permitted to meet in a social setting without triggering the OPML. Care must be taken, however, to avoid any discussion of public policy or administration, lest the social gathering evolve into an illegal public meeting.

Yet where the topics do relate to matters concerning the governing body, any discussion by a quorum of the body will trigger the OPML. As noted by the ODOJ, even meetings "for the sole purpose of gathering information" fall under the OPML.[40] Accordingly, the LOC recommends that members of governing bodies avoid discussing with each other <u>any</u> of the facts or context of local matters unless they are participating in a proper public meeting.

[36] ORS 192.620.
[37] ORS 192.610(5).
[38] ORS 192.610(1)
[39] ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 144 (2019) (citing 38 Op Atty Gen 1471, 1474, 1977 WL 31327 (1977)).
[40] *Id.*

III. REQUIREMENTS

The last two sections answered the *who* and the *what* of the OPML, namely what entities and what meetings of those entities are subject to the law. Now comes the meeting requirements, including rules on notice, meeting location, and the recording of minutes and votes. The OPML also requires public attendance, and many laws further require public participation. This section addresses these requirements and the challenges that accompany it.

A. Meeting Types and Notice

As a reminder, each city in Oregon is subject to its own individual charter, municipal code and rules of procedures. Public notice is a common topic of local procedure. As such, the LOC recommends that cities conduct a thorough review of applicable charter provisions, municipal code sections, and their respective city's rules and procedures to ensure that those provisions do not provide additional requirements to be followed when creating and posting a public notice. This section will address the minimum notice requirements under state law.

i. When Notice is Required

The OPML requires public notice to be given any time a governing body of a public body holds a "meeting" as defined under the law.[41] Therefore, all regular, special, and emergency meetings require notice, though the amount of notice depends on the meeting type. Generally, notice is required for any interested persons and any media outlet that has requested notice.[42]

ii. Contents of the Notice

ORS 192.640(1) requires a notice for meetings which are open to all members of the public to contain, at a minimum, the following information:

- Time of the meeting;
- Place of the meeting; and
- A list of the principal subjects anticipated to be considered at the meeting.

While the first two items are self-explanatory, the list of principal subjects is less clear. While publishing the agenda along with the notice is generally sufficient for this requirement, the

[41] ORS 192.640.
[42] *Id.*

ODOJ recommends that the list of principal subjects "be specific enough to permit members of the public to recognize the matters in which they are interested."[43] This means that notices should avoid repeating generic descriptions, such as "consideration of a public contract," and should instead state qualities specific to the subject, such as "consideration of contract with X company to provide Y services."[44]

Occasionally, a governing body may wish to discuss a subject that was not on the list, perhaps because the issue arose too late to be included in the notice. As a matter of state law at least, the absence of a subject from a notice does not preclude the governing body from discussing it; under the OPML, the list of *anticipated* subjects does "not limit the ability of a governing body to consider additional subjects."[45]

Beyond these requirements, a common practice is to include information in the notice for persons with disabilities. The OPML mandates that public bodies make all meeting locations accessible to persons with disabilities.[46] The ODOJ suggests that notices include the name and telephone number of a city employee who can help a person in need of a reasonable accommodation.[47]

iii. Amount of Notice

The number of days in advance a city must give notice of a public meeting depends on the type of meeting to be conducted. For regularly scheduled meetings, notice must be "reasonably calculated" to provide actual notice of the time and place of the meeting "to interested persons including news media which have requested notice."[48]

For special meetings, i.e. non-regular meetings, notice must be provided at least 24 hours in advance to "the general public" and again to "news media which have requested notice."[49] The only exception to the 24-hour notice rule for special meetings is an emergency meeting.

For an emergency meeting, the governing body must show that "an actual emergency" exists and must describe the circumstances of the emergency in the meeting minutes.[50] Even these meetings require notice; the OPML requires that emergency meetings be noticed in a

[43] ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 151 (2019).
[44] *Id.*
[45] ORS 192.640.
[46] ORS 192.630(5).
[47] ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 151 (2019).
[48] ORS 192.640(1).
[49] ORS 192.640(3).
[50] *Id.*

manner that is "appropriate to the circumstances."[51] Furthermore, an emergency meeting may only be used to discuss matters pertaining to the emergency.[52] In *Oregon Association of Classified Employees v. Salem-Keizer School District,* the Oregon Court of Appeals found that a school district had violated the OPML by using an emergency meeting held for budget reasons to discuss a "contract approval," a non-emergency matter.[53] The LOC recommends that cities use emergency meetings only in clear emergencies and only as a way to respond to the emergency.

iv. Noticing Executive Sessions

If the type of meeting to be held is an executive session, the governing body holding the executive session is required to give notice in the manner described above.[54] In addition, the notice must be sent to each member of the governing body.[55] No member of the governing body can be excluded from receiving notice of the executive session, even if it is known that the member is unable to attend the meeting. In addition, when providing notice of an executive session, the notice is required to state the specific provision of the OPML that authorizes the executive session.[56] Finally, unless the executive session is necessary to respond to an emergency, the notice of the session must be provided with a minimum of 24 hours' notice.[57]

The LOC Guide to Executive Sessions explores these issues and offers sample notices.[58]

B. Proper Meeting Space

The OPML requirements for a public meeting space fall roughly into four categories. First, the meeting space must have appropriate **capacity.**[59] Second, the meeting space must be within the right **geography**.[60] Third, the meeting space must satisfy criteria for **accessibility**.[61] Fourth, the space must be a place of **equality**.[62]

[51] *Id.*
[52] *See* Or. Ass'n of Classified Employees v. Salem-Keizer Sch. Dist. 24J, 95 Or App 28, 32 (1989).
[53] *Id.*
[54] ORS 192.640(2).
[55] *Id.*
[56] *Id.*
[57] ORS 192.640(3).
[58] LEAGUE OF OREGON CITIES, GUIDE TO EXECUTIVE SESSIONS (2017), https://www.orcities.org/application/files/7415/6772/9151/GuidetoExecutiveSessions-03-27-19.pdf (last accessed June 29, 2020).
[59] ORS 192.630(1).
[60] ORS 192.630(4)
[61] ORS 192.630(5).
[62] ORS 192.630(3).

i. Capacity

The OPML provides that any and all public meetings must "be open to the public" and that anyone interested in attending "shall be permitted to attend."[63] Based on this language, it should be inferred that governing bodies need to anticipate roughly how many citizens will be interested in a meeting and plan accordingly. A meeting space that is woefully inadequate for the expected turnout likely is a violation of the OPML.

ii. Geography

The OPML lays out certain criteria for the location of a governing body's meeting. The provisions are presented in an "either/or" list, and so not all of the criteria need to be satisfied. The OPML requires that a meeting space *either* be **(1)** "within the geographic boundaries" of the public body, **(2)** at the public body's "administrative headquarters," *or* **(3)** the nearest practical location.[64] Generally speaking, the LOC recommends public meetings be held within the city unless exigent circumstances arise. In the event of "an actual emergency necessitating immediate action," these criteria do not apply and the governing body may hold an emergency meeting at a different location than the ones described here.[65]

iii. Accessibility

In two main ways, the OPML requires accessibility for persons with disabilities.[66] First, meetings subject to the OPML must be held in places accessible to individuals with mobility and other impairments.[67] Second, the public body must make a "good-faith effort" to provide an interpreter at the request of deaf or hard-of-hearing persons.[68]

Cities can find guidance on the first requirement, and the potential penalties for failure to comply, under laws and regulations of the Americans with Disabilities Act (ADA). As for the "good faith" requirement, this can be enforced only through the OPML.[69] The law defines a "good-faith effort" as "including … contacting the department or other state or local agency that maintains a list of qualified interpreters and arranging for the referral of one or more qualified interpreters to provide interpreter services."[70]

[63] ORS 192.630(1).
[64] ORS 192.630(4). A fourth option for most public bodies is to hold a public meeting within "Indian country." *Id.*
[65] *Id.*
[66] See ORS 192.630(5)(a).
[67] *Id.*
[68] *Id.*
[69] *See* ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 154-55 (2019).
[70] ORS 192.630(5)(e).

iv. Equality

Public bodies are prohibited from holding meetings where discrimination is practiced on the basis of race, color, creed, sex, sexual orientation, national origin, age, or disability.[71] Generally, a public body may not hold a meeting at a location that is used by a restricted-membership organization, but may if the location is not primarily used by such an organization.[72]

C. Recording and Retaining Minutes

The OPML requires that the governing body of a public body provide for sound, video, or digital recording, or written minutes, of its public meetings.[73] Whatever the format, the record of the meeting must include the following categories of information:

> **(a)** All members of the governing body present;
> (**b)** All motions, proposals, resolutions, orders, ordinances and measures proposed and their disposition;
> **(c)** The results of all votes and, except for public bodies consisting of more than 25 members unless requested by a member of that body, the vote of each member by name;[74]
> **(d)** The substance of any discussion on any matter; and
> **(e)** Subject to ORS 192.311 to 192.478 relating to public records, a reference to any document discussed at the meeting. [75]

When recording minutes, the objective is not to include every word said at the meeting, but rather to provide "a true reflection of the matters discussed at the meeting and the views of the participants."[76] Upon conclusion of the meeting, the minutes must also be available to the public "within a reasonable time."[77] The ODOJ notes that, with some exceptions, the minutes should also be "available to persons with disabilities in a form usable by them, such as large print, Braille, or audiotape."[78]

[71] ORS 192.630(3).
[72] *Id.*
[73] ORS 192.650(1).
[74] Note that the recording of minutes requires the "vote of each member by name" to either be recorded or made available on request. This means that members of a governing body cannot vote anonymously. The Court of Appeals has held, however, that the "absence of a recorded vote alone is not reversible error." *See* ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 158-59 (2019) (citing Gilmore v. Bd. of Psychologist Examiners, 81 Or App 321, 324 (1986)).
[75] ORS 192.650(1).
[76] *Id.*
[77] *Id.*
[78] ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 161 (2019).

Finally, the OPML requires that minutes or another record of a public meeting must be preserved for a reasonable time.[79] However, the Secretary of State's Retention Schedule for cities requires minutes of non-executive session meetings to be retained permanently.[80] Executive session minutes must be retained for 10 years.[81] The LOC recommends that cities consult with their attorney before setting a retention schedule for meeting minutes.

D. Public Attendance and Participation

The OPML is a public attendance law, not a public participation law. Generally, meetings of a governing body of a public body are open to the public unless otherwise provided by law.[82] Yet while the law guarantees the right of public attendance, the law does *not* guarantee the right of public participation. In fact, the OPML only expressly mentions public participation in two specific contexts: the opportunity for "public comment" on the employment of a public officer and the opportunity for "public comment" on the standards to be used to hire a chief executive officer.[83]

Importantly, public participation laws *do* exist elsewhere under state and local laws. In many cases, public participation might be required by another statute, a state regulation, or by a local charter or ordinance. For example, a city ordinance may require the city council to hear public comment when the council considers whether to condemn private property for public use. Similarly, state law requires cities to provide an opportunity for public testimony during the annual budgeting process.[84] State regulations, meanwhile, require that "[c]itizens and other interested persons [have] the opportunity to present comments orally at one or more hearings" during the periodic review of a local comprehensive plan.[85] For this reason, the LOC cautions cities to consult their attorney before choosing to withhold opportunities for public comment. Note that there is no rule *against* public participation if cities wish to allow it at meetings.

i. Maintaining Order

For cities, the charter ordinarily designates a specific person with authority to keep order in council meetings, often the mayor or the council president. For other governing bodies serving the city, the one with this authority likely is the leader of the body, such as the head, chair, or president of a particular committee, group, or commission. Generally speaking, a city may adopt

[79] *Id.* at 162 (citing *Harris v. Nordquist*, 96 Or App 19 (1989)).
[80] OAR 166-200-0235.
[81] *Id.*
[82] ORS 192.630(1).
[83] ORS 192.660(7)(d)(C); ORS 192.660(7)(d)(D).
[84] ORS 294.453
[85] OAR 660-025-0080(2).

meeting rules and a violation of these rules can be grounds for expulsion. For more information on maintaining order in council meetings, consult the LOC's Model Rules of Procedure for Council Meetings.[86]

Reasonable restrictions also may be placed on public participation. However, care must be taken to protect the freedom of speech under the First Amendment and Article 1, Section, of the Oregon Constitution. For example, the First Amendment protects the interest of citizens who are "directing speech about public issues to those who govern their city."[87] Speech is a protected right that can be enjoyed not only through **actual speech** but also through **expressive conduct**, such as making a gesture, wearing certain clothing, or performing a symbolic act.[88] While the right to speech is "enormous," it is subject to content-neutral limitations.[89] Further, no city is required to "grant access to all who wish to exercise their right to free speech on every type of government property, at any time, without regard to the disruption caused by the speaker's activities."[90]

a. The Time, Place, and Manner of Speech

Under federal law, a city's council meeting or similar meeting is considered a limited public forum.[91] At a minimum, any expression of speech at a limited public forum in Oregon can be limited through time, place and manner restrictions.[92] Time, place and manner restrictions are simply that — rules regulating the **time** in which a person may speak, the **place** in which a person can speak, and the **manner** in which the speech can be made. An important caveat is that all of these restrictions must be viewpoint neutral.[93] The restrictions also must serve a "legitimate interest" and provide "ample alternatives for the intended message."[94]

[86] LEAGUE OF OREGON CITIES, MODEL RULES OF PROCEDURE FOR COUNCIL MEETINGS (2017), https://www.orcities.org/application/files/1115/7228/7626/ModelRulesofProcedure3-15-19.pdf (last accessed July 9, 2020).
[87] *See* White v City of Norwalk, 900 F2d 1421, 1425 (9th Cir 1990).
[88] *See* Virginia v. Black, 538 U.S. 343, 358 (2003).
[89] *See White*, 900 F. 2d at 1425 (1990).
[90] *See* Walsh v Enge, 154 F. Supp. 3d 1113, 1119 (D. Or. 2015) (quoting Cornelius v. NAACP, 473 U.S. 788, 799 (1985)).
[91] *See White*, 900 F. 2d at 1425 (1990).
[92] *See* State v. Babson, 355 Or 383, 408 (2014). Under federal law, expressions of speech in a limited public forum can also be subject to "content-based" rules, provided those rules are both "viewpoint neutral" and "reasonable." *Enge*, 154 F. Supp. 3d at 1128. Thus, under federal law, a city council could limit the *content* of a public comment to the subject-matter at hand as long as it did not apply this rule unevenly. *White*, 900 F. 2d at 1425 (1990). In Oregon, however, the free speech clause Oregon Constitution appears to prohibit any "content-based" regulation of speech. *See* Outdoor Media Dimensions, Inc. v. Dept. of Transp., 340 Or 275, 288 (2006). Cities should err on the side of caution by permitting speech on any "subject" at meetings and limiting only its time, place, and manner.
[93] *See White*, 900 F. 2d at 1425 (1990).
[94] *See Babson*, 355 Or at 408 (2014).

Because these restrictions are constitutional, local governing bodies generally can establish a specific format for speech at a council meeting or other public meeting. For example, a city's budget committee may choose to limit public comment to the start of a hearing and limit the amount of time a person may speak. Limiting public comment to the start of a public hearing is not legally contentious.

The challenge of time, place, and manner restrictions is ensuring that the restrictions are enforced consistently and equally to all speakers and that the restrictions cannot be construed as discriminating against a given viewpoint.[95] That said, cities generally will avoid triggering the First Amendment if their restrictions serve "purposes unrelated to the content of expression."[96] This is true even if an otherwise valid restriction, under particular circumstances, "*incidentally* burdens some speakers, messages or viewpoints."[97]

b. Disruptive Conduct

A good example of an "incidental" restriction on speech is rules on disruptive conduct. As noted above, cities and other governments are not required to tolerate "actual disruptions" when carrying out government business. So, even if the disruptive activity is a voice or some form of expressive conduct, i.e., speech, it can be regulated.[98] The rule against actual disruptions means that governing bodies may override one's freedom of speech in certain circumstances, such as when an audience member is shouting loudly at others or when an individual refuses to sit down long after their allotted speaking time has ended. The general rule of thumb is that the disruption has to be preventing the governing body from completing its work.

Conversely, cities must allow any actions that are not "**actual**" disruptions to the governing body's ability to conduct business.[99] In *Norse v. City of Santa Cruz*, for example, the Ninth Circuit Court of Appeals found that an audience member giving the Nazi salute did not actually interfere with or interrupt the public meeting and that the city therefore had not been justified in removing the individual from the meeting.[100] In reaching its decision, the *Norse* Court found that "[a]ctual disruption means actual disruption. It does not mean constructive

[95] *See Norse v City of Santa Cruz*, 629 F3d 966, 976 (9th Cir 2010) (noting that viewpoint neutrality is a key element under the First Amendment),
[96] Alpha Delta Chi-Delta Chapter v Reed, 648 F3d 790, 800 (9th Cir 2011) (quoting, in part, Ward v Rock Against Racism, 491 US 781, 791, 109 S Ct 2746, 105 L Ed2d 661 (1989)).
[97] *Id.*
[98] *Norse*, 629 F.3d at 976.
[99] *Id.*
[100] *Id.*

disruption, technical disruption, virtual disruption, *nunc pro tunc* disruption, or imaginary disruption."[101]

c. Barring Disruptive Individuals

It is not uncommon for a person desiring to make their point to cause several disruptions at the same meeting or over a series of meetings. The constant disruption of public meetings by the same person, despite repeated warnings and removals, often leads public officials to consider suspending the person from future public meetings. Unfortunately, any efforts to suspend or ban individuals from future hearings are highly suspect and likely unconstitutional.

On two separate occasions, federal courts have held that prohibiting a disruptive person from attending future meetings, and from entering the entirety of a government facility, is not permitted under the First Amendment. In *Reza v. Pearce*, the Ninth Circuit Court of Appeals ruled that "imposing a complete ban" on a person's entry into a government building "clearly exceeds the bounds of reasonableness … as a response to a single act of disruption."[102] Similarly, in *Walsh v. Enge*, a federal district court found that the city of Portland could not "prospectively exclude individuals from future public meetings merely because they have been disruptive in the past."[103] Note, however, that a district court decision is not binding precedent. While neither of these cases conclusively answers the question of whether a frequently disruptive individual can be barred from future hearings, they cast serious doubt that a court would uphold such an action.

For a description of these cases and a more detailed overview of the options available to cities for handling disruptive members of the public at public meetings, see the LOC's Legal Guide to Handling Disruptive People in Public Meetings (2017).[104]

IV. Executive Sessions

An executive session is a public meeting that is closed to members of the general public. Executive sessions may only be held for certain reasons and the other meeting requirements discussed above still apply, such as notice, location, and minute-keeping requirements.[105]

[101] *Id.*
[102] Reza v Pearce, 806 F.3d 497, 505 (9th Cir 2015).
[103] *See* Walsh v Enge, 154 F. Supp. 3d 1113, 1119 (D. Or. 2015).
[104] League of Oregon Cities, Legal Guide to Handling Disruptive People in Public Meetings (2017), https://www.orcities.org/application/files/2715/6116/0383/LOCWhitePaperonDisruptiveCitizens-FINAL5-5-17.pdf (last accessed June 29, 2020).
[105] *See* ORS 192.660; *see also* ORS 192.610(2) (defining an executive session as a "meeting.").

For a thorough assessment of how executive sessions apply to cities, including sample notices and a model media policy, consult the LOC Guide to Executive Sessions.[106]

A. Executive Sessions for Municipalities

The Oregon Legislative Assembly has identified 14 circumstances in which an executive session is authorized.[107] Of these, 10 circumstances are likely to be used by municipalities:

1. Employment of a public officer, employee, staff member or individual agent.

Members of governing bodies may generally deliberate whether to employ individuals that meet this description. That said, this exception does not apply to any public officer, employee, staff member, or chief executive officer unless **(1)** the position has been advertised **(2)** and there already exists an adopted regular hiring procedure. In addition, with respect to public officers, the public must have had an opportunity to comment on the officer's employment. With regard to chief executive officers, there must be adopted hiring criteria and policy directives. This type of executive session cannot be used for either of the following purposes:

- To fill a vacancy in any elected office, public committee or commission, or advisory group; [108] or
- To discuss an officer's salary.[109]

2. Dismissal, disciplining, or hearing complaints or charges relating to a public officer, employee, staff member or individual agent who does not request an open hearing.

A governing body may hold an executive session on disciplinary matters; however, the subject of the deliberations must be provided with an opportunity to request an open hearing.[110] Clearly, this means that the governing body must notify the individual well in advance and determine whether they wish to have an open hearing.

Generally, cities should be aware that public employees have a property interest in their employment. When in doubt, cities that are members of CIS are encouraged to consult the CIS

[106] LEAGUE OF OREGON CITIES, GUIDE TO EXECUTIVE SESSIONS (2017), https://www.orcities.org/application/files/7415/6772/9151/GuidetoExecutiveSessions-03-27-19.pdf (last accessed June 29, 2020).
[107] ORS 192.660.
[108] *See* ORS 192.660; *see also* ORS 192.660(7)(a)-(d).
[109] *See generally* 42 Op Atty Gen 362, 1982 WL 183044 (1982).
[110] ORS 192.660(2)(b).

Pre-Loss Legal Department before taking disciplinary action. Failing to do so can negatively impact a city's deductible if a lawsuit or wrongful termination complaint is subsequently filed.

3. Persons designated by the governing body to carry on labor negotiations.

This provision allows city officials to hold an executive session to conduct deliberations with the person they have designated to act on the city's behalf during labor negotiations.[111] Note that this is one of the few meetings where news organizations and the media can be excluded from an executive session.[112]

4. Persons designated by the governing body to negotiate real property transactions.

This provision allows city officials to hold an executive session to conduct deliberations with the person they have designated to act on the city's behalf regarding real property transactions.[113] A real property transaction likely may include the purchase of real property, the sale of real property, and/or negotiations of lease agreements.[114] The deliberations conducted during an executive session held under this provision must concern a specific piece of property or properties — the session may not be used to discuss a city's long-term property needs.[115]

5. Information or records that are exempt by law from public inspection.

In order to hold an executive session under this provision, the information and records to be reviewed must otherwise be exempt from public inspection under state or federal law.[116] The most common source for public records exemptions is Oregon's Public Records Law and the attorney-client privilege under ORS 40.225.

6. Preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations.

A governing body may use this provision to meet in executive session when it has good reason to believe it is in competition with other governments on a "trade or commerce" issue.[117]

7. Rights and duties of a public body as to current litigation or litigation likely to be filed.

[111] ORS 192.660(2)(c).
[112] ORS 192.660(4).
[113] ORS 192.660(2)(e).
[114] ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 165 (2019).
[115] *Id.* (citing Letter of Advice to Rep. Carl Hosticka, 1990 WL 519211 (OP-6376) (May 18, 1990)).
[116] ORS 192.660(2)(f).
[117] ORS 192.660(2)(g).

A governing body may use executive sessions as a way to consult with legal counsel about current or pending litigation.[118] In the event the litigation is against a news organization, the governing body must exclude any journalist who is affiliated with the news organization.[119]

8. Employment-related performance of the chief executive officer of any public body, a public officer, employee, or staff member who does not request an open hearing.

A governing body may hold an executive session to evaluate an employee's performance; however, the subject of the deliberations must be provided with an opportunity to request an open hearing.[120] Clearly, this means that the governing body must notify the individual well in advance and determine whether they wish to have an open hearing.

Generally, cities should be aware that public employees have a property interest in their employment. When in doubt, cities that are members of CIS are encouraged to consult the CIS Pre-Loss Legal Department before taking disciplinary action. Failing to do so can negatively impact a city's deductible if a lawsuit or wrongful termination complaint is subsequently filed.

9. Negotiations under ORS Chapter 293 with private persons or businesses regarding proposed acquisition, exchange or liquidation of public investments.

This provision allows cities to conduct negotiations about certain public investments.[121] The final decision on these investments must occur in an open public meeting (see below).[122]

10. Information on the review or approval of certain security programs.

In order to hold an executive session under this provision, the security program must be related to one of the areas identified under ORS 192.660(2)(n). These include telecommunication systems and the "generation, storage or conveyance of" certain resources or waste.[123]

B. Final Decision Prohibition

Under the OPML, executive sessions must not be used "for the purpose of taking any final action or making any final action."[124] While final decisions cannot be made, city councils and other public bodies may still reach a consensus during an executive session. This provision simply guarantees that the public is made aware of the deliberations. Thus, a formal vote in a

[118] ORS 192.660(2)(h).
[119] ORS 192.660(5).
[120] ORS 192.660(2)(i).
[121] ORS 192.660(2)(j).
[122] ORS 192.660(6).
[123] ORS 192.660(2)(n).
[124] ORS 192.660(6).

public session satisfies the requirement, even if the vote merely confirms the consensus reached in executive session.[125]

C. Media Representation at an Executive Session

Representatives of the news media must be allowed to attend all but two types of executive sessions.[126] The news media may be excluded from an executive session held to conduct deliberations with a person designated by the governing body to carry on labor negotiations or an executive session held by a school board to discuss certain student records.[127] Also, remember that a city council or other public body must exclude any member of the press if the news organization the reporter represents is a party to the litigation being discussed during the executive session.[128]

Even though news organizations are permitted to attend virtually every executive session, governing bodies may prohibit news organizations from disclosing certain specified information.[129] Unless a governing body specifies what information is prohibited from disclosure, news organizations are free to report on the entire executive session. It also is worth noting that there is no penalty or punishment under the OPML against a news organization that shares information from an executive session without the city's permission.

The term "representatives of the media" is not defined by the OPML or in case law. However, the Oregon attorney general recently issued an advisory opinion wherein it concluded that under Oregon law "news-gathering representatives of institutional media" are permitted to attend executive sessions and the term is "broad and flexible enough to encompass changing technologies for delivering the news."[130] The conclusion reached by the attorney general seems to imply that bloggers and other social media news entities are authorized to attend executive sessions. In reaching this conclusion, the attorney general relied heavily on what it believes are the stated reasons the Legislative Assembly allowed the media to attend executive sessions when the law was originally adopted.[131]

Due to the ambiguity around who is or isn't a "representative of the media," the LOC recommends that cities generally permit any person providing the public with news, including internet bloggers, to attend executive sessions. Some cities may seek to establish a stricter media

[125] *See* ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 173-75 (2019).
[126] ORS 192.660(5).
[127] *Id.*
[128] ORS 192.660(5).
[129] ORS 192.660(4).
[130] *See generally* Op Atty Gen 8291 (2016).
[131] *Id.*

attendance policy and, if so, those cities need to undertake a meaningful and in-depth discussion with their city attorney before drafting such a policy. Denying "representatives of the media" access to meetings can lead to costly litigation.

V. ENFORCEMENT

A. General Enforcement

Any person affected by a decision of a governing body of a public body may file a lawsuit to require compliance with, or prevent violations of, the OPML by members of the governing body.[132] Lawsuits may be filed by "any person who might be affected by a decision that might be made."[133]

A plaintiff may also file suit to determine whether the OPML applies to meetings or decisions of the governing body.[134] Under ORS 192.680(5), any suit brought under the OPML must be commenced within 60 days following the date the decision becomes public record.[135]

A successful plaintiff may be awarded reasonable attorney fees at trial or on appeal.[136] Whether to award these or not is in the court's discretion.[137] If a court finds that a violation of the OPML was the result of willful misconduct by a member or members of the governing body, each is liable for the amount of attorney fees paid to the successful applicant.[138]

If a governing body violates the OPML in a decision, the decision is not necessarily void. In the case of an unintentional or non-willful violation of the OPML, the court has discretion to void a decision, but such an action is not mandatory.[139] The law permits a governing body that violates the OPML to reinstate the decision while in compliance with the law.[140] If a governing body reinstates an earlier decision while in compliance with the law, the decision will not be voided and the decision is effective from the date of its initial adoption.[141]

Importantly, reinstatement of an earlier decision while in compliance with the law will not prevent a court from voiding the earlier decision "if the court finds that the violation was the result of intentional disregard of the law or willful misconduct by a quorum of the members of

[132] ORS 192.680(2).
[133] *See* Harris v. Nordquist, 96 Or App 19, 23 (1989).
[134] ORS 192.680(2).
[135] ORS 192.680(5).
[136] ORS 192.680(3).
[137] *Id.*
[138] ORS 192.680(4).
[139] ORS 192.680(1).
[140] *Id.*
[141] *Id.*

the governing body."[142] In that case, the court will void the decision "unless other equitable relief is available."[143]

B. Civil Penalties for Violations of ORS 192.660

Apart from the enforcement provisions described above, the Oregon Government Ethics Commission may review complaints that a public official has violated the executive session provisions of the OPML as provided in ORS 244.260.[144] The commission has the authority to interview witnesses, review minutes and other records, and obtain other information pertaining to executive sessions of the governing body for purposes of determining whether a violation occurred.[145] If the commission finds a violation of the executive sessions provisions, the commission may impose a civil penalty not to exceed $1,000.[146] If, however, the violation occurred as a result of the governing body acting on the advice of its legal counsel, the civil penalty may not be imposed.[147]

[142] ORS 192.680(3).
[143] *Id.*
[144] ORS 192.685(1).
[145] ORS 192.685(2).
[146] ORS 244.350(2)(a).
[147] ORS 244.350(2)(b).

DISCUSSION ITEMS

Discussion of City Council and Planning Commission Coordination

Working Effectively With Elected Officials

by Elaine Cogan

How often have you made a particularly difficult decision as a planning commissioner but then left the room relieved that any angry people you failed to placate can appeal to the governing body?

Most communities give that recourse to citizens and it is generally a good idea. As an appointee, you do not have the same responsibility to the electorate as your community's elected body.

However, you are not doing your proper job as an appointed official if most of your commission's opinions are appealed, and especially, if a majority of your rulings are subsequently overturned. If that happens often, you may think you are taking the high road and the elected officials are merely pandering to the voters, but it also may be a signal that you and your fellow commissioners are out of step or have not done all you could to lobby for your points of view.

Building bridges through effective advocacy is an aspect of your job that is often overlooked.

In small communities, where everyone knows everyone else and the positions on the various boards and commissions — and even membership on the governing body — may, in effect, rotate among public-spirited citizens, relationships are informal and it is easy to have access to the elected decision-makers. Still, other than in formal meetings, many planning board members are reluctant to speak up for their points of view, and thus may lose the opportunity to forge valuable alliances.

In larger communities, planning commissioners may be appointed by the mayor and not even be known to other elected officials. Staff has a stronger role than in smaller areas in carrying out the planning agenda, especially in dealing with other departments such as transportation or public works. However, that should not relieve planning commissioners of their advocacy responsibilities.

In any community, there are steps you can take to at least make sure planning commission aims and policies are clear to the elected body, with the long-range goal of mutual understanding and support.

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• *Attend your governing body's meeting when an appeal of one of your decisions is being considered.* It may not be pleasant to hear people disagree with you, but the experience will give you some sense of the depth of feeling of elected officials, and the public, on specific issues. If the commission's findings often are overturned because of form or content, you may want to review them with your staff; if the findings are okay but the governing body disagrees with your conclusions, it is still appropriate to revisit the issue informally to see why you are out of step. You may want to try again with a different approach.

• *Be acquainted with the political platforms of the members of the governing body.* Did someone campaign for office promising to end all planning as you know it? That is a clue to how that individual may respond to particular issues. You still should not give up. You or other commissioners should arrange a visit to explain your position and the positive results planning has on your community — and also listen to the elected official's contrary ideas.

• *Do not rely entirely on staff to convey your message.* In most cases, reliance on your professional staff is a satisfactory way to carry out your commission's planning objectives. But if there are certain planning issues on which you feel very strongly, you may be the best one to express it — and it should be to the appropriate elected official, not staff.

• *Enlist the help of the media.* Used sparingly, letters to the editor or "op-ed" or opinion pieces in the local newspaper can be effective in espousing a planning commission point of view that you believe is being maligned or misunderstood. It is better that this be from the entire commission rather than one individual who can be dismissed as a maverick. The objective should be to encourage constructive dialogue, not start a war of words.

• *Suggest a retreat or informal workshop* among planning commission members and elected officials to try to come to consensus on a common vision, goals and objectives. Even if the best you can do is agree to disagree, you will have heard each other and learned something.

The relationship between the elected official and appointed boards such as the planning commission should always be cordial, even in the heat of battle. You can do a great deal to make it so. ◆

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