



City of Tualatin

City of Tualatin City Council Training February 27, 2023

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Introduction and Overview

- 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
 - Public Records

We only have 45 minutes so we will go quickly!



Authority

- Remember You Can Act Only As A Body...
 - Generally speaking, neither the Charter nor the Municipal Code grant power to individual councilors or the mayor to act on behalf of the City.
 - Members of council are expected to abide by council decisions, whether or not they voted on the prevailing side.
 - If an individual member of the council is authorized to represent the City before the public or another government agency, the member must support and advocate for the official city position on the issue.
 - 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.



What is a “meeting”?

- 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)



What is a “meeting”?

- “Meeting” means the convening of a governing body of a public body for which a **quorum** is required in order to **make a decision** or to **deliberate toward a decision** on any matter.
- “Meeting” does not include any on-site inspection of any project or program.
- “Meeting” also does not include the attendance of members of a governing body at any national, regional or state association to which the public body or the members belong.



What is a “meeting”?

- A gathering of less than a quorum of a governing body is not a “meeting.”
- Sub-committees of a body constitute governing bodies in and of themselves, and as such, the quorum would be a majority of the sub-committee.
- Remember, however, a quorum of a governing body may not **meet** in private for the purpose of **deciding on** or **deliberating toward** a decision on any matter.



When does a body “meet”?

- In *TriMet v. Amalgamated Transit Union Local 757*, 362 Or. 484, 412 P.3d 162 (2018), the Oregon Supreme Court explained that it is possible for a “quorum of a governing body” to “meet” in violation of ORS 192.630(2), even if there is no “meeting”.
- The Court determined that persons comprising a governing body can “meet” even when not “convening a meeting.”
- In other words, members of a governing body may violate the Oregon Public Meeting Law’s prohibition on meeting in private even if a quorum never gathers contemporaneously.



Prohibition on Private Meetings

- So...
 - If more than a majority of the Council 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 Council are all at the same school play and start discussing the merits of whether to propose the creation of a City grant program that would support performing arts in schools. 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.



Serial Meetings: examples

- A council member forwards an email discussion they had with another member regarding a matter that is pending before the council to a third member. The third member then forwards the email chain to a fourth member, who then forwards it to a fifth member. Because the email messages, in the aggregate, include a quorum of the board members (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 Communications: examples

- 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 Council make comments and share opinion on the Facebook "thread." A fourth member reads the comments and also makes a comment. Because a quorum (4 members) 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.



Public Meeting Best Practices

- Council members should refrain from using the “reply all” function on emails.
- Council members should refrain from “serial communications” via e-mail, telephone, face-to-face or even social media postings, such as Facebook.
- Council members should not use staff or other individuals as intermediaries.
- Query...how to handle discussions with members of the community that could create a serial meeting...



Public Meetings

- Executive Sessions:
 - Public bodies may meet in executive sessions only in specified situations.
 - An “executive session” is defined as “any meeting or part of a meeting of governing body that is closed to certain persons for deliberation on certain matters.”
 - The public body may hold an open session even when the law permits it to hold an executive session. A public body is authorized to hold closed sessions regarding the following subjects: Real Property Transactions; Exempt Public Records; Pending or Threatened Litigation; Employees; and Labor Negotiations.



Public Meetings

- Executive Sessions:
 - No executive session may be held for the purpose of taking any final action or making any final decision.
 - The purpose of the “final decision” requirement is to allow the public to know the results of the discussions. Taking a formal vote in open session satisfies that requirement, even if the public vote merely confirms consensus reached in executive session.
 - If the body meets in executive session, members should attempt to provide direction or consensus to staff. All contact with other parties must be left to the designated staff or representative(s) handling the issue.
 - Unless required by law, no member of the council should make public the discussions or information obtained in executive session.



Public Meetings

- Executive Sessions:
 - Must follow specific procedures when going into executive session.
 - The person presiding at the meeting must announce the statutory authority for the executive session before going into closed session.
 - The body must announce if they plan to return to open session to take action.
 - Media permitted to attend in most situations but may not report – can use information to follow other leads though!



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.
 - **Remember:** attendance at a conferences, trainings, etc. excluded from the definition of “meeting.”



Land Use Hearings

- Two types of land use hearings: Legislative and Quasi-Judicial?
- Legislative: sit as a legislator; consider enacting a law that applies broadly (creating criteria to apply later); must comply with state land use laws, city's comprehensive plan and Metro's urban growth management plan; no requirement or deadline to act.
- 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)



Land Use Hearings

- 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).



Land Use Hearings

- 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)



Land Use Hearings

- 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



Land Use Hearings

- Ex Parte Communications (examples)
- Communications with audience members during a recess about the substance of a hearing are ex parte communications;
- Communications after a vote but before the final written decision is issued are ex parte communications;
- Communications after decision but while on appeal to LUBA could be ex parte communications if LUBA remands the matter



Land Use Hearings

- 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.



Land Use Hearings

- 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.



Land Use Hearings

- 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



Land Use Hearings

- 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.



Land Use Hearings

- 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.



Land Use Hearings

- 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.



Land Use Hearings

- 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.



Land Use Hearings

- 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.**



Land Use Hearings

- Are there exceptions?
 - Nonprofits. The definition of a “business” does not include nonprofits where the associated public official receives no remuneration.
 - Class exception. Seek legal advice prior to relying on this exceptions.



Control of public meetings

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



Public Records

- Oregon law requires both inspection and preservation.
- Public records include any “writing” containing information relating to the conduct of the public’s business.
- The term “writing” is defined expansively by ORS 192.410(6) to mean: handwriting, typewriting, printing, photographing and every means of recording, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, files, facsimiles or electronic recordings.
- May charge reasonable fees for inspection.
- Exemptions exist that permit City to keep certain documents confidential.



Public Records

- City must follow record retention policy approved by Secretary of State archives division.
- Must keep one official copy of each record for applicable retention period.
- Destruction of public records in a manner inconsistent with the approved record retention policy is a criminal offense.



Public Records

- Duty extends to elected, not just employees (which means social media posts and emails to home computers must be retained).
- Even after individual e-mail messages are “deleted” from an individual’s computer work area, the messages may continue to exist on computer back-up tapes for at least a short period of time. E-mails on back-up tapes remain public records. As with any public record, a public body must make all nonexempt e-mail available for inspection and copying regardless of its storage location.



Questions

- Please feel free to call or email with any questions.
- Thank you!

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