



ARCHITECTURAL REVIEW BOARD COMMISSION LEGAL TRAINING

OCTOBER 2, 2024 | ARB MEETING

INTRODUCTION

- **Goals for tonight...**
 - You don't need to be an expert
 - Try to gain tools to recognize issues
 - And then, ask for assistance!
- **Discussion Topics**
 - Authority
 - Public Meetings
 - Land Use Hearings
 - Roles, Criteria, Evidence, and the Final Decision



AUTHORITY

- **Remember You Can Act Only As A Body...**
 - **The Municipal Code does not grant power to individual Board Members.**
 - **Board Members are expected to abide by Board decisions, whether or not they voted on the prevailing side.**
 - **Personal opinions and comments should be expressed only if the member makes clear that they are acting in an individual capacity and not representing the City's position.**



OPEN/PUBLIC MEETINGS

- **Generally**
 - Under ORS 192.660 *et seq.*, elected and appointed officials must meet in public to make or deliberate towards decisions.
 - The purpose is to encourage transparency in government.
- **State law addresses public meetings in two ways:**
 - All meetings of a public body must be in public
 - All meetings of the governing body of a public body shall be open to the public and all persons shall be permitted to attend any meeting except [Executive Sessions]. 192.630(1)
 - A quorum may not meet in private
 - A quorum of a governing body may not meet in private for the purpose of deciding on or deliberating towards a decision on any matter except for [Executive Sessions]. 192.630(2).

NO PRIVATE MEETINGS

- **So...**
 - **If more than a majority of the Board meets outside an official public meeting and you are making or deliberating towards a decision then you have violated the public meeting laws.**
 - **Example: Assume five of the seven members of the Commission are all at the same school play and start discussing the merits of whether to approve a conditional use permit for the school. Have those members “met” in private for the purpose of deciding on or deliberating toward a decision?**

“SERIAL” MEETINGS

- **Serial meetings occur when a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action takes place between a quorum of a governing body.**
- **This is true even though at no given time does a quorum of the governing body communicate contemporaneously about the topic in question.**
 - **Example:** A Board Member forwards an email discussion they had with another Board Member regarding a matter that is pending before the Board Member to a third Board Member. The third Board Member then forwards the email chain to a fourth, who then forwards it to a fifth. Because the email messages, in the aggregate, include a quorum of the Board (5 of 7), and the purpose of the communications was to deliberate towards a decision, the email exchanges in the aggregate would likely constitute a serial meeting.

BEST PRACTICES

- **Board Members should refrain from using the “reply all” function on emails.**
- **Board Members should refrain from “serial communications” via e-mail, telephone, face-to-face or even social media postings, such as Facebook.**
- **Board Members should not use staff or other individuals as intermediaries.**
 - **Board Members can and should ask questions of staff that limits the communication between the staff and the Commissioner asking the question.**
- **Query...how to handle discussions with members of the community that could create a serial meeting...**

SOCIAL GATHERINGS

- **Can a quorum of a governing body meet in social settings?**
- **Yes, with a few caveats:**
 - **Must be purely social.**
 - **Governing body should avoid any discussion of official business.**
 - **At some point, such discussion may turn a social gathering into a meeting**
 - **Attendance at a conferences, trainings, etc. excluded from the definition of “meeting.”**

QUASI-JUDICIAL DECISIONS

- **Quasi-Judicial hearings require special procedures to protect due process rights of those involved.**
- **Must explain process and criteria (script).**
- **Must make disclosures (ex parte communications; bias and conflicts of interest).**
- **Must hold public hearing to take evidence.**
- **Must close hearing, then deliberate based solely on record and vote.**
- **Must have a final written decision with specific findings related to applicable criteria (staff will have a draft final order or if needed may bring back at future meeting).**

EX-PARTE COMMUNICATIONS

- **Ex Parte Communications in Quasi-Judicial Hearings:**
 1. **Any communication (written, oral or electronic)**
 2. **Made to a decision-maker**
 3. **Concerning the subject matter of the quasi-judicial hearing; and**
 4. **Occurs while the matter is pending (after a formal application is filed and before the final decision is made)**

BIAS

- **Bias Issues in Quasi-Judicial Hearings**
- **Bias occurs when a decision-maker does not provide the parties with a fair hearing due to prejudice or prejudgment (this can be in favor or against).**
- ✓ **Personal bias.**
- ✓ **Personal prejudice.**
- ✓ **Interest in the outcome.**
- **Established through actual evidence such explicit statements, pledges, commitments.**
- **Circumstantial evidence not enough.**

CONFLICT OF INTEREST

- **Conflict of Interests in Quasi-Judicial Hearings**
- **What is a conflict of interest?**
 - **A conflict of interest arises when a decision or recommendation you are making would or could result in a “private pecuniary benefit or detriment” to you, your relatives, or a businesses with which either you or your relatives are associated. Conflicts of interest come in two forms – actual conflicts and potential conflicts.**
- **What is the difference between an actual and potential conflict of interest?**
 - **An actual conflict of interest arises when any decision or act by you would result in a “private pecuniary benefit or detriment” to you, your relatives or an associated business; while a potential conflict arises when a decision or act by you could result in such an outcome.**

PUBLIC MEETINGS

- **Generally speaking, under state law, the public has a right to attend and observe but not participate in public meetings.**
- **Board may permit limited public participation, i.e., public comment period.**
- **Generally can establish time limits for public comment, but such standards need to be applied equally to all.**
- **May not remove a member of the public from a meeting unless you can clearly demonstrate the individual is disrupting the meeting in a manner that precludes your board or commission from conducting business.**



ARB MEMBER ROLE

- **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:** ARB 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 limits of ARB authority:** Recognize that even in your role as a decision-maker your authority has limits.
- **Interpret and apply zoning ordinance provisions. Apply facts to criteria:** Your planning staff will assist you.
- **Make decisions/recommendations:** Be courageous. Don’t avoid hard decisions.



STAFF ROLE

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

DECISION-MAKING CRITERIA

- **Application of pre-existing criteria to a set of facts**
- **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.**
- **Regarding interpretation of criteria, if the wording is clear and unambiguous, it must be followed regardless of legislative intent.**
- **If two provisions conflict, the more specific provision controls.**

EXAMPLE CRITERIA

- **Example criteria from *Architectural Review (Chapter 33)*:**
 - (d) *Large Commercial, Industrial, and Multifamily Development*. Applications for Large Commercial, Industrial, and Multifamily Development must comply with the applicable standards and objectives in TDC Chapter 73A through 73G
 - (a) Architectural Review decisions may include conditions of approval that apply restrictions and conditions that: (i) Implement identified public facilities and services needed to serve the proposed development; (ii) Implement identified public facilities and services needed to be altered or increased attributable to the impacts of the proposed development; and (iii) Implement the requirements of the Tualatin Development Code.
 - (b) Types of conditions of approval that may be imposed include, but are not limited to: (i) *Development Schedule*. A reasonable time schedule placed on construction activities associated with the proposed development, or portion of the development.



FINDINGS

- **Findings:** 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.
- **Common pitfalls:**
 - 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.



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.**
- **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.**

FINAL DECISIONS

A Final Decision may result in:

- 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 do 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.



QUESTIONS?

