



PLANNING COMMISSION LEGAL TRAINING

SEPTEMBER 20, 2023 | PLANNING COMMISSION

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 Commissioners.**
 - **Commissioners are expected to abide by Commission 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 Commission 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 Commission forwards an email discussion they had with another Commissioner regarding a matter that is pending before the Commission to a third Commissioner. The third Commissioner 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 Commission (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.

“SERIAL” MEETINGS

- **Example:** A citizen posts a comment on the city’s Facebook page about an upcoming land use hearing and the comment generates a discussion. Three members of the Commission make comments and share opinion on the Facebook “thread.” A fourth Commissioner reads the comments and also makes a comment. Because a quorum (4 Commissioners) have communicated opinions on the social media site on a matter that will require a vote before their body, the members may have created a serial meeting.

BEST PRACTICES

- **Commissioners should refrain from using the “reply all” function on emails.**
- **Commissioners should refrain from “serial communications” via e-mail, telephone, face-to-face or even social media postings, such as Facebook.**
- **Commissioners should not use staff or other individuals as intermediaries.**
 - **Commissioners 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.”**

LAND USE ROLES

- **Two types of roles in the Municipal Code: “Recommender” and Quasi-Judicial decision-maker?**
 - **“Recommender”:** Recommend and make suggestions to the Council regarding preparation and revision of plans for the growth, development, and beautification of areas both inside the corporate limits of Tualatin and also within the City's urban growth boundary [...] including [...] Land use, including Plan Text and Plan Map Amendments (PTA and PMA).
 - **Quasi-judicial:** sit as a judge; consider request by applying evidence to pre-existing criteria applicable to decision (state law, city code, Metro code); typically affects only one or a small group; must reach a decision (typically within 120 days); types: Conditional Use Permits, Variances, and Industrial Master Plans.

RECOMMENDATION

- **Similar to a legislative hearing (even for quasi-judicial matters), which is conducted as a public meeting with fewer procedural requirements.**
- **Does not require explanation of process and criteria; they are available in the staff report.**
- **Disclosures not required but encouraged (ex parte communications; bias and conflicts of interest).**
- **Note required to accept public testimony but highly encouraged.**
- **It is best practice to identify the basis for deliberations and vote, but not as strict as for quasi-judicial decision making.**
- **Written decision on recommendation is not required.**

QUASI-JUDICIAL

- **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 (typically staff will bring back at future meeting based on vote).**

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)**

EX-PARTE EXAMPLES

- **Ex Parte Communications (examples)**
- **Generally communications with staff or the city attorney are not ex parte when consulting regarding evidence provided or concerning interpretations of the code;**
- **Communications with a party or their attorney are ex parte communications;**
- **Site visits are considered ex parte communications;**
- **Other outside information, such as social media posts and newspaper articles are ex parte communications if urge a result and/or provide information you are relying on to make decision**

CURING EX-PARTE

- **Curing Ex Parte Communications**
 - 1. Announce that an ex parte communication occurred at the next public hearing immediately after the occurrence (before the public hearing begins or resumes).**
 - 2. Announce the nature and substance of the communication (specific enough to allow the parties to respond or offer evidence in rebuttal).**
 - 3. Allow parties to ask clarifying questions about the ex parte communications in order to be able to adequately respond.**

CURING EX-PARTE

- **Curing Ex Parte Communications**
- **Failure to adequately cure ex parte communications results in a violation of the rights of the parties**
 - ✓ **The right to be heard**
 - ✓ **The right to an impartial tribunal**
 - ✓ **The right to present and rebut evidence**
- **If an ex parte communication is not adequately cured, it could provide the basis for invalidating the underlying decision.**

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.**

CURING BIAS ISSUES

- **Bias Issues in Quasi-Judicial Hearings**
- **Better to announce issues of potential bias and declare ability to be impartial so as to avoid appearance issues or a basis to challenge decision after the fact.**
- **Once announced, allow parties to challenge participation if desired.**
- **If announced and not challenged, very unlikely that someone will be able to challenge later.**

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.**

CONFLICT OF INTEREST

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

CONFLICT OF INTEREST

- **Relatives include:**
 - ✓ **the spouse, parent, stepparent, child, sibling, stepsibling, son-in-law or daughter-in-law of the public official;**
 - ✓ **the parent, stepparent, child, sibling, stepsibling, son-in-law or daughter-in-law of the spouse of the public official;**
 - ✓ **any individual for whom the public official has a legal support obligation; and**
 - ✓ **any individual from whom the candidate receives benefits arising from that individual's employment.**

RESOLVING CONFLICTS

- **What do I do if I have a conflict?**
 - **For actual conflicts you must:**
 - 1. publicly announce the conflict; and**
 - 2. refrain from participation in any official action on the issue including any discussion of the matter.**
 - **For potential conflicts you must:**
 - 1. publicly announce the potential conflict every time the issue arises; and**
 - 2. after disclosure you may participate in any official action on the issue, including discussions and votes.**

PUBLIC MEETINGS

- **Generally speaking, under state law, the public has a right to attend and observe but not participate in public meetings.**
- **Commission 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.**

PLANNING COMMISSION 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:** 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.
- **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 Planning Commission
Explains land use	Staff's explanation 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

DECISION-MAKING 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:** 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.



PRECEDENCE

- **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.**
- **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?

