



**Development 101 –  
THE LAND USE PROCESS**

**City Council Meeting  
February, 2021**



# WHY WE ZONE

## WHAT IS ZONING?

- Demarcation of an area to establish regulations that govern uses within those zones
- Examples include:  
Commercial, Manufacturing, and Residential



# WHY WE ZONE

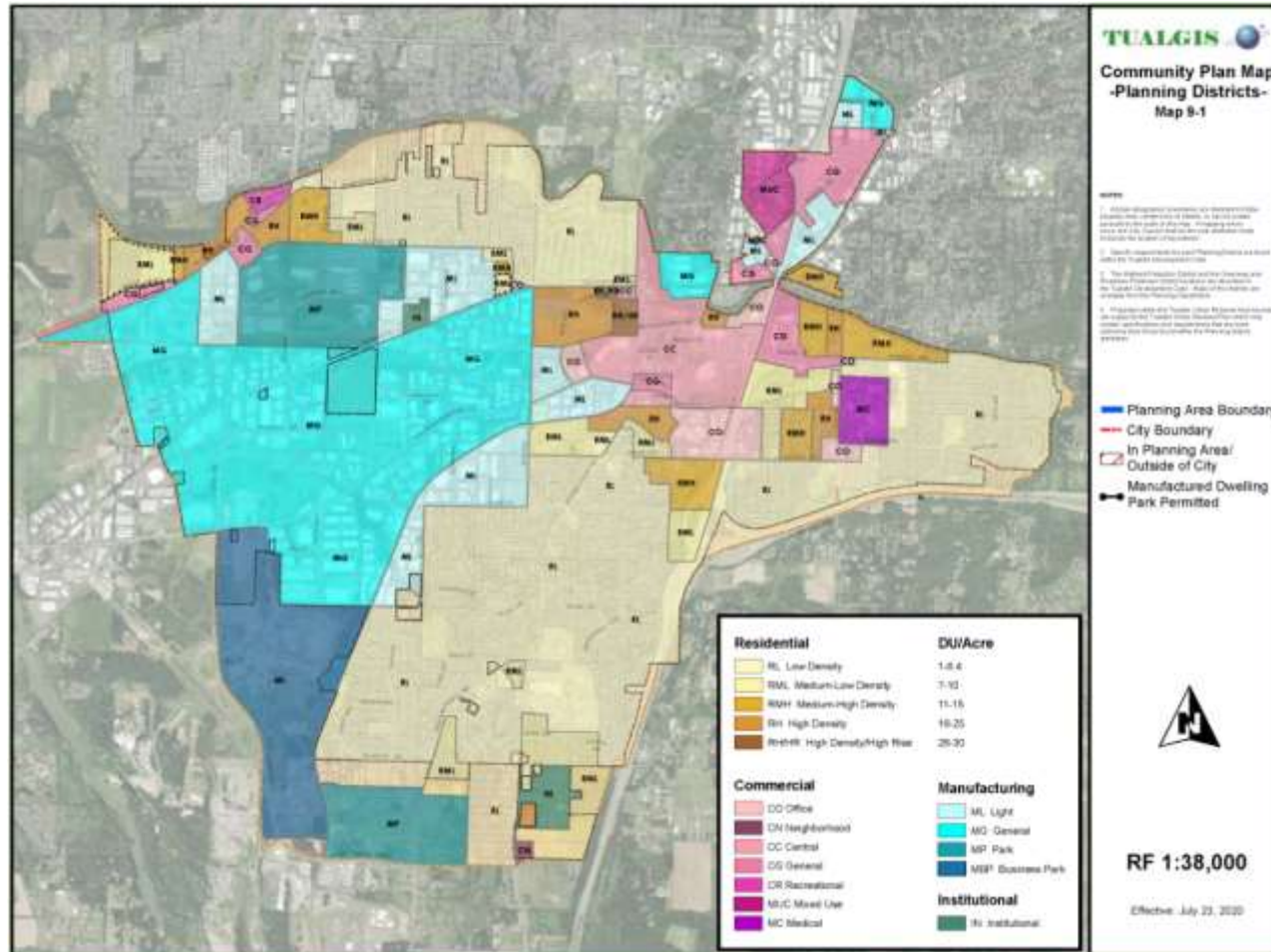
## WHY HAVE ZONING?

- Established to ensure public health and safety and to avoid placement of incompatible uses next to each other





# ZONING MAP





# OREGON'S LAND USE HISTORY

## **OREGON LAND USE ACT / SENATE BILL 100 (1973)**

- Land Conservation & Development Commission (LCDC) created to provide policy direction
- 19 Statewide Planning Goals established
- Comprehensive Plan required for long-range planning policies
- Urban Growth Boundaries (UGB) required to manage growth

## **METRO REGIONAL GOVERNMENT**

- Urban Growth Management Functional Plan to implement regional goals and objectives



# HOW TUALATIN PLANS

## COMPREHENSIVE PLAN

- General, long-range policies on how the community's future development should occur
- In compliance with Statewide and Metro goals

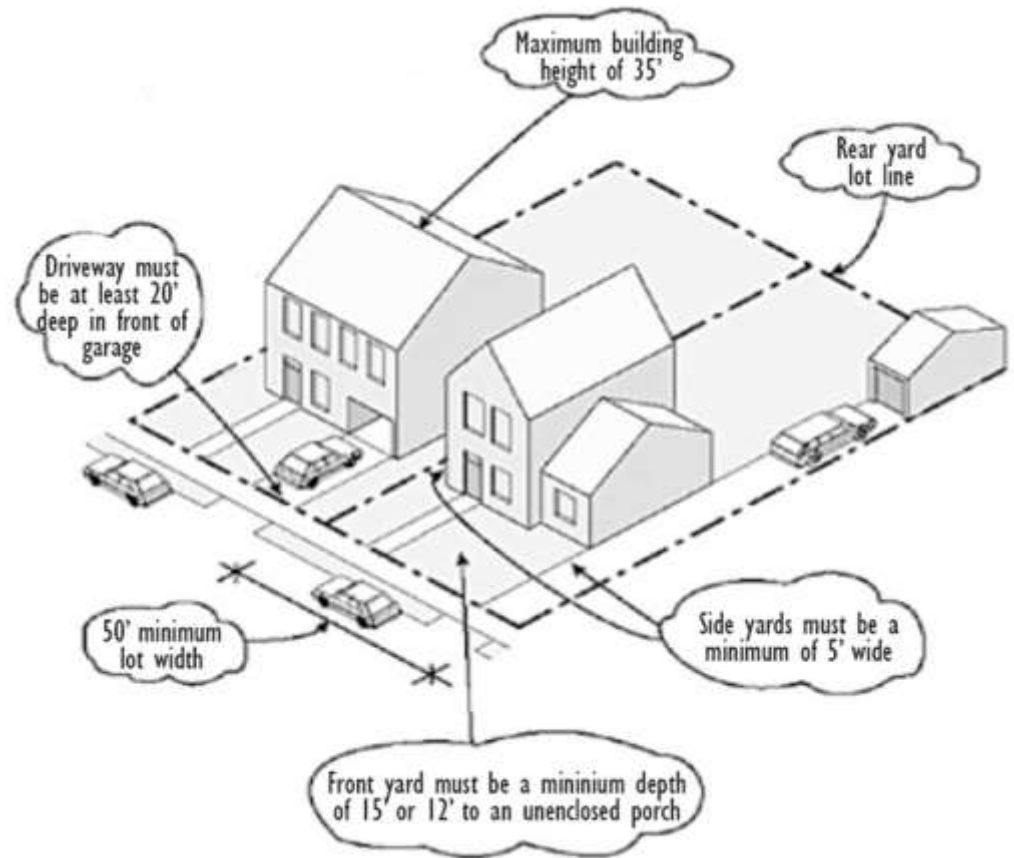




# HOW TUALATIN PLANS

## DEVELOPMENT CODE

- Implements policy guidance from the Comprehensive Plan.
- Provides specific regulations governing land use and/or siting of buildings and other improvements to land.





# WHEN IS LAND USE REQUIRED?

- Any exterior modifications to improved or unimproved real property;
- Any remodeling that changes the exterior appearance of a building;
- Any site alteration which alters the topography, appearance or function of the site; and
- Any change in occupancy from single family use to commercial or industrial use.





# WHAT PROCESS IS REQUIRED?

## **TYPE I (*Minor Architectural Review, Sign permit*)**

- No public notice; reviewing clear and objective standards; appealable to Oregon Circuit Court

## **TYPE II (*Architectural Review, Minor Variance*)**

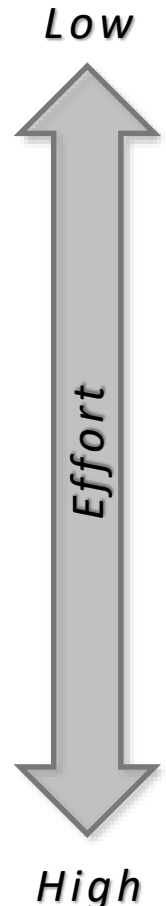
- Public notice and staff decision; some subjective standards; appealable to ARB or City Council

## **TYPE III (*Large-Scale Architectural Review; Conditional Use*)**

- Public notice and a hearing; very subjective standards; appealable to City Council

## **TYPE IV (*Map or Text Amendment; Annexation*)**

- Notice and a public hearing; highly subjective standards; appealable to Oregon Land use Board of Appeals





# WHAT PROCESS IS REQUIRED?

## COMMON PROCESS FOR NEW DEVELOPMENT – TYPE II ARCHITECTURAL REVIEW

- Public and partner agency notice
- Approval criteria mostly “clear and objective” with limited subjective criteria
- Approval authority is City Manager or designee; staff decision written by Planning Division
- Does not involve a public hearing unless the final decision is appealed



# WHAT PROCESS IS REQUIRED

## TYPE III-IV PROCESS DECIDED BY HEARINGS BODY

- **Architectural Review Board:** Large-scale development for - Commercial > 50,000 sq ft; Industrial > 150,000 sq ft; Multifamily > 100 units
- **Planning Commission:** Conditional Use Permit - Required for uses that need additional consideration to ensure compatibility with surrounding uses. Variance – Relief from development standard due to unusual circumstance.
- **City Council:** Annexation, Plan Map Amendment (Zone Change), Plan Text Amendment



# WHAT HAPPENS DURING LAND USE?

## **BEFORE SUBMITTAL (TYPE II-IV)**

- Preapplication conference
- Neighborhood Developer Meeting

## **AFTER SUBMITTAL:**

- 30 days to confirm application is “complete”; final action on a decision due within 120 days from date “complete”
- Public notice – Property owners within 1,000 feet (including platted subdivision within 1,000 feet) given 14 days to comment before decision made
- Agency notice provided to applicable public entities with opportunity to comment



# WHAT HAPPENS DURING LAND USE?

## **PRE-DECISION (TYPE II):**

- Application materials and comments from partner agencies and public reviewed to confirm Development Code applicable standards are met
- Conditions of approval are case-specific and are imposed to meet the criteria and policies in the code.

## **POST DECISION (TYPE II):**

- 14 day Appeal Period, after which decision becomes final
- If appealed: architectural feature heard by Architectural Review Board and public facilities heard by City Council



# DEVELOPMENT 101 – NEXT STEPS

Applicant has final Land Use Decision with Conditions of Approval that need to be addressed before a Building Permit can be approved.

- Conditions can include:
  - Public and Private Improvements
  - Submittal of Amended Plans to show compliance
  - Submittal of legal documents
  - Requirements to Mitigate Impacts of Development
- Construction of improvements required by the Conditions of Approval must be satisfied before a building can be occupied.



# LAND USE HEARINGS AT COUNCIL

## OVERVIEW

- Two Types of Land Use Hearings
  - Legislative
  - Quasi-Judicial
- Land Use Process
- Ex Parte Contacts
- Bias
- Conflicts of Interest



# TYPES OF LAND USE HEARINGS

LEGISLATIVE	QUASI-JUDICIAL
<ul style="list-style-type: none"><li>• Sitting as a Legislator</li></ul>	<ul style="list-style-type: none"><li>• Sitting as a Judge</li></ul>
<ul style="list-style-type: none"><li>• Enact a Law that broadly applies</li></ul>	<ul style="list-style-type: none"><li>• Apply the Law to specific property/area</li></ul>
<ul style="list-style-type: none"><li>• Creating new criteria</li></ul>	<ul style="list-style-type: none"><li>• Applying evidence to existing criteria</li></ul>
<ul style="list-style-type: none"><li>• Adding/amending Development Code</li></ul>	<ul style="list-style-type: none"><li>• Issue Written Order/Decisions</li></ul>
<ul style="list-style-type: none"><li>• No requirement to Enact the Law</li></ul>	<ul style="list-style-type: none"><li>• Must issue Decision within 120-days</li></ul>
<ul style="list-style-type: none"><li>• Conflicts of Interest Law applies</li></ul>	<ul style="list-style-type: none"><li>• Conflicts of Interest Law applies</li></ul>
<ul style="list-style-type: none"><li>• Ex Parte contacts are allowed</li></ul>	<ul style="list-style-type: none"><li>• Ex Parte contacts are not allowed</li></ul>
<ul style="list-style-type: none"><li>• Prohibition on Bias does not apply</li></ul>	<ul style="list-style-type: none"><li>• Prohibition on Bias applies</li></ul>

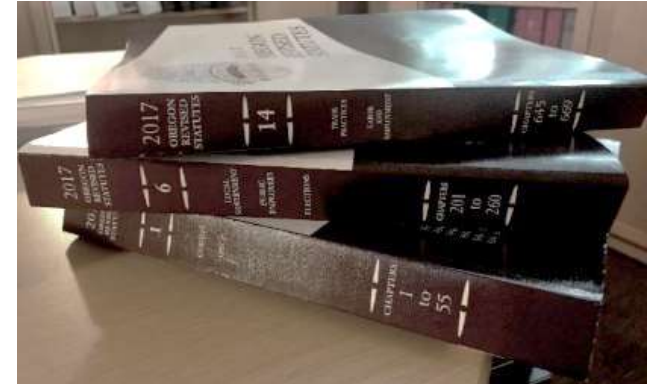




# LEGISLATIVE LAND USE

## LEGISLATIVE DECISIONS – TYPE IV

- Council is Creating a New Law
- Establishing New Land Use Criteria
- Amending Existing Land Use Criteria
  - Plan Map Amendment (PMA)
    - Create a New Zone
    - Change the Zone for an Area
  - Plan Text Amendment (PTA)
    - Changing the Development Code





# LEGISLATIVE HEARING PROCESS

## LEGISLATIVE HEARING AT COUNCIL

- Notice of public hearing to DLCDD and the public
- Introduction of legislative item by Mayor
- Councilors must disclose conflicts of interest
- Conduct public hearing
- Ordinance enacted
  - Includes legislative findings and conclusions that address:*
    - Compliance with state land use laws
    - Requirements in city comprehensive plan & master plans
    - Metro Urban Growth Management Plan
- Staff notifies DLCDD of final action



# QUASI-JUDICIAL

## QUASI-JUDICIAL DECISIONS – TYPE IV

- Criteria already established in Code
- Applying criteria to evidence presented at the Hearing to determine if criteria are met
- Did the applicant “*Prove*” their case?
  - Annexations
  - Removal of Historic Landmark Designation
  - Demolition/Relocation of Historic Resource on National Register
  - Plan Amendments for Specific Properties (Hybrid)
  - Appeals from Lower Decisions





# QUASI-JUDICIAL 120-DAY RULE

Final decision must be made within 120-days of the date the application is deemed complete

- If no decision is issued, the applicant can move the matter to Circuit Court and a judge decides the land use case
  - Writ of Mandamus
  - City loses jurisdiction
- Court will issue approve, unless City can prove it violates the code or a condition is needed to comply with the code



# LEGISLATIVE-QUASI HYBRID

## Site Specific Legislative Decisions

- Legislative decision that applies to one property or small number of properties
- Quasi-Judicial procedures apply to the Legislative decision
- This is an exception to the Legislative process
- 120-day Rule does not apply



# QUASI-JUDICIAL HEARING PROCESS

- Notice of Public Hearing - Date and Time of Council Meeting
- Conduct Hearing
  - Mayor Reads the Script – State Law
  - Councilors Disclose
    - Ex Parte Communications
    - Bias
    - Conflicts
  - Evidentiary Portion of Hearing
- Close Hearing, Motion, Deliberations, and Vote
- Direct Staff to Bring back a Final Written Decision at Future Meeting
- At Future Meeting, Council votes on the Resolution or Ordinance to Implement Decision





# LAND USE APPEALS



## Oregon Land Use Board of Appeals

Welcome to the Land Use Board of Appeals

### Legislative – 21 Days

Challenge whether Legislation complied with:

- State land use laws
- City Comprehensive Plan & Master Plans
- Metro Urban Growth Management Plan

### Quasi-Judicial – 21 Days

Challenge whether:

- Criteria is lawful
- Application of the criteria to evidence in the record
- Sufficiency of evidentiary record to support the Decision



# EX PARTE CONTACTS

## APPLIES TO QUASI-JUDICIAL ONLY - *Not Legislative Decisions*

- Origins in Due Process
  - Right to be heard
  - Right to impartial tribunal
  - Present and rebut evidence
- Should a Judge discuss the case with one party outside of the presence of the other party and outside the presence of the Public?
  - No back-room deals with the Judge







# EX PART CONTACTS

## ELEMENTS

- Communication (written, oral, electronic);
- Made to a decision-maker;
- Outside of the Quasi-Judicial Hearing;
- Concerning the subject matter of the Quasi-Judicial Hearing;  
and
- Occurs while a matter is pending before the Hearing Body
  - After a formal application is filed
  - Before final decision





# EX PARTE SITUATIONS

## COUNCIL COMMUNICATION WITH STAFF

- Not Ex Parte When:
  - Consulting regarding the evidence presented
  - Concerning interpretations or application of code
- Is Ex Parte If:
  - Communication with Staff presents new evidence not in the record; and
  - Decision-maker wants to rely on that new evidence, in whole or in part, as a basis to make the decision



# EX PARTE SITUATIONS

## ATTORNEYS

- City Attorney = Not Ex Parte
- Party Attorney = Ex Parte

**SITE VISITS** = Ex Parte

## NEWS ARTICLES

- Ex Parte if:
  - Urge a result; and
  - Discuss a fact at issue in the pending matter



# EX PARTE SITUATIONS

## HEARING SCENARIOS

- **Recess of Hearing** - Discussions with audience members about substance of hearing during a recess
- **After Close of Hearing** - Contacts relating to substance of hearing after hearing closed, but before final written decision issued
- **On Appeal** - Contacts while case on appeal to LUBA, if the case is remanded from LUBA



# HOW TO CURE EX PARTE CONTACTS

## THE CURE

- **Announce that an Ex Parte contact has occurred:**
  - At the next public hearing immediately after contact occurs
  - Before the public hearing begins or resumes
- **State the nature and substance of the contact**
  - Specific enough to allow parties to respond or offer rebuttal evidence
- **All parties to the proceeding get to question decision-maker and rebut evidence - *On the record*:**
  - Opportunity to question the decision-maker to clarify contact
  - Present evidence and argument to rebut the substance of what was discussed outside of the hearing





# RISKS IF DO NOT CURE

Violates substantial rights of parties

- Right to be heard
- Right to impartial tribunal
- Present and rebut evidence
- Basis for Invalidating the Decision





# BIAS

A decision-maker that substantially impairs a party's ability to receive a full and fair hearing.

- Can be in favor or against

## Actual Bias

- Prejudice or prejudgment of the case to such a degree that the decision-maker is incapable of making a decision on the merits
  - Personal bias
  - Personal prejudice
  - Interest in the outcome





# BIAS

## ESTABLISHED THROUGH

- Explicit statements, pledges, or commitments that the elected local official has prejudged the specific matter before the tribunal

### Insufficient:

- Circumstantial evidence based on prior acts
- Statements made in a campaign
- Prior active appeal and opposition to a similar project
- Prior praise for legislation opposing the project
- Prior newspaper editorials about project being a “bad idea”





# CONFLICTS OF INTEREST

## APPLIES TO LEGISLATIVE & QUASI-JUDICIAL ACTIONS

- Originates in State Ethics Laws – ORS Chapter 244
- Two types of conflicts
  - Actual Conflict
  - Potential Conflict





# CONFLICTS OF INTEREST

## **ACTUAL CONFLICT** *ORS 244.020(1)*

- Action, decision, or recommendation by a public official
- The effect of which “would be to the private pecuniary benefit or detriment” of:
  - Public Official
  - Relative of the Public Official
  - Business with which the Public Official is associated
  - Business with which a relative of the Public Official is associated.
  - Business does not include Non-profit - 501(c) corporations if:
    - Member of a nonprofit
    - Position on Board of Directors; or
    - Association is unpaid relationship



# CONFLICTS OF INTEREST

## ACTUAL CONFLICT – *REQUIRED ACTION*

- Must disclose the nature of the conflict and reason for abstention
  - Abstention alone is insufficient
  - Must give reasons
- Must refrain from discussions
- Must refrain from voting





# CONFLICTS OF INTEREST

## **POTENTIAL CONFLICT** *ORS 244.120(13)*

- Action, decision, or recommendation by a public official
- The effect of which *“could be to the private pecuniary benefit or detriment”* of:
  - Public Official
  - Relative of the Public Official
  - Business with which the Public Official is associated
  - Business with which a relative of the Public Official is associated
  - Business does not include Non-profit - 501(c) corporations if:
    - Member of a Nonprofit
    - Position on Board of Directors; or
    - Association is unpaid relationship



# CONFLICTS OF INTEREST

## POTENTIAL CONFLICT – *REQUIRED ACTION*

- Must disclose nature of the conflict
  - Stating “*I have a conflict*” is insufficient
- May participate in discussions
- May participate in voting
- May still choose recusal, but not required





# CONFLICTS OF INTEREST

## FAILURE TO DISCLOSE

Nature of conflict and/or reason for abstention

- Personal Liability under ORS 244
- Jurisdiction of the Oregon Government Ethics Commission
- Decision may be Voided
  - Depends on the Circumstances



# CONFLICTS OF INTEREST

## QUESTIONS ABOUT CONFLICTS OF INTEREST

- Consult with Oregon Government Ethics Commission (OGEC)
- City Attorney
  - Assist through Process
  - Cannot rely on advice given as a defense to OGEC





# QUIZ QUESTION #1

- A developer speaks to the City Planning Department about a zoning issue
- A zoning application has not been filed, but the person intends to submit an application soon
- The proposed applicant contacts each member of the Council and asks whether they would support a re-zone of a property from Residential to Commercial

***Is this an Ex Parte contact?***

***Why or why not?***

***Would this alone constitute Bias?***





## QUIZ QUESTION #2

- Property abuts a park and a person applies to rezone property from residential to commercial
- After the application is submitted but before the hearing, Ms. Smith contacts a Councilor to urge the Councilor to vote against the rezone because it will increase the amount of traffic near the park
- At the close of hearing Councilor discloses: “I had an ex parte contact with Ms. Smith and she urged me to vote no.”

***Was this Ex Parte disclosure sufficient?***

***Why or why not?***



## QUIZ QUESTION #3

- A Councilor has a sister who submits an application to rezone an investment property from industrial to residential to increase the value of the land
- The Council holds a public hearing and is prepared to vote on the rezone
- At the end of the public hearing, the Councilor makes a statement that the Councilor has a conflict and is going to abstain from voting

***Is this a conflict of interest?***

***Why or why not?***

***Did the Councilor comply with ethics laws?***

