



CLATSOP COUNTY PLANNING COMMISSION REGULAR MEETING AGENDA

GoTo Meeting

Tuesday, August 11, 2020 at 10:00 AM

GO TO MEETING

- [1.](#) Instructions on how to attend the GoTo Meeting via computer, tablet, smartphone or dial-in.

CALL MEETING TO ORDER

ROLL CALL

ADOPT AGENDA

BUSINESS FROM THE PUBLIC: This is an opportunity for anyone to give a brief presentation about any land use planning issue or county concern that is not on the agenda.

MINUTES:

- [1.](#) Minutes July 14, 2020

CODE CONSOLIDATION AND MODERNIZATION

COMPREHENSIVE PLAN UPDATE

SPECIAL PROJECTS UPDATE (verbal updates provided at meeting, unless otherwise noted.)

PROJECT STATUS REPORT

- [2.](#) Updated status of projects approved by the Planning Commission.

OTHER BUSINESS

- [3.](#) Informational item providing the Planning Commission members with a copy of the agenda package submitted for the Board of Commissioners Work Session on August 12. No further action is required by the Planning Commission at this time.
- [4.](#) Discussion item to identify materials that would be useful and relevant to orient new members appointed to the Planning Commission and to identify additional trainings that would be of benefit to all Planning Commission members.

ADJOURN

NOTE TO PLANNING COMMISSION MEMBERS: Please contact the Community Development Department (503-325-8611) if you are unable to attend this meeting.

ACCESSIBILITY: This meeting location is accessible to persons with disabilities. A request for an interpreter for the hearing impaired or for other accommodations for persons with disabilities should be made at least 48 hours prior to the meeting by contacting the Community Development Land Use Planning Division, 503-325-8611.



Clatsop County

Community Development – Planning

800 Exchange St., Suite 100
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Clatsop County Planning Commission Regular Meeting GoTo Meeting Instructions

During the COVID-19 pandemic, the Clatsop County Planning Commission remains committed to broad community engagement and transparency of government. To provide an opportunity for public testimony while physical distancing guidelines are in effect, the Commission will host virtual meetings on GoTo Meeting.

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Those wishing to provide testimony on public hearings or provide oral communication at the designated time must register in advance by calling 503-325-8611 or emailing ghenrikson@co.clatsop.or.us. You will be notified when your three-minute presentation is scheduled. Comments may also be submitted via email to ghenrikson@co.clatsop.or.us to be read at the meeting.

1 **Minutes of July 14, 2020**
2 **Clatsop County Planning Commission Regular Session**
3 **Online Meeting**
4

5 *The regular meeting was called to order at 10:00 a.m. by Chair Francis.*
6

7 **Commissioners Present**

Commissioners Excused

Staff Present

8 Bruce Francis

Gail Henrikson

9 Myrna Patrick

Clancie Adams

10 Robert Stricklin

Ian Sisson

11 Christopher Farrar

12 Nadia Gardner

13 John Orr

14 Lam Quang

15
16 **Adopt Agenda:**

17 *Commissioner Gardner moved and Commissioner Orr seconded to adopt the agenda as modified to include*
18 *introductions of new Commission members. Motion passed unanimously.*
19

20 **Introduction of Newly Appointed Commissioners:**

21 **Gail Henrikson** advised that the Board of County Commissioners met on June 24, 2020 and voted to reappoint
22 Commissioner Stricklin and Commissioner Farrar to the commission. They also appointed Lam Quang to fill the
23 position vacated by Mike Magyar. These appointments filled the available positions and the Commission is fully
24 staffed at this time.
25

26 **Commissioner Lam Quang** introduced himself and provided some background information. He thanked the
27 committee for the opportunity to serve.
28

29 **Business from the Public:**

30 **Beth Radich, 79117 Tide Road, Arch Cape, OR**

31 Ms. Radich addressed the need for affordable housing in the county. She feels the housing inventory would be
32 greatly increased by limiting the amount of short-term rental properties. This would provide the county with a
33 low cost opportunity to increase housing availability without new construction. She feels there has been a
34 massive increase of short-term rental properties, used as businesses. This is decreasing available residential
35 housing and resulting in a lack of engagement or investment in the community by property owners. She would
36 like to stop families from being displaced as long-term rentals are converted to short term rentals.
37

38 **Minutes:**

39 *Commissioner Patrick moved and Commissioner Farrar seconded to adopt the June 9, 2020 Clatsop County*
40 *Planning Commission Regular Meeting minutes as presented. Motion passed unanimously with Commissioner*
41 *Orr abstaining.*
42

43 **Comprehensive Plan Update, Gail Henrikson, Community Development Director:**

44 Ms. Henrikson advised that comprehensive plan review committee meetings were held in June to provide
45 participants an opportunity to reassess meeting schedules, test technology and plan for upcoming workloads. All
46 committees will be meeting in July (meeting dates were provided) to begin work on Goal 5, which addresses
47 open spaces, and historic and natural resources. It is expected that this will take a minimum of three months to
48 complete. DLCD will be conducting a virtual workshop on August 5, 2020, starting at 3:00 p.m. to discuss Goal 5
49 topics that are covered by statewide planning goals.
50

51 **Other Business:**

1 **Affordable Housing.** Discussion to identify impacts from rental evictions and identify possible land use strategies
2 and changes that will address the immediate housing and homeless crisis.

3 **Ms. Henrikson** provided statistics from the 2019 housing study regarding county population age breakdowns,
4 percentage of residents in rental properties and information on the legislative residential rental eviction
5 moratorium. The Commission reviewed House Bill 4212 and discussion ensued. Topics addressed:

- 6 • Overnight camping and yurts possibly allowed on private property
- 7 • Church and other organizations being allowed to provide space for those living in RV's and automobiles.
- 8 • Farm help housing options
- 9 • Possible uses for the current Astoria Jail building
- 10 • Tiny Houses and Accessory Dwelling Units (ADU's) used as long term, low income solutions. This could also
11 include living areas in converted basements, garages, etc.
- 12 • Amend current commercial zoning to allow multi-family residential units or commercial units with
13 residential housing located above them.
- 14 • Changes to existing statutory mandates being called emergency or temporary
- 15 • Providing incentives to property owners who rent long term while decreasing short term rentals by
16 introducing a lottery system for determining how many permits will be issued.

17 Commissioner Gardner will forward a summary of suggestions to Ms. Henrikson for presentation to the
18 commission members. If feedback from the commission members indicates agreement by all, these suggestions
19 will be presented to the Board of Commissioners without requiring further review at the August planning
20 commission meeting. Due to the lack of time available to deal with the looming crisis, the commission would like
21 to move forward with this as soon as possible.

22
23 ***As there was no further business or discussion, Chair Francis adjourned the meeting at 11:20 a.m.***

24
25 Respectfully Submitted,

26
27
28 _____
29 Bruce Francis
30 Chairperson - Planning Commission

CLATSOP COUNTY PROJECT UPDATE REPORT



AUGUST 2020

PROJECT STATUS REPORT – AUGUST 2020

| PERMIT # | PROJECT NAME | LOCATION | DESCRIPTION | PC MEETING DATE | PC DECISION | BOC MEETING DATES | BOC DECISION | STATUS | EXPIRATION DATE* |
|----------|----------------|--|---|--------------------|--|-------------------|--------------|--|------------------|
| 20170352 | Arch Cape Deli | T4N, R10W, Section 30BB, Tax Lots 00601 and 00605, 79330 Hwy 101 | Conditional use permit to construct and operate a restaurant/grocery store/flex space with a manager's living quarters | 11-14-17 | APPROVED WITH CONDITIONS 7-0 | N/A | N/A | No development permits or building permits issued ONE YEAR EXTENSION APPROVED 11-14-19 | 11-27-20 |
| 20180204 | James Neikes | T8N, R9W, Section 19AD, Tax Lot 01800 35399 Hwy 101 Business | Conditional use permit to expand a single, existing conditional use (3,600 square-foot mini-storage), to a mixed use to include a 900-square-foot residential component | 7-10-18 | APPROVED WITH CONDITIONS 4-0 | N/A | N/A | Under construction | N/A |
| 20190305 | McVay Livery | T8N, R06W, SEC. 36CA, TL00300 49215 HIGHWAY 30 | Conditional use request to change the use of an existing walk-up/drive-through eating and drinking establishment to a mixed-use residential and commercial establishment. | 7-26-19 8-13-19 | CONTINUED TO 8-13-19 MEETING APPROVED WITH CONDITIONS 6-0 | N/A | N/A | Site plan approved. Building permits not yet applied for. Building for sale; recent damage from auto collision | 8-25-21 |

PROJECT STATUS REPORT – AUGUST 2020

| PERMIT # | PROJECT NAME | LOCATION | DESCRIPTION | PC MEETING DATE | PC DECISION | BOC MEETING DATES | BOC DECISION | STATUS | EXPIRATION DATE* |
|----------------------|---------------------------|--|---|-----------------|------------------------------|-----------------------|--------------------|---|------------------|
| 20190512 20190513 | Benesch / Horton Trucking | 34850 HIGHWAY 101 BUSINESS T8N, R09, SEC. 30AC, TL02101 | Similar use request to determine “commercial trucking” use is similar to other uses in the Type II conditional use category in the RCC zone | 12-10-19 | APPROVED WITH CONDITIONS 4-0 | 1-8-20 | AFFIRM PC DECISION | Development permit and floodplain permit under review | 1-8-22 |
| 20-000031 | Kinney Watchman Quarters | 42852 OLD HIGHWAY 30 T8N, R07W, SEC. 20B, TL02100 | Conditional use request to establish a night watchman’s dwelling, accessory to an existing mixed-use construction / excavation equipment storage and trucking yard. | 3-10-20 | APPROVED WITH CONDITIONS 5-0 | N/A | N/A | Building permit issued 6-24-20 | 3-10-22 |
| 20-000088 | Code Consolidation | N/A | Consolidation of the Land and Water Development and Use Ordinance and the Clatsop County Standards Document | 6-9-20 | APPROVED | 8-4-20 (WORK SESSION) | | Under review by County Counsel | N/A |

*Expiration date for projects that are not completed or substantially completed



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TO: Clatsop County Planning Commission Members

FROM: Gail Henrikson, Community Development Director

DATE: August 11, 2020

**RE: BOARD OF COMMISSIONERS WORK SESSION – PLANNING COMMISSION
RECOMMENDATIONS REGARDING AFFORDABLE HOUSING, RESIDENTIAL
RENTAL EVICTION MORATORIUM, AND CORONAVIRUS**

On its July 14, 2020 regular meeting, the Planning Commission considered and recommended possible areas of action that the County might take in order to address the overlapping and evolving crises of affordable housing and possible residential rental evictions later in 2020 due to the coronavirus.

The Clatsop County Board of Commissioners will discuss those recommendations at a work session to be held at 5:00 p.m., Wednesday, August 12. The work session will be via the GoTo Meeting platform. The agenda for that work session, as of the date this memo was prepared, has not yet been published. However, a copy of the agenda package prepared by staff and submitted to the Secretary of the Board is attached.

This item is provided for informational purposes only and no further action by the Planning Commission is required at this time.

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Board of Commissioners Clatsop County

WORK SESSION AGENDA ITEM SUMMARY

August 12, 2020

Topic: Planning Commission Update
Presented By: Gail Henrikson, Community Development Director

**Informational
Summary:**

The bylaws of the Clatsop County Planning Commission state that the Planning Commission “shall make recommendations to the Board of Clatsop County Commissioners on the Comprehensive Plan and its implementing ordinances.”

At the Planning Commission’s regular meeting of February 12, 2019, Commissioner Stricklin requested that the Planning Commission continue to meet on its regularly scheduled meeting dates, even if no public hearings were scheduled, in order to address planning commissioners’ topics of interest. To that end, staff prepared a list of possible work topics, which was presented to the Planning Commission at its regular meeting of March 2019 for consideration and prioritization. The Planning Commission approved a prioritized list of work topics at its regular meeting of April 9, 2019 (**Exhibit A**).

As shown on Exhibit A, the highest priority identified by the Planning Commission was the issue of affordable housing. While the affordable housing discussion was originally predicated upon finding ways to provide permanent affordable workforce housing, the Planning Commission re-examined this approach in light of the ongoing coronavirus pandemic and its specific impacts on Clatsop County at its July 14, 2020 regular meeting. There is a very likely chance that the housing needs the county and cities may need to address in the upcoming months will be very different than the needs identified in the January 2019 Affordable Housing Study.

At the July 14, 2020 regular Planning Commission meeting, the members reviewed the following discussion items:

- Should Clatsop County encourage the use of overnight camping spaces on private property? If so, how should this message be promoted to the public? Should there be any additional requirements to address neighborhood concerns? Sanitation? Should there be a limit on the number of campsites per property?

- Strategy #6 in the *Clatsop County Housing Strategies Summary Report* encourages jurisdictions to “Facilitate ‘Missing Middle’ Housing Types in All Residential Zones.” This strategy would include larger multi-family apartment buildings and smaller structures that are more compatible with detached single-family neighborhoods. Allowing such uses “outright” as opposed to requiring a condition use application could facilitate “missing middle” housing such as duplexes, triplexes, garden or courtyard apartments, and townhomes.
- Strategy #7 in the *Housing Strategies Summary* is to “Encourage Cottage Cluster Housing.” While the consultants stated that this strategy should apply to all cities, it may be possible to incorporate it into certain zoning districts within unincorporated Clatsop County. “Cottage Clusters” are groups of small detached homes, usually oriented around a common green or courtyard, that can be located on individual lots, a single lot, or structured as condominiums.
- Strategy #8 in the *Housing Strategies Summary* encourages jurisdictions to “Promote Accessory Dwelling Units.” There have been previous discussions about amending the County’s zoning regulations to expand the zoning designations where accessory dwelling units (ADUs) would be permitted. ORS 215.501 would allow a “historic home” to be converted to an ADU if a new dwelling is constructed on the property. Clatsop County zoning codes on rural residential lands allows “guesthouses”, which are limited in size and cannot be rented out. However, these zones do not allow accessory dwelling units that could be rented out on a long-term basis.
- If accessory dwelling units are allowed in an expanded area of the county, should those units be allowed to be used as short-term rental or vacation rental units?
- One of the recommendations in the housing study was to amend commercial zoning regulations to allow multi-family residential dwellings units. Is this something that the Planning Commission would recommend to the Board of Commissioners for their consideration and direction to staff?

The Planning Commission prepared a set of recommendations (**Exhibit B**) for the Board of Commissioners to consider, prioritize and return to the Planning Commission for further work.

Attachment List

- A. July 14, 2020 Planning Commission Agenda Item
- B. Recommendations from July 14, 2020, Planning Commission meeting

EXHIBIT A

July 14, 2020

Planning Commission Agenda Item



Clatsop County

Community Development – Planning

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TO: Clatsop County Planning Commission Members

FROM: Gail Henrikson, Community Development Director

DATE: July 7, 2020

RE: **AFFORDABLE HOUSING, RESIDENTIAL RENTAL EVICTION MORATORIUM, AND CORONAVIRUS**

BACKGROUND

The bylaws of the Clatsop County Planning Commission state that the Planning Commission “shall make recommendations to the Board of Clatsop County Commissioners on the Comprehensive Plan and its implementing ordinances.”

At the Planning Commission’s regular meeting of February 12, 2019, Commissioner Stricklin requested that the Planning Commission continue to meet on its regularly scheduled meeting dates, even if no public hearings were scheduled, in order to address commissioner topics of interest. To that end, staff prepared a list of possible work topics, which was presented to the Planning Commission at its regular meeting of March 2019 for consideration and prioritization. The Planning Commission approved a prioritized list of work topics at its regular meeting of April 9, 2019 (**Exhibit A**).

As shown on Exhibit A, the highest priority identified by the Planning Commission was the issue of affordable housing. While the affordable housing discussion was originally predicated upon finding ways to provide permanent affordable workforce housing, the Planning Commission may wish to re-examine this approach in light of the ongoing coronavirus pandemic and its specific impacts on Clatsop County. As will be detailed below, there is a very likely chance that the housing needs the county and cities may need to address in the upcoming months will be very different than the needs identified in the January 2019 study.

PRE-CORONAVIRUS CONDITIONS

Even prior to the declaration of the coronavirus pandemic, securing safe, permanent, affordable housing within Clatsop County was challenging for many households. In 2018, Clatsop County, in conjunction with the cities of Astoria, Warrenton, Gearhart, Seaside and Cannon Beach, began a coordinated effort to identify causes of and possible solutions to the county-wide affordable housing crisis. In January 2019, the *Clatsop County Housing Trends & Needs Report* (**Exhibit B**) final report was released.

At the time the housing trends report was completed, it was estimated that there was a total of 22,673 housing units in the county (incorporated and unincorporated areas), with a household size of 2.32 persons per household. Per capita and median household income, based on 2018 data, was estimated at \$27,895 and \$49,828, respectively. Approximately 12% of the entire estimated county population of 39,200 had household incomes that were below the federal poverty level. Both the cities of Seaside and Astoria had 16% of their incorporated populations with incomes below the federal poverty level.

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FIGURE 1.2: DEMOGRAPHIC PROFILE AND TRENDS (CLATSOP COUNTY)

| POPULATION, HOUSEHOLDS, FAMILIES, AND YEAR-ROUND HOUSING UNITS | | | | | |
|---|-----------------|-----------------|---------------|----------------|---------------|
| | 2000 | 2010 | Growth | 2018 | Growth |
| | (Census) | (Census) | 00-10 | (PSU) | 10-18 |
| Population ¹ | 35,630 | 37,039 | 4.0% | 39,200 | 5.8% |
| Households ² | 14,703 | 15,742 | 7.1% | 16,460 | 4.6% |
| Families ³ | 9,450 | 9,579 | 1% | 10,015 | 5% |
| Housing Units ⁴ | 19,685 | 21,546 | 9% | 22,673 | 5% |
| Group Quarters Population ⁵ | 1,121 | 956 | -15% | 1,012 | 6% |
| <i>Household Size (non-group)</i> | 2.35 | 2.29 | -3% | 2.32 | 1% |
| <i>Avg. Family Size</i> | 2.88 | 2.85 | -1% | 2.90 | 2% |
| PER CAPITA AND MEDIAN HOUSEHOLD INCOME | | | | | |
| | 2000 | 2010 | Growth | 2018 | Growth |
| | (Census) | (Census) | 00-10 | (Proj.) | 10-18 |
| Per Capita (\$) | \$19,515 | \$26,221 | 34% | \$27,895 | 6% |
| Median HH (\$) | \$36,301 | \$44,330 | 22% | \$49,828 | 12% |

SOURCE: Census, PSU Population Research Center, and Johnson Economics

Census Tables: DP-1 (2000, 2010); DP-3 (2000); S1901; S19301

¹ From PSU Population Research Center, Population Forecast Program, final forecast for Clatsop Co. (2017)

² 2018 Households = (2018 population - Group Quarters Population)/2018 HH Size

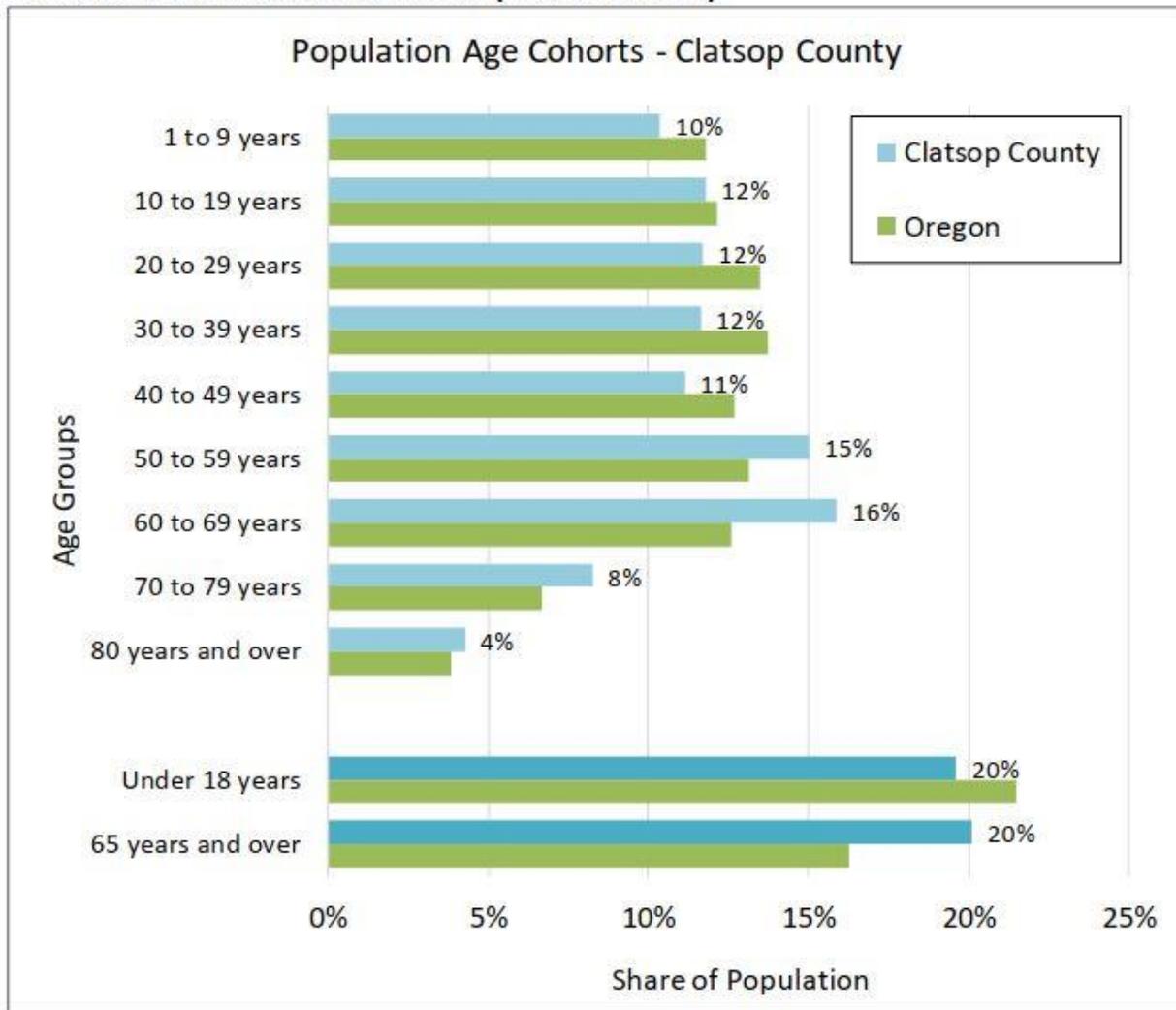
³ Ratio of 2018 Families to total HH is based on 2016 ACS 5-year Estimates

⁴ 2018 housing units are the '10 Census total plus new units permitted from '10 through '18 (source: Census, Cities)

⁵ Ratio of 2018 Group Quarters Population to Total Population is kept constant from 2010.

The study further estimated that as of 2018, 20% of the county population was below 18 years in age and 20% of the population was over 65 years in age. These are two age cohorts that are less likely to participate in the workforce and may be considered among the most vulnerable of the county's population. Additionally, the U.S. Centers for Disease Control has identified persons over 60 years of age, particularly those with underlying health conditions, to be one of the populations most at risk to contract coronavirus.

FIGURE 1.4 POPULATION BY AGE COHORT (CLATSOP COUNTY)

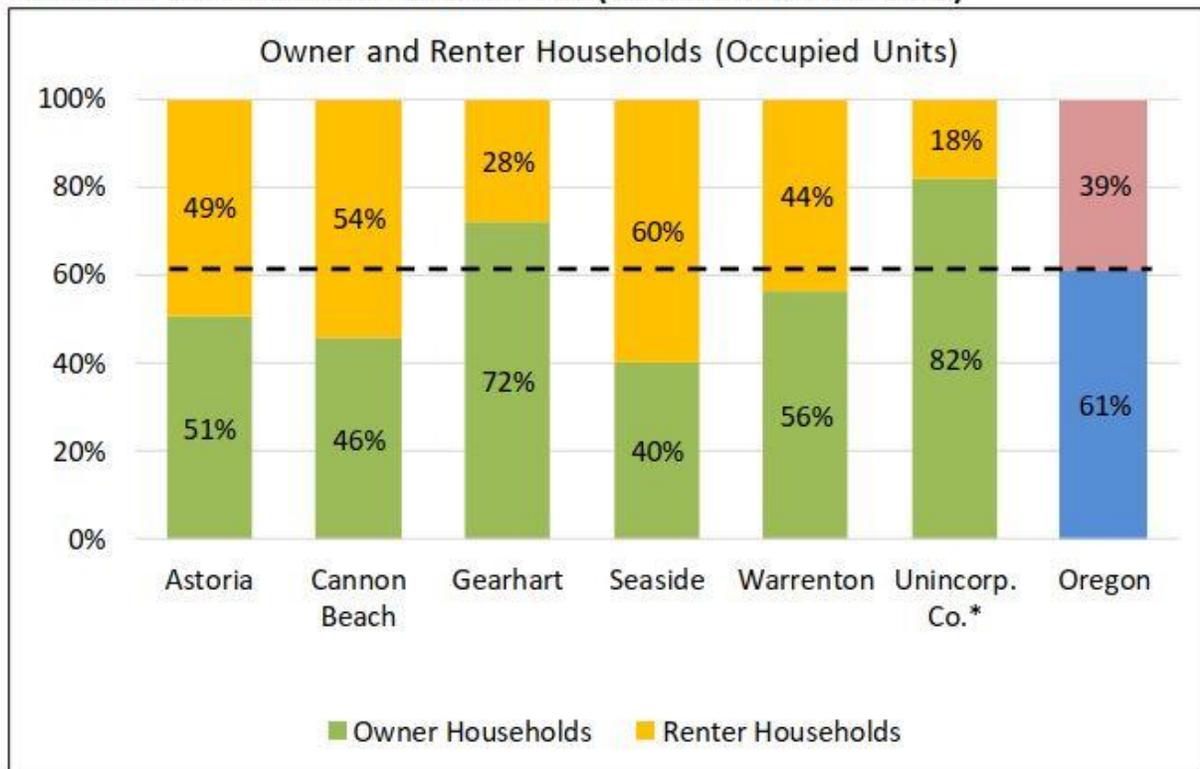


Source: American Community Survey, 2017 5-Year, S0101

With regard to owner-occupied dwellings versus renter-occupied dwellings, the housing study estimated that 18% of households within unincorporated Clatsop County were renter-occupied, versus 82% of unincorporated housing units that were owner-occupied. Conversely, the number of renter-occupied units within the incorporated limits of Seaside was 60%.

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FIGURE 1.7: TENURE OF OCCUPIED HOUSEHOLDS (CLATSOP COUNTY AND CITIES)



Source: American Community Survey, 2017 5-Year, B25007

* Unincorporated statistic is estimated; geography not available from Census

DURING-CORONAVIRUS CONDITIONS

Due to temporary shut-downs and permanent business closures, unemployment reached 24.2% in Clatsop County in April 2020 ([Exhibit C](#)). Accommodation and food services, which constitute approximately 18% of the employment by industry sector (US Bureau of Economic Analysis), was especially hard-hit as restaurants, bars and transient lodging accommodations were almost entirely closed down to halt the spread of the virus.

Population estimates from the U.S. Census Bureau from July 1, 2019, indicate that approximately 8.6% of Clatsop County’s population is of Hispanic or Latino origin. This community has been disproportionately affected by coronavirus within the county, with the Clatsop County Public Health Department stating that of 38 coronavirus cases directly linked to outbreaks at local seafood processors, 84% of those workers that tested positive are of Hispanic origin (*Daily Astorian*, June 3, 2020).

Emergency Legislation – Economic Assistance

Initial steps taken by the federal government in March 2020, including a one-time stimulus check and enhanced unemployment benefits, have been completed or will expire in July 2020. At this time, it is uncertain what, if any, additional emergency funding may be made available to individuals and families.

Emergency Legislation – Residential Rental Eviction Moratoria

Statewide, Governor Brown initially issued a rental eviction moratorium on March 22, 2020 (Emergency

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Order 20-13), which was in effect for 90 days. The Oregon state legislature, during its emergency session in June 2020, adopted HB 4213 ([Exhibit D](#)), which extends the rental eviction moratorium through September 30, 2020, and provides a grace period for renters to repay back rent, which will expire on March 31, 2021. There is concern, however, that despite these restrictions, as Oregon courts reopen, eviction cases will move forward through the court system, potentially resulting in thousands of households losing shelter over the next several months. The moratoria only prohibit eviction for non-payment of rent or “no cause” evictions.

Emergency Legislation – Emergency Shelters and Vehicle Camping

Also during the June 2020 Special Session, the Oregon Legislature adopted HB 4212 ([Exhibit E](#)), which requires local governments to approve an application for the development or use of land for an emergency shelter or any property under certain conditions, notwithstanding any statewide plan, rule or local land use regulation, zoning ordinance, regional framework plan, functional plan, or comprehensive plan. “Emergency shelter” is defined as a building that provides temporary shelter for individuals or families lacking permanent homes. The facility must meet applicable building codes and local standards for natural hazards, be located within an urban growth boundary or an area zoned for rural residential use, and must not pose an unreasonable risk to public health or safety.

HB 4212 stipulates that the approval of an emergency shelter is not a land use decision and is only subject to review against ORS 34.010 to 34.100. Siting such a shelter ends 90 days after the effective date of HB 4212, but allows for approval of an application that was completed and submitted prior to the sunset date.

HB 4212 also allows local government to authorize any number of overnight camping spaces on a person’s property for homeless individuals who are living in vehicles. Local governments are allowed to regulate vehicle camping spaces as transitional housing accommodations under ORS 446.265. This authority also sunsets 90 days after the effective date of HB 4212 (June 30, 2020).

POST-CORONAVIRUS (ANTICIPATED) CONDITIONS

Rise in Residential Rental Evictions

Until such time as the virus is eradicated, there will likely be continued uncertainty with regard to personal health risks and the economy. Because of the potential for sustained high levels of unemployment in certain sectors of the economy, it is unclear how long eviction moratoria will be able to be continued. If, as is predicted by the COVID-19 Eviction Defense Project (CEDP), one in five renter households are at risk of eviction, the results would likely be highly devastating to Clatsop County. Per information from the US Census Bureau as of July 1, 2019, there are an estimated 15,910 households within all of Clatsop County, who live in an estimated 22,774 housing units. The owner-occupied rate of those housing units was 61.7%, meaning that renter-occupancy countywide was 38.3%. Multiplying the total number of households (15,910) by 38.3% yields a total of 6,094 renter households. The U.S. Census Bureau also reports a household occupancy rate of 2.37 persons per household. A 20% (one-one-in-five) eviction rate could conceivably leave over 1,200 households and over 2,800 persons, including children and adults over age 65, without housing.

What Types of Housing May be Needed?

If economic recovery remains stalled and if evictions do substantially increase, the affordable housing needs of Clatsop County will also change. Previously-discussed efforts to increase affordable housing

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stock had been focused on shelter and dwellings for a minimum-wage, service-industry workforce. Oftentimes, these types of accommodations took the form of dormitories or communal housing. That vision may now need to be reconsidered given the challenges to communal living arrangements presented by the pandemic.

Conversely, because wages and employment may continue to be depressed for several months, if not years, workers and residents may face greater pressures to share housing in order to reduce rental expenses. Smaller housing units, whether apartments, duplexes or triplexes may assist with addressing some of the expense concerns, but even those units may remain economically infeasible for many households. It may be that new types of dwellings, both structurally and functionally, may need to be developed to address the multiple and conflicting concerns that may arise during this time.

Funding Sources

Additionally, funding sources for housing may change. In April 2020, the Clatsop County Board of Commissioners established grand funding of \$100,000 for community organizations that provide programs and assistance for shelter, food, and other critical social services. Previous discussions have also focused on methods to incentivize the construction of workforce and affordable housing. Some of those incentives have included certain permit fee waivers or payment delays. As states, cities and counties grapple with unknown and unplanned budget shortfalls over the next several years, decisions will need to be made as to whether such monetary incentives are still feasible or even fiscally prudent.

DISCUSSION

Because the current situation evolves almost daily both locally, statewide, nationally and internationally, it is difficult to predict with any accuracy what needs may arise and when. The purpose of this Planning Commission item is to best identify areas where Clatsop County can proactively make preparations to assist residents within the unincorporated areas or collaborate to assist cities. Much of the assistance, should it be needed, will come in the form of monetary assistance. However, there are areas related to land use issues where the Planning Commission could identify recommended strategies that the Board of Commissioners could consider:

- Should Clatsop County encourage the use of overnight camping spaces on private property? If so, how should this message be promoted to the public? Should there be any additional requirements to address neighborhood concerns? Sanitation? Should there be a limit on the number of campsites per property?
- Strategy #6 in the *Clatsop County Housing Strategies Summary Report* ([Exhibit F](#)) encourages jurisdictions to “Facilitate ‘Missing Middle’ Housing Types in All Residential Zones.” This strategy would include larger multi-family apartment buildings and smaller structures that are more compatible with detached single-family neighborhoods. Allowing such uses “outright” as opposed to requiring a condition use application could facilitate “missing middle” housing such as duplexes, triplexes, garden or courtyard apartments, and townhomes.
- Strategy #7 in the *Housing Strategies Summary* is to “Encourage Cottage Cluster Housing.” While the consultants stated that this strategy should apply to all cities, it may be possible to incorporate it into certain zoning districts within unincorporated Clatsop County. “Cottage Clusters” are groups of small detached homes, usually oriented around a common green or courtyard, that can be located on individual lots, a single lot, or structured as condominiums.
- Strategy #8 in the *Housing Strategies Summary* encourages jurisdictions to “Promote Accessory

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Dwelling Units.” There have been previous discussions about amending the County’s zoning regulations to expand the zoning designations where accessory dwelling units (ADUs) would be permitted. ORS 215.501 ([Exhibit G](#)) would allow a “historic home” to be converted to an ADU if a new dwelling is constructed on the property. Clatsop County zoning codes on rural residential lands allows “guesthouses”, which are limited in size and cannot be rented out. However, these zones do not allow accessory dwelling units that could be rented out on a long-term basis.

- If accessory dwelling units are allowed in an expanded area of the county, should those units be allowed to be used as short-term rental or vacation rental units?
- One of the recommendations in the housing study was to amend commercial zoning regulations to allow multi-family residential dwellings units. Is this something that the Planning Commission would recommend to the Board of Commissioners for their consideration and direction to staff?

DIRECTION

The purpose of this discussion is to provide input on land use considerations related to pandemic-induced housing issues in order to address repercussions to residents, workers and business owners from the pandemic. Recommended strategies and considerations identified by the Planning Commission will be forwarded by planning staff to County Management and the Board of Commissioners for their consideration.

EXHIBIT LIST

- EXHIBIT A:** Planning Commission prioritized list of work topics (April 2019)
- EXHIBIT B:** [Clatsop County Housing Trends & Needs Report Appendix A \(January 2019\)](#)
- EXHIBIT C:** State of Oregon Employment Department [May 2020 Employment and Unemployment in Oregon’s Counties](#)
- EXHIBIT D:** [HB 4213](#) and [Summary](#)
- EXHIBIT E:** [HB 4212](#)
- EXHIBIT F:** [Clatsop County Housing Strategies Summary Report](#)
- EXHIBIT G:** [ORS 215.501 Accessory Dwelling Units in Rural Residential Zones](#)

ADDITIONAL RESOURCES

- <https://www.co.clatsop.or.us/county/page/grant-program-aimed-local-coronavirus-impacts>
- <https://www.opb.org/news/article/oregon-eviction-moratorium-what-you-need-to-know-rent/>

For project information and updates, visit us on the web!
www.co.clatsop.or.us/landuse/page/comprehensive-plan-update
www.facebook.com/ClatsopCD

PLANNING COMMISSION AGENDA ITEM EXHIBIT A

Planning Commission Prioritized List of Projects

Future Planning Commission Topics

| TOPIC | PRIORITY | DATE |
|---|----------|------|
| Comprehensive Plan Updates | 5 | |
| Affordable Housing / ADUs | 1 | |
| Reducing Public Debt | 4 | |
| Transportation | 2 | |
| Parks Natural Areas | 6 | |
| Wildlife Corridors | 7 | |
| Timberlands | 8 | |
| Water Resources | 9 | |
| Economic Development | 3 | |
| Climate Change | 10 | |
| Planning and Homelessness | 11 | |
| Limits on Desirability of Continued Growth | 12 | |
| Negative impacts on Clatsop County in the Next 30 Years | 13 | |

EXHIBIT B

*Recommendations from July 14, 2020
Planning Commission Meeting*



Clatsop County

Community Development – Planning

800 Exchange St., Suite 100
Astoria, OR 97103
(503) 325-8611 phone
(503) 338-3606 fax
www.co.clatsop.or.us

TO: Clatsop County Board of Commissioners

FROM: Clatsop County Planning Commissioners

DATE: July 14, 2020

RE: RECOMMENDATIONS REGARDING AFFORDABLE HOUSING, RESIDENTIAL RENTAL EVICTION MORATORIUM, AND CORONAVIRUS

Due to the current housing and houselessness crisis, the Planning Commission recommends that the County focus on the solutions that could be analyzed, potentially implemented and provide results most quickly.

Affordable Housing & Houselessness Campaign

The Planning Commission recommends that the County share with the public information regarding the current affordable housing & houselessness crisis, especially in the face of the pandemic. The campaign could share information about what is currently legal in the county – e.g. renting a room, building a duplex or Accessory Dwelling Unit – and encourage people to be part of the solution by providing long-term rentals. The campaign could produce press releases, brochures, webpages and social media posts.

Accessory Dwelling Units (ADUs)

The Clatsop County Housing Strategies Summary Report states:

Strategy #8: Promote Accessory Dwelling Units

An Accessory Dwelling Unit (ADU) is a secondary dwelling unit on the same lot as a single-family house that is smaller than the primary dwelling. ADUs can be a detached structure, an attached addition, or a conversion of internal living space in the primary dwelling. The State recently began requiring cities with a population of over 2,500 and counties with a population over 10,000 to allow ADUs outright on any lot where single-family housing is allowed. Clatsop County and the cities of Astoria, Cannon Beach, and Warrenton currently allow ADUs; however, a conditional use permit is required for ADUs in some locations. In other locations, ADUs are not permitted, but a smaller, temporary guesthouse is. A guesthouse is limited in size, cannot be rented, and must be connected to the same utility meters as the primary house.

The State's Model Development for Small Cities recommends the following provisions:

- Allow the ADU to be up to 900 square feet or 75% of the primary dwelling, whichever is less
- Do not require an off-street parking space for the ADU in addition to the spaces required for the primary dwelling
- Do not require that the owner of the primary dwelling reside either in the primary dwelling or the ADU
- Minimize special design standards that apply to the ADU

addition

The Planning Commission recommends that the County look at these potential changes to the code this fall.

Short Term Rentals

The Clatsop County Housing Strategies Summary Report states:

Strategy #10: Limit Short-Term Rental Uses in Residential Zones

The prevalence of short-term or vacation rental uses in Clatsop County is consuming a substantial share of the existing housing stock and is contributing to an overall housing shortage. Short-term rentals should be classified as a commercial use when considered as part of a broad analysis of land needs and supply, as required by Oregon's statewide planning goals and land use system. Given that some areas in the County are experiencing shortages of residential land supply, and all communities are facing shortages for some types of housing, the consumption of residential land and housing units by short-term rental uses is an issue that must be addressed as part of a complete housing strategy. Rules that address short-term rentals can include:

- Limit this activity to certain zones or geographies
- Limit the number permitted
- Establish use and occupancy standards that set expectations for how this activity should be conducted
- Adopt an official definition of short-term rentals as distinct from longer rentals, and/or as a commercial activity
- Require business licensing, and track unregistered short-term rentals
- Collect taxes and assess penalty fees

The Planning Commission recommends that the County look at potential changes to the code this fall.

Camping

The Planning Commission does not recommend that the County encourage increased camping in unincorporated areas at this time. However, we encourage the cities and houselessness-focused organizations and churches to explore centralized camping areas with services. We also encourage the County to look at the old jail as a possible facility to support those who lose their homes due to the crisis.

Long-term, the Planning Commission is also interested in exploring Strategies 4, (Housing in Commercial Areas), 6 (Missing Middle Housing) and 7 (Cottage Clusters) as discussed in the January 2019 *Clatsop County Housing Trends Needs Report*.

For project information and updates, visit us on the web!
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Clatsop County

Community Development – Planning

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TO: Clatsop County Planning Commission Members

FROM: Gail Henrikson, Community Development Director

DATE: August 11, 2020

RE: **PLANNING COMMISSIONER HANDBOOK AND TRAINING**

At this time, there is not a formal process in place to orient new members who are appointed to the Planning Commission. While Department of Land Conservation and Development staff provided a training for Planning Commission members in December 2018, no additional training has been scheduled or provided since that time.

It appears that prior to 2016/2017 staff had prepared a handbook for incoming Planning Commissioners (attached). However, some of that information may now be outdated, no longer relevant, or there may be new topics of which Planning Commissioners should be advised.

The current Planning Commission membership consists of persons with a variety of backgrounds and experience with local government. Staff would like to use that diversity to assist in preparing an updated orientation handbook and process. Specifically, staff is asking for input on the following questions:

1. What information from the previous handbook should be retained?
2. What new information should be added?
3. What information would be of value to new Planning Commission members who have never served in local government?
4. What additional trainings, if any, would Planning Commissioners benefit from?
5. Is a paper copy or electronic copy preferred?
6. Other items?

Links to other jurisdictions' orientation materials are provided below.

- [Department of Land Conservation and Development](#)
- [Lincoln City](#)
- [Eugene](#)
- [Ottawa County, Michigan](#)
- [The Florida Planning Officials Handbook](#)

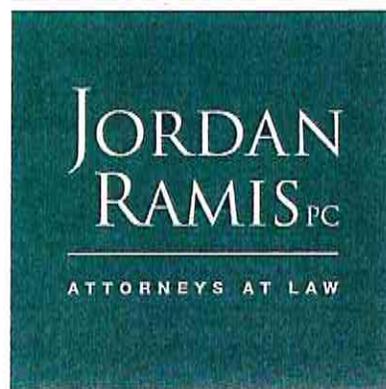
For project information and updates, visit us on the web!
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www.facebook.com/ClatsopCD

CLATSOP COUNTY
BOARD OF COUNTY
COMMISSIONERS
AND
PLANNING COMMISSION

LAND USE HEARING
SUBSTANCE AND
PROCEDURE TRAINING

Presented by:

Timothy V. Ramis



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COUNTY COMMISSION AND PLANNING COMMISSION LAND USE HEARING SUBSTANCE AND PROCEDURE

I. HEARING PROCEDURES

A. General Background.

The source of most procedural requirements for land use hearings in Oregon is the 1972 case *Fasano v. Board of Commissioners of Washington County*, a case involving a request for a zone change to accommodate a trailer park. The case is significant because in it the Supreme Court first stated the principle that parties to a quasi-judicial proceeding¹ are entitled to have the hearing conducted in conformance with Constitutional procedural due process, and that in order to achieve due process, the hearing tribunal must adhere to certain standards for the conduct of the hearing, reaching its decision, and reduce that decision to writing. Although the *Fasano* decision has been refined over the years, it remains good law and is the beginning of any discussion of Oregon land use hearing procedures. The elements of procedural due process are: the opportunity to present and rebut evidence, the right to a decision based on the record and supported by adequate findings, and the right to an impartial tribunal.

B. The Elements of Due Process.

1. The Opportunity to Present and Rebut Evidence.

Every party to a quasi-judicial hearing has the right to present evidence and to rebut all the evidence presented by the other parties. These rights generate several significant procedural requirements for the conduct of hearings. What constitutes "evidence" will be discussed below.

The opportunity to present evidence may be preserved by the hearing body even though limits may be set on the manner of presentation. Such limits might include time limits on oral presentations, requiring submittal of certain materials in writing before the hearing, or setting a minimum time before the hearing in which written evidence must be submitted.

The opportunity to rebut evidence creates more complicated procedural requirements. If a party is to rebut evidence, it follows that that party must (a) know what the evidence is and (b) have an opportunity to speak or to submit written materials after the evidence is introduced.

¹ Quasi-judicial proceedings are generally defined as involving either only a few parties or affecting relatively small tracts of land. Contrast this with legislative matters, which are broad in scope, affecting large tracts of land or a large number of people. Examples of quasi-judicial proceedings are conditional use permits and subdivisions; examples of legislative proceedings are text amendments and major general plan amendments.

a. Knowing What the Evidence Is.

The parties will, if they are present at the hearing, know what oral testimony is introduced and what written exhibits are received. But there are ways in which evidence from outside the hearing room may enter into the decision-maker's deliberations, and unless the parties know what this evidence is and are given a chance to refute or rebut it, the decision may be overturned as procedurally flawed.

The two basic means by which so-called "external" evidence may enter into a decision are by means of ex parte contacts and site visits. For purposes of procedural due process, it is important to remember that this external evidence is not necessarily bad; it simply must be placed on the record, out in the open, to allow every interested person to know of its existence and to attempt to refute it.

b. Opportunity to Rebut.

The evidence is now out in the open. The tribunal must now ensure that those adversely affected by the evidence have a chance to refute it. This means they must be given a chance to speak or submit written rebuttal after the evidence is introduced. If the applicant, for example, presents its case, and opponents of the proposal present new information, the applicant must then be given a chance to rebut that information. Two areas for caution: first, this back-and-forth introduction of new evidence/rebuttal between the sides need not go on indefinitely; the hearing tribunal may set limits on the introduction of new material. Second, once the public hearing is closed, no new material must be introduced or accepted, or it will necessitate re-opening the hearing. The tribunal must refrain from asking questions after the close of the hearing to prevent potential re-opening of the hearing for rebuttal purposes. Questions of staff which do not generate new evidence are permitted even after the hearing is closed. ORS 197.763 requires that any new evidence presented at the hearing in support of an application gives an automatic right to continuance to anyone who requests it. The tribunal may limit the continued hearing to consider only those new issues.

2. The Record.

The parties have now introduced everything they wish to introduce and the hearing is closed. What is the "record" of the hearing on which the decision must be based? The record is significant in that it is the document which may be reviewed on appeal should an appeal occur.

The record includes all the evidence "placed before" the tribunal during the hearing, including maps, photographs and all written items submitted. The record also includes the oral testimony. Generally, the minutes suffice to preserve the oral testimony but in cases where the accuracy of the minutes is disputed or they are not sufficiently complete, a full transcript may be prepared. Again, ORS 197.763

contains changes in procedures relating to the record. Before the hearing is closed, any party can request that the record remain open for seven days. This delays the final decision.

3. "Evidence" in Land Use Cases.

Somewhere in this "record" is the evidence which must be the basis of the tribunal's decision. "Evidence" in land use cases is not necessarily "evidence" which would be acceptable in a court of law, since the rules are much more relaxed in land use settings. For example, witnesses may or may not be sworn in to testify in land use cases, and even hearsay evidence can be accepted.

The rule of thumb to determine whether the evidence in the record is adequate to support the decision reached is the standard used in administrative law: is it the kind of evidence on which reasonable persons rely in the conduct of their own affairs? The test is basic reliability or trustworthiness of the evidence. This obviously allows a great deal of discretion on the part of the hearing body to determine whether the evidence should be accepted.

a. "Substantial" Evidence.

The decision must not only be based on reliable evidence in the record, but the quantity of that evidence must be substantial. The evidence need not be uncontroverted or even voluminous. There may be some inconsistencies in the evidence presented. The key issue is whether the evidence in support of the decision, when viewed in light of any contrary evidence, was still sufficient that a reasonable person could rely on it. The reviewing body on appeal will not disturb a decision based on substantial evidence even if there is conflicting evidence in the record, as long as the findings are sufficient as to why certain evidence was believed sufficient.

b. Procedures of Admitting Evidence.

If doubts as to whether evidence is reliable or relevant arise during the hearing (i.e., lots of hearsay, signed petitions introduced that night), the best procedure is to admit the evidence. If another party objects, the evidence may still be accepted and a decision on whether to admit it into the record can be made at the time the order is written (the hearing body will have to give direction on this issue before adoption of an order). There may be evidence which for some reason is not advisable to admit. The attorney will offer direction in such event.

4. ORS 197.763 - "Raise It or Waive It"

The provisions of ORS 197.763 require local governments to give detailed notice and follow certain procedural requirements at quasi-judicial land use hearings. In exchange for compliance with these notice and procedure requirements, the local government receives the benefit of a demand placed on participants that calls for all

issues to be raised during the local proceedings. Any issues not raised at the local proceedings are waived if the matter is taken up on appeal to LUBA. The benefit to the County from this “raise it or waive it” provision is that fewer LUBA appeals are remanded back to the local level to address new issues raised for the first time at LUBA.

- a. **Notice of hearing:** The notice of hearing must explain the nature of the application and the proposed use or uses which could be authorized, and it must list the criteria that apply to the application. The notice must also include a warning that failure to raise an issue with sufficient specificity to give the local decision maker an opportunity to respond to that issue precludes LUBA appeal based on that issue. Furthermore, the notice of hearing must contain a general explanation of procedure for the conduct of the hearing and presentation of evidence, including an explanation of the right to request a continuance if new evidence in support of an application is submitted.
- b. **Distribution of notice:** ORS 197.763 requires notice to property owners within 100 feet and to a recognized neighborhood organization whose boundaries include the site.
- c. **Staff report:** Any staff report used at the hearing shall be available at least seven days prior to the hearing.
- d. **Statement by chair at commencement of hearing:** At the beginning of the hearing, a statement must be made that enumerates the applicable criteria, directs participants to address their testimony and evidence to applicable criteria, and states that “failure to raise an issue with sufficient specificity to afford the decision maker and the parties an adequate opportunity to respond to the issues precludes appeal to LUBA based on that issue.”
- e. **Continuances:** As described in the notice of hearing, any party can request a continuance if additional evidence in support of an application is received after the notice of hearing is given. In most instances, a continuance will not be warranted if the applicant limits its presentation at the hearing to a discussion of the evidence previously submitted and rebuttal of evidence presented by opponents.
- f. **Leaving the record open:** Unless a continuance has been granted, any participant may request that the record remain open for at least seven days after the hearing. If new issues are raised when additional evidence is submitted during this period, the record may need to be reopened to allow rebuttal.
- g. **Compliance with procedures:** Failure to comply with the notice and procedure requirements of ORS 197.763 constitutes procedural error, which will result in reversal or remand if the error caused prejudice to the

petitioner's substantial rights. However, if the petitioner had the opportunity to object to the procedural error before the local governing body but failed to do so, then the error cannot be assigned as grounds for reversal or remand.

An additional consequence of failure to comply with the notice and procedure requirements of ORS 197.763 is that such failure invalidates the "raise it or waive it" concept. That is, if the local body fails to comply with the notice and procedure requirements, a petitioner will be allowed to raise issues on appeal before LUBA that were not raised before the local governing body.

- h. **Conclusion:** Local governments must pay careful attention to the notice and procedure requirements of ORS 197.763 to make sure that cases on appeal to LUBA are not reversed or remanded and that the beneficial limiting effects of the "raise it or waive it" provisions are not lost.

5. Impartial Tribunal.

The parties to a quasi-judicial land use proceeding have a right to what is known as an "impartial tribunal." The hearing body acts as judge or arbitrator and must therefore be free of personal interest or bias. In the course of a particular proceeding, certain situations may arise that challenge the ability of the hearings body to make a decision in an impartial and uninterested manner. These situations include ex parte contacts, site visits, conflicts of interest, and bias. The following sections identify when these situations arise and examine the procedural requirements that should be followed to avoid having a decision reversed or remanded on appeal.

a. Ex parte Contacts

i. What are they?

Ex parte contacts are those contacts by a party on a fact in issue under circumstances which do not involve all parties to the proceeding. Note the three essential elements; unless all three are present, you have not been involved in an ex parte contact. Ex parte contacts can be made orally when the other side is not present, or they can be in the form of written information that the other side does not receive.

Although it is important for public officials to communicate with their constituents, ex-parte communications should be discouraged in favor of the public hearing process. If ex parte contacts do occur, they do not necessarily invalidate the impartial hearings procedure. The procedure outlined below is designed to ensure that a record is made to establish that the hearing process and the members of the hearing body were not biased.

ii. What should you do?

The most important thing to remember is this: If an ex parte contact occurs, put it on the record at the very next hearing on the matter, before any testimony is received and before any other proceedings on the matter take place. Describe the substance of the contact and announce the right of the interested person to rebut the substance of the communication. This must be done as early as possible during the proceedings, at the first hearing after the contact occurs. The court of appeals has held that failure to make such disclosures are not simply procedural errors, but can result in remand of the case to the County.

b. Site Visits

At the beginning of each quasi-judicial hearing, the Chairman asks if any Commissioner/Councilor has visited the site of the proposal. Why?

Closely associated with ex parte contacts, the issue of site visits is important because a Commissioner/Councilor may have had an opportunity to gain information outside of the public hearing which may or may not otherwise be part of the record. Since the decision must be based on the evidence in the record, it becomes important that the visit, and any information gained which does not appear in the record, must be put on the record if the decision is to be valid. The key to solving the problem created by a site visit is to MAKE A DISCLOSURE. As always, the disclosure should be made as early in the process as possible so as to afford the applicant or other interested parties a chance to rebut the evidence is necessary.

c. Conflicts of Interest

Generally, conflicts of interest are defined as situations in which you, as a public official deliberating in a quasi-judicial proceeding, have an actual or potential financial interest in the matter before you. The legislature defines actual and potential conflicts of interest in ORS Chapter 244, the Ethics Rules.

i. Actual and Potential Conflicts:

An **actual** conflict of interest is defined as any action or any decision or recommendation by a person acting in a capacity as a public official. The effect of which **“would”** be to the private pecuniary benefit or detriment of the person or the person’s relative²

² A “relative” is defined to include the spouse of the public official, the domestic partner of the public official, and any children, siblings, spouses of siblings, or parents of the public official or of the public official’s spouse, any individual for whom the public official has a legal support obligation, or any individual for whom the public official provides benefits arising from the public official’s public employment or from whom the public official receives benefits arising from that

or any business with which the person or a relative of the person is associated. (ORS 244.020(1) A **potential conflict of interest** is one that “**could**” be to the private pecuniary benefit or detriment of the person or the person’s relative, or a business with which the person or the person’s relative is associated. ORS 244.020(11).

ii. What should you do?

The statute describes rules for public officials who have actual or potential conflicts of interest. Commissioners/Councilors must PUBLICLY ANNOUNCE **potential** and **actual** conflicts of interest, and in the case of an ACTUAL CONFLICT, MUST REFRAIN FROM PARTICIPATING IN DEBATE ON THE ISSUE OR FROM VOTING ON THE ISSUE. An announcement of the nature of a conflict of interest needs to be made on each occasion the conflict of interest is met; that is, one time during a meeting. If the matter giving rise to the conflict of interest is raised at another meeting, the disclosure must be made again at that meeting.

Note: ORS 244.135 specifies how Planning Commission members must handle conflicts. The rules are somewhat different from the general requirements noted above. A member of a planning commission shall not participate in any commission proceeding or action in which any of the following has a direct or substantial financial interest:

- a. the member or the spouse, brother, sister, child, parent, father-in-law, mother-in-law of the member;
- b. any business in which the member is then serving or has served within the previous two years;
- c. any business with which the member is negotiating for or has an arrangement or understanding concerning prospective partnership or employment.

These specific rules that apply to planning commission members take precedence over the general requirements described in this document. ORS 244.135 (2) also requires that a planning commission member disclose any actual or potential interest at the meeting of the commission where the action is being taken.

There is an exception to the voting restriction if a public official’s vote is necessary to meet a requirement of a minimum number of votes to take official action. In this situation, the official is eligible to vote, but still may not participate in any discussion or debate on the issue. We do not recommend utilizing this exception because it creates an appearance of impropriety when a Commissioner/Councilor votes on an issue that would provide a financial benefit to the Commissioner/Councilor or a relative of the Commissioner/Councilor.

individual's employment. (ORS 244.020(14))

To recapitulate the conflict of interest definitions and requirements: A situation that **could** provide private pecuniary benefit is a **potential** conflict of interest. The public official must only **publicly announce** the potential conflict prior to participating in debate and voting on the issue. In contrast, a situation that **would** provide private pecuniary benefit is an **actual** conflict of interest. The public official must **publicly announce** the actual conflict, **refrain from debate and not vote** on the issue.

It is important to remember that even the appearance of an actual or potential conflict of interest is what counts. You need not actually believe you are in a conflict of interest situation to give rise to your duty to disclose it as discussed above. **IF THERE IS ANY DOUBT IN YOUR MIND, MAKE THE DISCLOSURE.** Again, the reason this is important is that we are required to provide an impartial tribunal for deciding the quasi-judicial matters, which come before us.

d. Personal Bias

Personal bias exists when a Commissioner is prevented from rendering a fair judgment in a matter because of an acquaintance or relationship with someone or something involved in the case. Personal bias differs from conflicts of interest because there is no potential for financial gain, but only the existence of a relationship.

In situations where there is even the appearance of potential bias, you must **DISCLOSE** the nature of the bias and state whether or not in your opinion it requires disqualification. There is no requirement of disqualification in situations involving simple bias, but Commissioners should disqualify themselves if the bias prevents them from being fair and impartial in the matter.

6 Burden of Proof.

The proponent of change has the burden of proving that all elements necessary to grant the proposed change are met. The greater the change proposed, the greater will be the burden of proof. The applicant's job is to submit substantial evidence, which shows that the proposal complies with each of the applicable criteria.

II. FINDINGS

Another requirement which originates with the *Fasano* decision and that has been expanded and refined considerably since then is the requirement that the decision made is supported by findings which in turn are based on the record. There are three essential requirements for findings: that they are based on the record, be facts and not conclusions, and be relevant to and address all relevant criteria for the decision. Findings are significant in that often they are the means by which an appeal is either avoided or won.

A. Findings Must be Based on the Record.

It is not possible to generate findings from thin air. Although this seems to go without saying, it is important to remember that somewhere in the transcript of the proceeding or in written materials submitted, all the evidence necessary to draw findings must be recorded. Surprisingly, failure to meet this test is one of the most common bases for overturning a decision on appeal. Generally, the applicant bears the burden of introducing the majority of evidence, but in cases where staff or the hearing body disagrees with the applicant, evidence supporting denial must appear in the record. Staff generally supplies the necessary data and, at times, opponents of the request may also produce evidence. The hearing body's role is to both ensure that the decision made is supported by the evidence heard, and to get into the record items of personal knowledge that are relevant and form all or a part of the basis for a decision (i.e., ex parte contacts or site visits).

B. Findings are Facts, not Conclusions.

Proper findings constitute an outline of the evidence in the record. They are not conclusions or opinions; these are drawn from the facts in order to arrive at a decision. In other words, the facts are stated and conclusions are drawn as to how the facts in the record relate to the criteria for the decision. It is necessary to state what the relevant criteria are and then to apply the facts proven in the hearing to those criteria. Again, the hearing body's role is really one of understanding how the evidence produced at the hearing relates to the criteria for the decision, and making certain that the record supports the decision made. It is up to the preparer of the order to ensure that the findings are legally sufficient once a sound decision is made.

C. Findings Address All Relevant Criteria.

In case of approval of an application, all criteria outlined in the General Plan or Zoning Ordinance are relevant. That means each and every one of them must be addressed in the hearing body's decision and in the findings adopted by the hearing body. In the case of a denial of an application, findings are still required, but a failure of the proposal to meet any criterion will suffice to support the denial. Therefore, findings are only required as to the criterion not met. The hearing body should make clear on a vote to deny an application which criterion (or criteria) is not met by the evidence and why so that appropriate findings can be prepared.

III. THE 120-DAY RULE

ORS 215.429 requires counties to take final action on most quasi-judicial land use applications within 120 days of the date the application was deemed complete. An application is deemed complete on the date it is filed if the application is complete when filed or if staff does not advise the applicant that it was incomplete within 30 days of filing. If staff does advise the applicant that additional materials must be submitted, and the applicant does provide the additional materials, the application is deemed complete when the additional materials are filed. If the County advises the applicant that the application is not complete but the applicant refuses to provide the additional materials, the application is deemed complete 31 days after the application was first filed.

Note: a recent case confirmed that ORS 215.427(4) means what it says: on the 181st day after first being submitted an application is void under certain circumstances. The statute provides that on the 181st day after first being submitted an application is void if the applicant has been notified of the missing information and has not submitted either: a) all of the missing information, b) some of the missing information and written notice that no other information will be provided, or c) written notice that none of the missing information will be provided. A County cannot continue processing the application after the 181st day.

If the County does not act on the application within 120 days, the applicant may apply to circuit court for a writ of mandamus. ORS 215.429. If the applicant does so, the County loses jurisdiction to make a decision on the application. The court will have sole jurisdiction until it makes its decision. The court may order that the County approve the application. Courts generally are not concerned with land use details, so orders from courts to grant an application normally do not contain detailed conditions of approval.

If the 120-day deadline passes and the applicant does not file a mandamus action in circuit court, the County retains jurisdiction to make a decision. If the County realizes it has missed the deadline, it should still proceed to a decision following normal procedures unless the mandamus proceeding is filed. However, the County may want to speed up the process, to the extent consistent with applicable rules, if it is aware that the 120 deadline is approaching or has passed.

The 120-day rule has a second effect that is often ignored. If the local government does not reach a final decision within 120 days, the applicant is entitled to a partial fee refund (all unexpended fees or deposits of 50 percent of the total of all fees and deposits, whichever is greater). ORS 215.427(8).

IV. CONDITIONS OF APPROVAL

Conditions of approval may be granted under three circumstances:

- A. The code expressly allows a condition of approval to be imposed;
- B. The application could be denied if the condition of approval is not imposed;
- C. The condition of approval assures that applicable criteria or standards will be complied with.

These criteria for granting an approval often overlap. A condition may also be imposed if consented to by the applicant, but the County should normally only seek to impose conditions if they meet at least one of the criteria.

Even if the local ordinance does not expressly authorize conditions of approval, conditions of approval may be imposed if the decision would have to be denied without the condition of approval. For example, if a wall is shown on the application as being 8 feet in height and the code imposes a 6-foot maximum, the application may be approved with a condition that the wall not exceed 6 feet.

Conditions of approval may be imposed to assure compliance with applicable standards or criteria. While applicable criteria and standards will not always require separate conditions of approval, in some cases it will be appropriate to impose conditions to assure compliance with applicable standards. For example, parking requirements may be adjusted if significant trees are preserved. If the County allows the adjusted parking, it may impose a condition of approval requiring that the significant tree be preserved.

ORS 197.522 provides:

“A local government shall approve an application for a permit, authorization or other approval necessary for the subdivision or partitioning of, or construction on, any land that is consistent with the comprehensive plan and applicable land use regulations or shall impose reasonable conditions to make the proposed activity consistent with the plan and applicable regulations. A local government may deny an applicable plan that is inconsistent with the comprehensive plan and applicable land use regulations and that cannot be made consistent through the imposition of reasonable conditions of approval.”

This statute was added by the 1999 legislature and has not been extensively interpreted by LUBA or the courts. As written, it appears to require an approval without conditions if consistent with applicable regulations and an approval with conditions if an application cannot be approved without conditions but can be approved with conditions. Finally, it appears to impose an obligation to impose conditions of approval rather than denying an application if the application can be made consistent with applicable standards and criteria through the imposition of the conditions.

V. **EXACTIONS:** THE *NOLLAN/DOLAN* STANDARD - Approvals, Denials, and Conditions of Approval

A. Introduction

Since *Dolan v. City of Tigard*, 512 US 374 (1994) was decided, local governments have had to deal with the issues raised by *Dolan* and apply *Dolan* to land use applications. Lower court and state court decisions have resulted in substantial clarification of the *Dolan* decision, but the one Supreme Court case that discussed *Dolan* directly has apparently limited the scope of *Dolan*'s applicability. The knowledge gained through the evaluation of the post-*Dolan* court cases and the practical experience gained through the processing of applications in which *Dolan* issues are present allows us to reassess *Dolan* at this time.

Dolan requires that every exaction imposed as a condition of a land approval be related to and roughly proportional to the impact of the development.³ The government must demonstrate rough proportionality based on an individual assessment in each case. All provisions of the code must be interpreted in light of the *Dolan* standard.

³ The most common exactions are requirements to dedicate land for rights-of-way and requirements to provide on-site or off-site public improvements.

The County may, however, deny applications based on a failure to meet established criteria, as long as the criteria do not require an exaction. The County can deny an application if required public services or improvements are not available but cannot deny an application because the applicant failed to provide the required public improvements when the burden of the exaction would significantly exceed the impact of the development.

B. Analysis

1. Every Exaction Must Be Justified by a Rough Proportionality Analysis

A requirement to dedicate right-of-way is an exaction. A requirement to construct public improvements is probably an exaction. A denial of an application is not an exaction. There must be an “essential nexus” between any exaction imposed as a condition of development and the impact of the development, *Nollan v. California Coastal Comm’n*, 483 US 825 (1987).⁴ The exaction must be “roughly proportional” to the impact of the development. *Dolan v. City of Tigard*, 512 US 374 (1994). *Dolan* requires “some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”

Under *Dolan*, every exaction must be justified under the rough proportionality test, with the burden of proof being on the County. LUBA has taken the position that requiring additional right-of-way on a street bordering a development cannot be justified as a matter of course, but must meet the rough proportionality standard. *Gensman v. City of Tigard*, 29 Or LUBA 505 (1995). Therefore, even a condition requiring that an applicant dedicate right-of-way for an adjoining street must meet the rough proportionality standard and be based on an individualized evaluation of the traffic impact created by the development.

2. Local Governments May Deny an Application Based on Uniform Standards and Criteria that Do Not Require an Exaction

As recognized by the U.S. Supreme Court in *Nollan v. California Coastal Commission*, 483 US 825 (1987), a local government may deny a request for a land use approval if objective standards regarding the property or the level of services available justify a denial. However, the holding in *Dolan* precludes a denial based on the failure to meet a code requirement if the code requirement requires an exaction and the exaction is disproportionate to the impact of the development. In other words, if the County could not require an exaction as a condition of approval under *Dolan*, it cannot deny the application on the basis that the applicant did not provide the exaction. However, if the code requires that certain public improvements or services be in place and meet certain standards, *Dolan* does not prevent a denial based on the lack of existing public improvements.

⁴ The “essential nexus” requires a relationship between the type of impact and the type of exaction. This test is met if the impact is on the road transportation system and the exaction is a street dedication or improvement. The test is not met if the impact is on the sewer system but the exaction is a street dedication or improvement unrelated to any sewer line.

In the case of rights-of-way and street improvements, a requirement that all developments must have direct access to a street that meets County standards would survive a *Dolan* challenge; a requirement that the applicant dedicate right-of-way and improve all adjacent streets so that they meet County standards would not satisfy *Dolan* unless the County could demonstrate that the dedication and improvement are roughly proportional to the traffic impact of the development.

The *Dolan* standard applies in all situations involving exactions. It applies to local streets, to developments with more than one street frontage, to single family residences, and to redevelopment. In the case of redevelopment, the impacts that can be compensated for by an exaction are limited to the increase resulting from the redevelopment.

C. Summary

In deciding land use applications in which dedications or improvements may be an issue, the County should apply the County code in light of the *Dolan* requirements that all exactions must be related to and roughly proportional to the impact of the development and that the rough proportionality evaluation must be based on an individualized assessment. Failure to apply existing code provisions in light of *Dolan* could result in takings claims.

Oregon's Statewide Planning Goals & Guidelines

GOAL 1: CITIZEN INVOLVEMENT

OAR 660-015-0000(1)

To develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process.

The governing body charged with preparing and adopting a comprehensive plan shall adopt and publicize a program for citizen involvement that clearly defines the procedures by which the general public will be involved in the on-going land-use planning process.

The citizen involvement program shall be appropriate to the scale of the planning effort. The program shall provide for continuity of citizen participation and of information that enables citizens to identify and comprehend the issues.

Federal, state and regional agencies, and special-purpose districts shall coordinate their planning efforts with the affected governing bodies and make use of existing local citizen involvement programs established by counties and cities.

The citizen involvement program shall incorporate the following components:

1. Citizen Involvement -- To provide for widespread citizen involvement.

The citizen involvement program shall involve a cross-section of affected citizens in all phases of the planning process. As a component, the program for citizen involvement shall include an officially recognized committee for

citizen involvement (CCI) broadly representative of geographic areas and interests related to land use and land-use decisions. Committee members shall be selected by an open, well-publicized public process.

The committee for citizen involvement shall be responsible for assisting the governing body with the development of a program that promotes and enhances citizen involvement in land-use planning, assisting in the implementation of the citizen involvement program, and evaluating the process being used for citizen involvement.

If the governing body wishes to assume the responsibility for development as well as adoption and implementation of the citizen involvement program or to assign such responsibilities to a planning commission, a letter shall be submitted to the Land Conservation and Development Commission for the state Citizen Involvement Advisory Committee's review and recommendation stating the rationale for selecting this option, as well as indicating the mechanism to be used for an evaluation of the citizen involvement program. If the planning commission is to be used in lieu of an independent CCI, its members shall be selected by an open, well-publicized public process.

2. Communication -- To assure effective two-way communication with citizens.

Mechanisms shall be established which provide for effective communication between citizens and elected and appointed officials.

3. Citizen Influence -- To provide the opportunity for citizens to be involved in all phases of the planning process.

Citizens shall have the opportunity to be involved in the phases of the planning process as set forth and defined in the goals and guidelines for Land Use Planning, including Preparation of Plans and Implementation Measures, Plan Content, Plan Adoption, Minor Changes and Major Revisions in the Plan, and Implementation Measures.

4. Technical Information -- To assure that technical information is available in an understandable form.

Information necessary to reach policy decisions shall be available in a simplified, understandable form. Assistance shall be provided to interpret and effectively use technical information. A copy of all technical information shall be available at a local public library or other location open to the public.

5. Feedback Mechanisms -- To assure that citizens will receive a response from policy-makers.

Recommendations resulting from the citizen involvement program shall be retained and made available for public assessment. Citizens who have participated in this program shall receive a response from policy-makers. The rationale used to reach land-use policy

decisions shall be available in the form of a written record.

6. Financial Support -- To insure funding for the citizen involvement program.

Adequate human, financial, and informational resources shall be allocated for the citizen involvement program. These allocations shall be an integral component of the planning budget. The governing body shall be responsible for obtaining and providing these resources.

A. CITIZEN INVOLVEMENT

1. A program for stimulating citizen involvement should be developed using a range of available media (including television, radio, newspapers, mailings and meetings).

2. Universities, colleges, community colleges, secondary and primary educational institutions and other agencies and institutions with interests in land-use planning should provide information on land-use education to citizens, as well as develop and offer courses in land-use education which provide for a diversity of educational backgrounds in land-use planning.

3. In the selection of members for the committee for citizen involvement, the following selection process should be observed: citizens should receive notice they can understand of the opportunity to serve on the CCI; committee appointees should receive official notification of their selection; and committee appointments should be well publicized.

B. COMMUNICATION

Newsletters, mailings, posters, mail-back questionnaires, and other

available media should be used in the citizen involvement program.

C. CITIZEN INFLUENCE

1. Data Collection - The general public through the local citizen involvement programs should have the opportunity to be involved in inventorying, recording, mapping, describing, analyzing and evaluating the elements necessary for the development of the plans.

2. Plan Preparation - The general public, through the local citizen involvement programs, should have the opportunity to participate in developing a body of sound information to identify public goals, develop policy guidelines, and evaluate alternative land conservation and development plans for the preparation of the comprehensive land-use plans.

3. Adoption Process - The general public, through the local citizen involvement programs, should have the opportunity to review and recommend changes to the proposed comprehensive land-use plans prior to the public hearing process to adopt comprehensive land-use plans.

4. Implementation - The general public, through the local citizen involvement programs, should have the opportunity to participate in the development, adoption, and application of legislation that is needed to carry out a comprehensive land-use plan.

The general public, through the local citizen involvement programs, should have the opportunity to review each proposal and application for a land conservation and development action prior to the formal consideration of such proposal and application.

5. Evaluation - The general public, through the local citizen

involvement programs, should have the opportunity to be involved in the evaluation of the comprehensive land use plans.

6. Revision - The general public, through the local citizen involvement programs, should have the opportunity to review and make recommendations on proposed changes in comprehensive land-use plans prior to the public hearing process to formally consider the proposed changes.

D. TECHNICAL INFORMATION

1. Agencies that either evaluate or implement public projects or programs (such as, but not limited to, road, sewer, and water construction, transportation, subdivision studies, and zone changes) should provide assistance to the citizen involvement program. The roles, responsibilities and timeline in the planning process of these agencies should be clearly defined and publicized.

2. Technical information should include, but not be limited to, energy, natural environment, political, legal, economic and social data, and places of cultural significance, as well as those maps and photos necessary for effective planning.

E. FEEDBACK MECHANISM

1. At the onset of the citizen involvement program, the governing body should clearly state the mechanism through which the citizens will receive a response from the policy-makers.

2. A process for quantifying and synthesizing citizens' attitudes should be developed and reported to the general public.

F. FINANCIAL SUPPORT

Overview of Public Meetings Law

November 2009

History

“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 ORS 192.610 to 192.690 that decisions of governing bodies be arrived at openly.”

Oregon’s Public Meetings Law was enacted in 1973 to make sure that all governing body meetings covered by the law are open to the public.

Notice

The Public Meetings Law requires that the public receive notice of the time and place of meetings and those meetings be accessible to everyone, including persons with disabilities. The notice must give actual notice of the meeting to interested persons, specifically including members of the new media who have requested notice.

In order to avoid inadvertently triggering the Public Meetings Law, committee members should direct email messages and replies to department staff only. Department staff will then distribute to the full committee as appropriate.

Public Attendance and Participation

The Public Meetings Law guarantees the public the right to attend governing body meetings, but does not include the right to participate by public testimony. The Public Meetings Law is not a participation law. Under the Public Meetings Law, governing body meetings are open to the public except as provided by law (e.g. Executive Sessions). ORS 192.630(1).

Other statutes, rules, charters, ordinances, and bylaws outside the Public Meetings Law may require governing bodies to hear public testimony or comment on certain matters. But without such a requirement, a governing body may conduct a meeting without any public participation.

Written Minutes or Recording

The Public Meetings Law requires that written minutes or recording of the meeting be taken. Executive Sessions must also have written minutes.

Minutes or recording must include:

- Members present
- Motions, resolutions, etc.
- Result of votes
- Substance of discussion – “true reflection” – not verbatim.
- Reference to any document discussed, subject to Public Records Law

Minutes or recording must be made available to the public in a reasonable time after the meeting.

Control of Meetings

The presiding officer has authority to keep order and to impose any reasonable restrictions necessary for the efficient and orderly conduct of a meeting. The presiding officer can reasonably regulate use of cameras and tape recorders.

The presiding officer may regulate the order and length of appearances by the public and limit appearances to presentations of relevant points. The public has no right to participate in the meeting under Public Meetings Law.

Smoking is banned at public meetings. ORS 192.710

- \$10.00 fine for violation. ORS 192.990

Enforcement of Meetings Law

Oregon Government Ethics Commission (OGEC) enforces Executive Session violations – ORS 192.685(1) and 244.260. No Attorney General enforcement role – acts only as legal counsel to state agencies.

Complaints that public officials have violated the Executive Session provisions of the law may be made to the OGEC. ORS 192.685(1)

LCDC Chair John VanLandingham Reflections on LCDC for 12 Years

Oregon Planning Institute

Eugene, OR

Sept. 15, 2011

1. **Never fight over process – only over substance.** Do whatever it takes to make the process right – start over if necessary, extend time limits for public comments, additional meetings – whatever is necessary. Don't like timelines or time limits.
2. **The VanLandingham process** – want people at the table to talk about the issues, such as the Woodburn example. Put the people at the table to talk about the issue. Woodburn makes the proposal, 1000 Friends disagrees, Woodburn has rebuttal – go back and forth until the Commission feels the issue has been thoroughly discussed. Leads to better decisions
3. **Do not like unanimous votes.** Parties feel like they have been heard and the process works for them.
4. **Get out into the community.** State and local officials and staff must get out into the community. It allows (1) officials and staff to really understand the issues, particularly if a tour is involved; and (2) helps people understand who the officials and staff are.
5. **Do not ever assume people are acting in bad faith.** People have strong opinions about different issues and express those opinions differently, but rarely do people act in bad faith so don't ever assume it.
6. **Natural tension between what happens at the state and local levels.** This is to be expected with a statewide planning program with goals, administrative rules, etc.
7. **Important to have some fun.** Some laughter is important.
8. **Frustrated we have not done the following:**
 - a. Education of newcomers to the state and program.
 - b. Focus more urban issues.
 - c. Make the process/program less complex. LCDC should focus more on policy issues – that is the intent of the body.
 - d. Get to what Goal 10 really means.
9. **Don't be afraid of public involvement.** People will be rude, mean, and angry with you and that is OK. Elementary school closing example. Isn't it great that so many people care so deeply about issues.
10. **If king for a day...** the entire planning program would be by rule. The Statutes are a compromise and cannot be touched except by the Legislature.



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How to be a Better Planning Commissioner

Stuart Meck, AICP

For the newly appointed member, service on a planning commission can be overwhelming during the first few months. It's like you've been plopped down in a foreign country and have to learn a strange language and a new road system--and sometimes the natives aren't so friendly! Here are nine tips for the neophyte and, yes, even the veteran commission member to help sharpen performance.

1. Meet with the planning director.

Discuss where he or she thinks the commission should go during the next several years. What are the major, recurring issues facing the commission and the community? How has the commission addressed them? Is the commission split, or does it work like a team, even when individual members disagree with each other?

2. Review the commission agenda.

With the planning director's assistance, review the agenda for the first few meetings until you feel confident of your role. The agenda should be organized so that each action item has a supporting staff report. Check to see if these staff reports are both clearly written and thorough. Make certain that if commission members ask for supplemental information, those requests are answered.

3. Read and absorb.

Become familiar with the plans you oversee and the regulations that guide the commission's deliberations. At a minimum, as a new planning commission member, you should review the most recent edition of the community's comprehensive plan, the zoning ordinance, and subdivision regulations. Ask the following questions. When was the plan last updated? Have special studies or area plans been completed since then? What revisions have been made to the zoning ordinance and subdivision regulations?

4. Master the rules of procedure.

Every commission should have these rules because they determine how you conduct your meetings and decide issues. Equally important, the rules assures the public that business is conducted in an orderly, fair and democratic manner. Indeed, the commission's credibility is tied to its procedural rules and how they are applied. The rules are not cast in stone, however, and may be amended; the planning commission should feel comfortable with them. Remember, state statutes change, affecting open meetings or "sunshine" laws, ethical requirements for elected and appointed officials, and availability of public records, among others. State and federal court decisions will also influence how your planning commission conducts its business. For those reasons, it's prudent for the planning commission to evaluate its rules periodically.

5. Set aside time for long-range thinking and brainstorming.

Step back. Look at the big picture. This is really what the planning should be doing. If your evening meeting doesn't leave much time (or energy) for this, then schedule periodic special meetings or retreats for the commission.

6. Meet with the legislative body at least once a year.

Planning commissioners are most effective when they anticipate the needs of the

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elected officials who have appointed them. The commission and the legislative body need to discuss their expectations of each other. Regular meetings keep lines of communication open between the two bodies, preventing rifts and misunderstandings.

7. Publish an annual report.

It should contain a list of actions taken by the commission during the year, as well as a comparison between the commission's recommendations and the legislative body's actions. Use the report to convey planning advice to the legislative body and general public by proposing needed studies, plans, ordinance amendments, and capital projects.

8. Continue to learn.

Learn about planning and the role of planning commissions in shaping the community. APA chapters have special tracks at state conferences or annual workshops devoted to planning commissions. APA's Planners Book Service sells a number of inexpensive books expressly written for commissioners: Albert Solnit's *The Job of the Planning Commissioner*; William Toner, Efraim Gil, and Enid Lucchesi's *Planning Made Easy*; Herbert H. Smith's *A Citizen's Guide to Planning* and *A Citizen's Guide to Zoning*; and David J. Allor's, *The Planning Commissioner's Guide*. Training videos, such as *Meeting Management: A Mock Commission Hearing* are also available.

9. Keep an open mind.

Always be a statesman. You've been appointed to the planning commission because your elected officials thought you had good judgment and sound character. You'll find you'll be most effective when you remain open to new ideas and concepts that can help your community solve the complex problems of growth and change.

Stuart Meck, AICP, is Principal Investigator for Growing Smart, APA's project to develop the next generation of model planning and zoning legislation for the U.S. He is a former planning director and assistant city manager. Meck is co-author with Kenneth Pearlman of a treatise, Ohio Planning and Zoning Law (Banks Baldwin, 1995).

HOW A PLANNING COMMISSION OPERATES

Planning Commission Roles

Generally, the planning commission has three basic roles:

- Role #1. *Advisory*
- Role #2. *Regulatory*
- Role #3. *Procedural*

Advisory Role

The commission is the "keeper of the plan." The "plan" refers to the local comprehensive plan and implementation ordinances. The commission is responsible for assisting with the preparation, review, and approval of the comprehensive plan and ordinances. They work with the public, the governing body, and staff. They advise the governing body on planning matters related to the development and implementation of the comprehensive plan. They make recommendations on plan adoption, plan amendments, and rezones. They are a listener, counselor, gatherer of facts and information, and a facilitator.

Regulatory Role

The commission administers the local land use regulations such as the zoning and subdivision ordinances.

Procedural Role

The commission is charged with running a fair meeting, making fair decisions, and conducting itself properly.

Key Planning Commission Responsibilities

Know your community and its geography and character

Your knowledge as a resident of the city or borough is invaluable to the commission. If you are not as familiar with your community as you might be, do yourself and the commission a favor: after reading this handbook, go out and take a tour of your community.

Look at the landscape and take note of the lot sizes, the ages, and the architecture of the homes. Note where the major and minor transportation routes are and where major utility rights-of-way are located. Where are the public buildings, parks, and schools located? Where are the major business areas and traffic flows? Where are the major industries?

Learn about the community's natural features: its streams, waterbodies, drainage channels, wetlands, steep slopes, avalanche and mass wasting exposures, different soils types, prevailing and seasonal winds, snow drift patterns, and other matters that would affect development decisions. Discover what is happening with the natural environment. Are there areas prone to



How a Planning Commission Operates

- Planning Commission Roles
- Key Planning Commission Responsibilities

Relationship Between Staff, Governing Body, and the Planning Commission

- Elected Body and Commission Relationship

Public Participation and Working with Citizens

- Public Involvement Techniques
- Elements of a Successful Public Meeting or Hearing



Effective staff/commission relations are vital to the overall success of planning in your community, whether your planning agency has one, ten, or one hundred employees. Good will and an understanding of the pitfalls that impede sound relationships can help you solve any problems that may arise.

- Planning Commissioners
Journal, No. 3, March/April
1992, Elaine Cogan

flooding or erosion? Is a wetland or wildlife habitat being threatened? Are there old landfills leaching pollutants into the waterbodies?

Take note of what is located where and what is occurring. Is the community growing? Are businesses moving or finding it difficult to survive? Is traffic becoming more of a problem? If so, where and why? Is the average age of the population increasing or decreasing?

Get a firm grasp on your community and on the factors affecting its prosperity, quality of life, and local economy. In many rural communities, land use planning that supports a subsistence way of life is as important as planning decisions that promote a cash-based economy.

Use the State of Alaska DCED web page and community profiles for current and well-presented information about your community.

Know your local regulations and all required procedures

Preparation is key to being an effective planning commissioner and it starts with knowledge. Commission members must have knowledge of the comprehensive plan and municipal land use codes (e.g. zoning and subdivision) at a minimum. Review the comprehensive plan and look for the general intent and for the way in which the various provisions interrelate. Ask yourself why certain uses are grouped

with certain others. Look for patterns. Review the zoning and subdivision codes - their intent, definitions, applicability, and review procedures. Become familiar with the other plans and codes used in your community, such as the coastal management plan, capital improvement plans, housing plans, State DOT/PF highway plans, the statewide transportation improvement plan, recreation and trails plans, flood mitigation plans, and where applicable, building and safety codes.

Know your partners

There are many partners in the planning process. They include the governing body (borough or municipal assembly or city council), planning commission, board of adjustment, state legislature, courts, and planning staff. Look for opportunities to meet your governing body members, planning director, and staff. Find out what their concerns are. Ask about the history of planning issues. Learn what has been tried, what has worked and has not worked, and why. Get to know the "movers and shakers" and their positions. Your knowledge regarding community concerns will assist you when you are faced with difficult decisions.

Know the meeting agenda

In addition, an effective commissioner comes prepared for the meeting. This means that, in advance of the meeting, you review the commission agenda, set aside time for thinking about the topics, review

the facts, and if necessary, meet with the planning director to discuss the meeting and any questions you might have about the agenda.

RELATIONSHIP BETWEEN STAFF, GOVERNING BODY, AND THE PLANNING COMMISSION

Staff and Commission Relationship

The planning staff plays a vital role in the planning process and the effectiveness of the planning commission. Staff carry out the tasks associated with administering the land use regulations. They also perform necessary research, prepare plans and reports, and distribute and explain the results of their work.

Professional planning staff have been trained to perform research; write reports; make public presentations and meet with the public; interpret plans, municipal ordinances, and other laws and carry out the routine tasks of their job. They do this using their training in geography, landscape design, urban and rural planning, economics, law, statistics, knowledge of the community, and other education and experience. In some communities the staff will have dual roles as the engineer, the manager/administrator, or the clerk.

Staff and its work may have the following effect on the planning commission and can be described using the following examples: The commission should consider how well the planning program is providing needed services in the community. Many communities do not have a full-time or even part-time planner on staff. Typically, another local government employee may serve as the planner. If services are not being adequately provided, the commission needs to support the hiring of either a full-time or part-time planner. This can be achieved through the municipal budgeting process (see the section on the Municipal Budget in Chapter Six).

Elected Body and Commission Relationship

As a planning commission, are too many of your recommendations or decisions are overturned by the elected officials? Or, as an elected official, do you wonder what direction the planning commission will take next? The following ideas may improve working relationships between the planning commission and elected officials.



Planning Staff:

- ✓ Administers the land use regulations
- ✓ Prepares staff reports and notices for meetings
- ✓ Researches planning, land use, and development issues
- ✓ Advises and assists the planning commission
- ✓ Educates and assists the public
- ✓ Knows and interprets laws and ordinances
- ✓ Conducts community and capital project planning
- ✓ Negotiates, facilitates, and coordinate between agencies, developers, and the public
- ✓ Enforces municipal code and conditions of approval stipulated by the commission
- ✓ Provides continuity – policy, documents, and people



Top ten ways the planning commission can improve its relationship with the elected body:

1. Understand the responsibilities and authority of the planning commission and elected body.
2. Make sound decisions with adequate findings to insure that the reasons for your actions are clear to the elected officials.
3. Attend the governing body's meeting when an appeal of one of your decisions is being considered.
4. Ask for clarification of the governing body's policies or actions that are unclear.
5. Include in planning commission minutes any questions or points of view

- that are not obvious in your decisions and findings.
6. Request an annual joint work session to discuss priorities, communications, etc.
 7. Recognize the elected officials' responsibilities to voters. Be acquainted with the political platforms of the members of the governing body.
 8. Enlist the help of the media. Use "op-ed" or opinion pieces to clarify commission opinions.
 9. Do not rely solely on staff to convey your message - either to the public or to appropriate elected officials.
 10. Do an annual self-evaluation and follow through with any needed changes in how the commission does business.

| Staff Role | Effect on the Planning Commission (PC) |
|---|---|
| Explains land use plan, zoning and subdivision requirements at the "counter." | Staff's explanation and attitude affect the tone and content of testimony at the PC meeting. |
| Accepts or rejects applications. | Staff's assurance that applications are complete saves time and confusion at the PC meetings. |
| Prepares staff reports. | Staff's identification of issues, data, and criteria assists the PC with decisions and citizens with testimony. |
| Prepares public notices. | Staff's notice minimizes legal challenges to PC decisions and reduces "no one notified me" claims at public hearings. |
| Stays current on regulations, court cases, rulings, etc. | Staff's knowledge prevents PC errors from lack of current information. |

Commission vs. Staff

Commission Expectations of Staff

- Be well organized and anticipate the type of information the commission will need.
- Respond to request for information in a timely and professional manner.
- Prepare accurate, well-researched, documented, and well-written staff reports including basis for recommendations (legal findings of fact).
- Provide exhibits, illustrations, and/or pictures to help commissioners and the public visualize the proposal.
- Help orient new commissioners.
- Be accessible to all commissioners.
- Keep all commissioners equally informed.
- Implement the commission's decision.
- Act in a fair, ethical, and consistent manner.
- Make professional verbal presentations at commission meetings.

Staff Expectations of the Commission

- Prepare for meetings by reading all reports.
- Call staff with your questions before the meeting.
- Examine all the facts on a given issue and make the best decision possible.
- State your reasons for your decision (legal findings of fact).
- Do not ridicule or make light of the staff in public.
- Do not assume the staff is wrong and the citizen is right.
- Compliment the staff when and where appropriate.
- Trust and respect staff.
- Remember that the planners' first responsibility is to the city or borough administration.
- Explain your reasoning if the commission disagrees with staff recommendation.
- Act in a fair, ethical, and consistent manner.



Many new commissioners feel they have been appointed to the commission to represent a political view or to advocate an agenda. Decisions that take place on the planning commission level are always best made when the commission works towards a common goal of trying to shape the best possible solution for all those involved. All commissioners will need to rely on the other commissioners to help handle dicey decisions and there is no place for adversarial positions on a planning commission.⁹⁵

- Dwayne Adams,
MOA Planning Commissioner

The above tips were taken from the *Planning Commissioners Journal*, November 24, 1996.

PUBLIC PARTICIPATION AND WORKING WITH CITIZENS

Public participation takes a great deal of planning, hard work, and resources. The

planning commission is one of many forums where the public has a chance to learn about the community, find out about proposed projects, and participate in the decision-making process.

Major reasons to incorporate meaningful



Attributes of an Effective Planning Commissioner

- ✓ Patient
- ✓ Self-confident
- ✓ Willing
- ✓ Good listener
- ✓ Enthusiastic
- ✓ Objective
- ✓ Courageous
- ✓ Sense of humor
- ✓ Public spirited

⁵⁶ Listen or your tongue will make you deaf.⁵⁷

- Native American Proverb

and broad-based public participation as part of the local planning program include:

- Improving the general trust in government
- Tapping local knowledge and talents
- Creating a sense of ownership in the plan and governing regulations
- Creating a constituency for planning
- Ensuring the plan remains intact over time
- Increasing the quality of the plan
- Improving enforcement of land use laws
- Streamlining the development and planning process

Involving the public gives the commission an opportunity to educate, build support, and encourage ownership of a project.

Public Involvement Techniques

There are a number of public involvement techniques a community can use that have proved successful. These can work well to keep the community informed about plans and actions. Techniques include:

- Visioning and focus groups
- Public meetings
- Open houses (information sharing/gathering)
- Facilitated discussions (issue identification, scoping, present alternatives)
- Joint meetings with community councils, city councils or assembly, and local corporations

- Newsletters
- Media - interviews, talk shows, public service announcements
- Surveys

Elements of a Successful Public Meeting or Hearing

Consider the following checklist when planning the next public meeting or hearing:

Purpose

There should be a good reason to meet. The purpose may be to gather information (and listen and learn) about a project. The purpose may be to perform an official function, make a decision (facilitate).

Notice

People need to know they should attend, why they should, and when and where the hearing or meeting will be held.

Preparation

For a successful meeting, an agenda must be prepared and published, people need to be notified, arrangements must be made for a proper meeting place and time, and reports and visual aids prepared.

Agenda

Public meetings and hearings need clear and fair rules about the procedure to be followed. An agenda available for public review prior to the meeting is essential. By sticking to the agenda, the commission can run an efficient hearing.

Participants

Make sure the necessary people are invited to attend the meeting.

Place

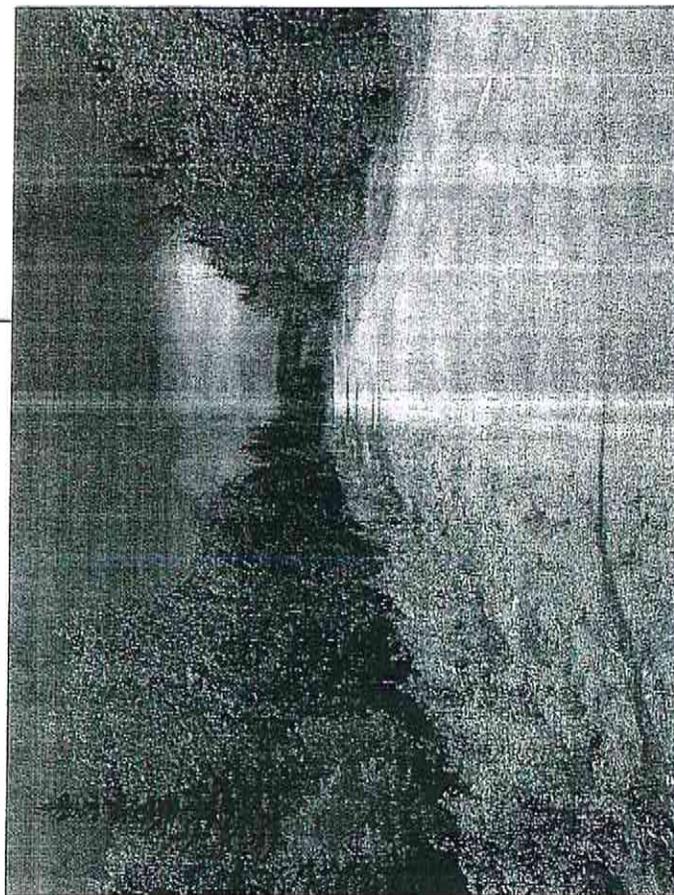
The site for the meeting needs to be convenient for the participants and of a type and size appropriate for the meeting.

Results

Time should be taken at the conclusion of the meeting to reflect on the meeting and what was accomplished.

The Record

A record of the meeting must be kept. A list of the time, the place, participants, and results may be adequate for an informal meeting. For public hearings, minutes must be taken and filed with the local government. In some communities, the meetings are tape-recorded and the tapes filed for future reference.



Technical Briefs

1

Planning and the Comprehensive Plan

The comprehensive plan is a community's compass. It is designed to help residents chart a course to a mutually agreed-upon future. The comprehensive plan is a tool that can be used to foster change or effectively deal with unanticipated changes. The planning commission plays a vital lead role in this process, deciding when an update is necessary and leading community involvement in shaping the plan.

Every city or town has its own identity, much of which is derived from the physical layout of homes, business, industry, and agriculture. In communities where roads, parks, local services, and various amenities seem well integrated, it is usually because a comprehensive plan has guided the community's development. These plans are most effective when used as the basis for ongoing and daily decision making. That way everything—from the location of a shopping center to the development of houses to the widening of a main arterial—is integrated and compatible.

While land-use plans have existed in this country since the late 17th century, it is only in recent times that courts have begun relying on them as a basis for reviewing local government decisions. Increasingly, courts will uphold a zoning or land-use determination that is in

conformance with a comprehensive plan or strike down one that is not supported by the plan.

While there is much truth in the old adage, "if you fail to plan then plan to fail," there is no one, single plan that is a perfect fit for every city or town.

Comprehensive plans—their contents, graphics, and format—vary from one community to another. In general, however, a comprehensive plan should be:

- inclusive of all aspects of development;
- long range (15–20 years);
- focused on a community's physical development;
- able to relate physical development to the community's goals and its social and economic policies;
- developed with input from all segments of the community;

- formally adopted by the local legislative body;
- readily available and easily understood.

The unique conditions and circumstances of each community, as well as state statutes, will dictate a plan's contents. Some states require that local comprehensive plans include certain components and be updated at specific intervals. At a minimum, most plans contain a land-use, housing, transportation and infrastructure element. Other possibilities include:

- parks and open space;
- air quality and the environment;
- energy conservation;
- historic preservation;
- urban design;
- economic development;
- culture, arts, and leisure;
- education;
- health and human services.

The development of a comprehensive plan should be a community effort. All stakeholders should be involved in

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establishing the community's goals. In order to do that, it is essential to understand the current state of community affairs. The planning commission can lead community input in this process, and additional data can provide insight into community characteristics, land-use patterns, and social, economic, and demographic trends.

Potential plan elements and critical issues within the community will help determine what data to gather. If housing is a plan element, data might be collected about the existing housing stock—age, condition, number and types of units—and the existing and projected housing need. Once collected and analyzed, data will provide the basis for modifying earlier goals or setting new ones.

Goals are broadly written and encompass fundamental community values. They provide insight into what a community wants to preserve or change. Often, in the final document, goals and their accompanying objectives are grouped by element. For example, under economic development, a goal might be "to encourage a more diverse industrial mix to guard against cyclical fluctuations."

For each goal, there usually are multiple objectives. An objective is a quantifiable step that, when taken, can help achieve a goal. If a community transportation goal is "to promote efficient circulation and accessibility," then an objective might be, "establish a network of pedestrian and bicycle greenways

connecting neighborhoods with the town center and recreational facilities."

Building consensus around goals and objectives is a time-consuming and sometimes controversial process. Because a comprehensive plan can affect residents' property, livelihood, and overall quality of life, they should be encouraged to participate in the planning process. Online, mail, or telephone surveys, public forums, focus groups, charrettes, and media and public information campaigns can be designed to either gauge public sentiment or elicit participation.

In putting together the actual plan document, it is important that it not only describe but show. Maps, charts, graphs, photos, and other visual elements can speak as loudly as words. Important components of the plan include the land-use maps. One map usually shows the location of existing land uses that will not change while another shows proposed land uses—residential, commercial, business, industrial, and mixed use.

Although the comprehensive plan communicates a community's vision, it is regulations, ordinances, and other governmental tools that turn the vision into reality. Zoning ordinances, subdivision regulations, incentives, capital improvements programs, and annexation agreements are among the implementation tools available. Some plans detail the implementation strategies that will be used.

Once adopted by the local governing body, the comprehensive plan should be widely disseminated and used to guide planning and land-use decisions, not left on a shelf. The plan is a guide to the community's future, and a document that can help keep planning

commissioners on track with the long-term goals for their community. The plan must be updated periodically to keep pace with the changing and growing community. Rules for amending comprehensive plans appear in state enabling legislation. ■

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2

Decision Making: Powers and Duties of the Planning Commission

Since 1907, when the Hartford City Council in Connecticut appointed the nation's first planning commission, commissioners have served as independent advisors to their local governing body on matters of planning and land use. While the mission of planning commissions is similar, their roles may differ depending upon state legislation and how they fit within the local decision-making system. Some planning commissions are purely advisory, others function in a quasi-judicial capacity, and others serve as the sole local planning agency.

Planning commissions derive their powers from a variety of provisions. State enabling legislation, a state's constitution, or a statutory grant of power from the state legislature can confer the authority to plan and zone to localities. Local authorizing legislation then establishes a planning commission and outlines its responsibilities.

Publicly defining the powers and duties of a planning commission not only helps members better understand their roles but provides the community with insight into both the commission's range of responsibilities and the procedures it follows in fulfilling those responsibilities. A formally adopted mission statement, bylaws, and rules of procedure enhance focus, keep discussion relevant, and are an invaluable reference when situations become complicated.

- A mission statement is a clear, concise summary describing what the agency is, what it does, for whom and where. A good mission statement articulates the commission's essential nature, its values, and its purpose. Statements that work best tend to be motivational, free from jargon, and short enough that commissioners and residents can readily repeat it.
- Bylaws define a planning commission's operations. They typically address matters required by state law and include an explanation of leadership structure, including powers, duties, and terms of officers, and may address meetings, attendance requirements, voting, conflicts of interest, ex parte

communication, and the process for amending bylaws.

- Rules of procedure dictate planning commission conduct and, generally, are more specific than bylaws. These rules delve into detail about orientation and training; committees; meetings, including attendance, quorum, schedules, notice, and agendas (preparation, order, and form); minutes/record keeping; conflicts of interest; and fairness. Most planning commissions adopt Robert's Rules of Order to guide their deliberations.

The duties of a planning commission vary depending on the local legislative body's expectations and its delegation of specific duties and functions. Possible functions include:

- encouraging and facilitating public participation in the planning process;
- developing, updating, and recommending methods of implementation of a comprehensive plan (see *Technical Brief 1: Planning and the Comprehensive Plan* for more information);

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- determining a proposed project's consistency with the comprehensive plan;
- making findings regarding a development application's relationship to the comprehensive plan;
- creating a zoning ordinance and zoning districts for adoption by the local governing body; and
- hearing matters related to zoning regulations.

As the local planning agency or in an advisory position, the planning commission serves to guide and inform elected officials and planning staff as well as act as a community leader in planning. The commission may raise issues of concern to the community; monitor, provide suggestions for, and create the comprehensive plan; educate the public on good planning; and involve the public in the community's planning process.

In communities where a planning commission serves in a quasi-judicial manner, each commissioner acts not only as an advisor but as a judge. When a commission considers evidence for or against a proposal, implements adopted policy, or renders a decision that impacts specific parties, the action may be considered quasi-judicial.

Quasi-judicial proceedings require due process. This is the legal method used to reach a decision about a land-use request. Due process is mandated by provisions in the federal and state constitutions that prohibit government

from depriving a person of "life, liberty, or property without due process of law." Due process has both substantive and procedural elements.

The substantive due process clause of the U.S. Constitution requires land-use regulations to serve a legitimate governmental purpose, such as the protection of public health, safety, morals, or welfare. Substantive due process requires commissions to determine whether a valid governmental purpose exists and whether the proposed regulation advances that purpose.

Substantive decision making, then, focuses on the content of the deliberations and includes all the facts of a situation as well as related interests, rights, obligations, and estimates of merit and value (both financial and of importance to the community). Substantive decision making may also consider an individual's character and intentions, since human conduct influences whether a commitment or obligation will be fulfilled. Because character and intentions may be difficult to ascertain, the primary focus of substantive decision making tends to be on the comprehensive and long-range estimation of effects.

Determining the adequacy and reliability of facts is part of a commissioner's job. Staff members should provide an assessment of the situation and present relevant information from other public agencies or consultants. Testimony at public hearings or presentations at meetings may provide additional information. Commissioners themselves often have knowledge to share. Data sought from multiple sources generally constitutes a reasonable effort to obtain adequate and reliable information and can satisfy substantive due process requirements.

Procedural due process is designed to ensure fairness. It requires that the procedures and standards used to decide planning and land-use issues are clear and concise. Fairness exists when:

- advance notice of a hearing or potential action has been extended to all potentially interested parties;
- exhibits, studies, and staff reports are made available for study in advance of the proceedings;
- all participants are given the opportunity to testify and present evidence to an unbiased panel;
- there are no conflicts of interest (commissioners with conflicts must recuse themselves);
- the hearing takes place in a controlled environment that allows all parties to testify or present evidence without fear of intimidation or retaliation;
- the hearing allows for the compilation of a complete record; and
- any decision meets all legal requirements and is based on the record.

The official record must provide the basis for and support the decision reached by the commission. A court relies solely on the record when reviewing a land-use decision. It will not hear new testimony or review new evidence. Planning commissioners have the responsibility to act responsibly and to ensure, to the best of their abilities, that the integrity of the process is not compromised. 

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3

Ethical Meeting Conduct and How to Record Decisions

Individuals appearing before a planning and zoning commission deserve a fair, impartial hearing and decisions based on fact. Applicants and concerned residents have much at stake in these proceedings, both financial and emotional. When decisions are tainted by bias, improper conduct, or a conflict of interest, not only may the community lose faith in the process but the courts may invalidate a commission's decision. Because allegations of unethical conduct can tie up projects for lengthy periods of time, it is in the community's best interest for commissioners to avoid even the appearance of impropriety.

The purpose of a planning or zoning commission meeting is to collect relevant information, expert opinion, and analysis; establish a complete record; and reach a decision that is legally sound and based on the record. Unethical conduct can jeopardize decisions, no matter how rational or well documented.

To preserve the public trust, many state and local governments have adopted ethics statutes or ordinances. These often require the disclosure of information, such as sources of income, or they prohibit specific conduct. Many commissions address ethics, to some degree, in their bylaws and rules of procedure. To guide commissioners involved in planning and zoning matters, the American Planning Association has adopted its "Ethical Principles in

Planning." These guidelines provide the context for planning decisions and are especially useful for locales without local ethics ordinances or procedures. The principles are available online at www.planning.org/ethics.

Individuals are appointed to boards and commissions because of their understanding of and close contacts with the community. Those close contacts, however, can create ethical dilemmas.

Over the years, courts have concluded that a variety of circumstances and behaviors can compromise a commission's ability to reach an unbiased decision. In a few states, courts have invalidated decisions when the mere appearance of unfairness exists. Elsewhere, courts have considered the appearance of unfairness along with evidence of

actual bias or a substantial interest or temptation.

While the specific circumstances of planning and land-use decisions vary, the types of conflicts of interest and bias that influence hearings can be grouped into distinct categories, with financial influences among the most common conflicts faced by commissioners.

- **Gifts and Rewards**—The solicitation or acceptance of gifts is generally prohibited. Board members should not accept items of value or promises of future reward (either monetary or consisting of special consideration) when it is clear that doing so would be construed by a reasonable person to have influenced a vote.
- **Financial Gain**—When a decision maker, or a member of her family, stands to benefit (as an employee, partner, or neighboring landowner) financially, the potential for a conflict of interest exists. The gain does not have to be immediate.
- **Relationships**—Certain personal or professional relationships can represent a conflict of interest. A board

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member serving as a legal guardian, trustee, administrator of an estate, or involved in an employer-employee or mortgagor-mortgagee relationship should disclose the relationship and potentially recuse herself.

- **Dual Office Obligations**—When commissioners serve on other local government boards or in an elected capacity, they face the potential for a conflict of interest unless local practice clarifies the relationship. This is the case where the performance of the duties of one office would interfere with the performance of another, or when there would be a subordination of one office to the other.
- **Communication**—By disclosing confidential information, commissioners open themselves up to allegations of unethical behavior. The same can be said of board members engaged in ex parte contacts—persuasive discussions with applicants outside of official proceedings. In some cases, a commissioner's public statements have been used to prove prejudice or bias. Written debate and discussion via e-mail between a commissioner and applicant or among commissioners should be avoided.

A conflict of interest is neither unusual nor improper. Failure to disclose a conflict is. Sometimes, a board member will not realize a conflict of interest exists until the hearing is underway. The commissioner must disclose the conflict immediately.

When a conflict of interest exists or ex parte contact has taken place, commissioners must divulge the fact and must not participate in any aspect of the decision making process. It is not enough to abstain from voting. It is incumbent upon board members to review a meeting agenda at the earliest opportunity. That way if recusal is considered prudent, alternate board members (in states that allow them) may attend or the item may be postponed if a quorum is unlikely.

Commissioners have a responsibility to make legally sound decisions that are based on the facts presented. Decision making must not be arbitrary, capricious, or unreasonable. When a decision is alleged to be unfair, courts will look to the record for findings of fact. The lack or inadequacy of such findings can result in the invalidation of a board's decision.

Findings of Fact

Findings of fact should include a summary of the evidence presented at a hearing and indicate which evidence the board finds most credible. The findings must show a logical connection between facts and conclusions.

There are several ways to develop findings of fact. At the conclusion of a hearing, board members can make a decision and provide their rationale and the facts upon which they relied. This procedure can be time consuming. A well-written staff report can expedite the process. The board can adopt or modify the report's findings of fact depending on whether members approve of or disagree with the staff recommendation. Occasionally, the board may delay its decision to allow staff to summarize the factual findings. This method may not work well if a decision is required within a short period of time.

The ideal staff report will provide a description of the proposal, factual information and data, analysis, comments from other agencies, and a recommendation. Factual information, which the board can use as a basis for the findings of fact, may include:

- a current description of the site based on survey and observation;
- current zoning;
- surrounding land uses;
- recent land-use actions in the area;
- existing and proposed public services, utilities, and amenities; and
- relevant data such as population projections, traffic counts, existence of endangered species, costs associated with environmental mitigation, etc.

While findings of fact and ethical meeting conduct cannot prevent allegations of unfairness, they can provide residents and the courts with important insight into the rational and principled process used to make decisions. 

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4

Special Plans

While the comprehensive plan serves as an overall guide to a community's future physical development, residents and planners often develop other, more specific, plans to address the needs of certain geographic areas or issues of concern. These special plans — for downtowns, neighborhoods, environmentally sensitive areas, historic preservation, pedestrian and bicycle needs, or wildlife protection — are not intended to replace but, rather, complement and supplement the comprehensive plan.

Special plans go by many different names, depending on their purpose. Geography-based plans may be called special plans, special area plans, or may simply be denoted by the geographic location of the plan (Blue River Basin Plan). The issue itself often provides the name for issue-oriented plans, such as a bicycle and pedestrian plan. The words master, sector, corridor, and strategic often are found in the names of special plans, demonstrating their position as an extension of the comprehensive plan. Despite these different names, the process followed in developing special plans does not differ greatly from that used to create a comprehensive plan. It is not unusual for the focus of a special plan to have been addressed in a comprehensive plan, often as an element of the plan.

California has a well-defined system for creating and using special plans that are implementation-focused. These plans are called "specific plans" and they outline how concrete development proposals fit within the goals set out in the comprehensive or general plan for the area. California's specific plans are an example of geography-based special plans.

Geography-based plans serve a clearly defined area with explicit boundaries inside the larger community. Neighborhoods and downtowns are often the subject of planning efforts. While many geography-based plans include elements similar to those found in a comprehensive plan (such as land use, transportation, open space, and housing), the main emphasis of these plans will undoubtedly be different.

Downtown plans might focus on economic development and urban design, whereas a coastal plan might emphasize ecosystem preservation and wastewater management.

The development of these area plans is often done in collaboration with existing public and private groups such as neighborhood advisory committees, airport commissions, and chambers of commerce, to name a few. Local residents also play a significant role in plan development.

Types of special plans that are geographically based include those for:

- agricultural areas;
- airports;
- coastal areas;
- downtowns;
- environmentally sensitive areas;
- industrial districts;
- neighborhoods;
- rail or other transportation corridors;
- river access;
- waterways.

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Issue-oriented plans may focus on specific geographic areas or include the entire community. Habitat conservation plans, for example, might involve just the shoreline or a certain forested area. A bikeway plan might encompass the entire community. Although an issue-oriented plan might have a limited geographic focus, the planning process must include the entire community as well as special interest groups within the region if the plan is created or adopted by elected officials.

Given the nature of some issue-oriented plans, such as wildlife protection or water and wastewater plans, certain levels of scientific or engineering expertise may be needed. Sometimes, these plans are developed jointly with other agencies or commissions—public works or historic preservation—that have access to such expertise. On occasion, consultants with expertise in the subject matter are hired to assist with plan development.

Included among issue-oriented plans are those that address:

- bicycle and pedestrian transportation;
- disasters and natural hazards mitigation or recovery;
- economic development;
- ecosystem, habitat, or wildlife protection;
- growth management;
- historic preservation;
- housing;

- parks and open space;
- public transit;
- recreation;
- urban forestry;
- water and wastewater management.

Some states require that communities address certain issues, such as growth management, through the planning process and develop special plans. These plans must conform with and implement state policies at the local level. There are often timelines for plan development and updates and a deadline for submission to the responsible state agency.

State and federal agencies may require special plans in order for a community to be eligible for grants or to receive individual exemptions. The U.S. Fish & Wildlife Service, for instance, requires that a habitat conservation plan accompany a request for a permit allowing development in areas where an incidental taking of an endangered species might occur. The Federal Emergency Management Agency (FEMA) recently required local disaster preparedness and recovery plans as a prerequisite to receive FEMA funds.

There are both opportunities and challenges inherent in developing and implementing special plans. For example, because the topic hits close to home, participation may be more easily garnered than when developing a comprehensive plan. While the numbers may be large, sometimes participation is not truly representative and is dominated by activists.

Special plans—both geography-based and issue-oriented—allow communities to focus on unique needs or areas of concern in a more in-depth manner.

As a companion to the comprehensive plan, they are able to foster change, manage unanticipated change, and ultimately, help realize a community's vision of the future. ■

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Development Review Process & Legal Issues

While the extent of local development review varies from one community to another, the purpose is the same—to ensure the highest quality environment, consistent with community values. The process generally involves an assessment of a project's consistency and compliance with a community's stated goals and objectives as set forth in its comprehensive plan, zoning ordinance, and other related regulations and standards. In many communities, the development review process is comprised of two categories, site plans and subdivision plats. (See *Technical Brief 7: Site Plan Review* and *Technical Brief 10: Subdivision Regulation*)

Planning commissions often are charged with development review. In some states, however, proposals are reviewed by a separate committee, which may or may not include members of the planning commission. There are other states where the planning commission functions in an advisory capacity and the authority to approve subdivisions rests with the local legislative body.

Planning commissions also are called upon to evaluate site plans for new commercial development. The role of the commission or review panel is threefold.

- Review the project's conformance to community standards and technical criteria.

- Consider the development in light of the existing legal framework.
- Serve as an arbiter between planning staff, the applicant, and other interested parties.

The development review process begins with an application to develop land. While the planning department generally oversees the application and review process, other agencies—both local and state—or regulatory commissions may be asked to evaluate the proposal. Planners will assess the suitability of the proposed project as it relates to:

- consistency with the comprehensive plan;
- conformity with local zoning;

- concurrency (adequate public facilities);
- traffic and parking;
- building and landscape design;
- environmental and historic preservation efforts;
- economic impacts and job creation;
- hazard protection and safety;
- nuisance impacts (lights, noise, odor, and vibration);
- compatibility with surrounding development.

Planners work with applicants to resolve issues before placing the proposal on the planning commission's agenda. Sometimes, however, the two parties cannot reach agreement or neighborhood opposition is so intense that the application comes before the commission with a recommendation from staff not to approve or to approve with conditions.

Conditions are requirements under which project approval is granted. Developments must not only meet local zoning standards but also those imposed as a condition of approval. The assign-

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nation of conditions generally is centered on the concept of compatibility.

Compatibility describes the relationship of buildings to neighboring structures. Compatibility exists when buildings, activities, and land uses are balanced and in harmony. Compatibility does not imply monotony in appearance or function. It means simply that new development fits with existing structures and uses and that the new use does not adversely impact the surrounding area.

Common types of conditions for approval include adjustments to building height, dimension, setback, orientation, and street layout. Site features that cause negative impacts—such as lighting, drive-up windows, dumpsters, and signage—are subject to conditions, as are, in some situations, architectural details and building materials.

Dedications and fees, also known as exactions, are imposed as conditions to offset new or increased demands on public resources. Dedications—when ownership of property is transferred to a local agency—are used to secure land for parks, bike paths, and schools. Development fees are imposed in lieu of dedications to finance sewers, affordable housing, and libraries, for example.

The basic rule when imposing exactions is that they be reasonably related in purpose and proportional in amount to the impacts caused by the development. When a planning commission agrees to an exaction, it must make specific findings that support its action. These findings

are part of a process—known as procedural due process—that requires planning commissions to offer interested parties and affected individuals a meaningful opportunity to rebut evidence that will serve as the basis for a decision.

The imposition of conditions, such as requiring a dedication of property, has resulted in takings claims against local governments. The Takings Clause of the U.S. Constitution limits the police power, not by prohibiting actions but by requiring compensation when actions unduly impinge upon private property rights. It is important to note that when a condition decreases property value or prevents the landowner from developing property in a specific way, it does not necessarily result in a taking.

Several states have statutes that protect the rights to develop land that has been acquired at certain points in the development review process. When this occurs, the right to develop is said to have "vested" or fixed. The rights cannot be abolished or restricted by subsequently enacted regulations. For development rights to be vested, the local government must have made a decision and the landowner, acting in good faith on that decision, must have committed resources to the development of the property. Generally, the right to develop is not vested until the last permit needed for construction has been issued and substantial expenditures have been made in reliance on the permit.

Planned Unit Developments (PUDs), both a type of development and a zoning classification, also require planning commission review. PUDs often consist of individually owned lots with common areas for open space, recreation and street improvements, as well as offices, shopping centers, and schools. The

planned unit development review process often involves more give and take between the community and the developer than conventional subdivisions.

Other legal tenets that come into play during the development review process include the First Amendment and the Establishment Clause of the U.S. Constitution, and the Religious Land Use and Institutionalized Persons Act (RLUIPA). The First Amendment issue of free speech is generally associated with the regulation of signage, news racks, and adult businesses. Under RLUIPA, governments may not enforce land-use regulations that impose a substantial burden on religion unless it can be demonstrated that there is a compelling government interest in doing so. The Establishment Clause requires that governments not favor one religious group over another.

Planning commission decisions regarding site plans or subdivision plats can generally be appealed to the local governing body and, ultimately, to the courts. Establishing an accurate record and providing findings of fact that demonstrate the rationale behind a decision are essential if the commission's determination is to stand. ■

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Design Review

For more than 100 years, American communities have sought to protect community aesthetics. Initial efforts revolved around restrictions—such as height limits—that could be tied to a local government's power to protect the public welfare. Today, aesthetics are considered by the courts to be a legitimate basis for regulation. While thousands of communities have adopted design ordinances, there remain a few states where such regulation is not permitted.

Design review involves more than determining if a particular building is aesthetically pleasing. It is contextual. In other words, how does the proposed project relate to the surrounding environment? The idea is to look at an area not as a collection of buildings and streets but as a fabric of interwoven forms and uses that create community.

How do communities address design and review? One early example is historic preservation and the preservation ordinance. Subdivision regulation and neighborhood plans may address size, bulk, setback, landscaping, and other design elements such as building materials, colors, and types from a predetermined palette. Downtown plans and ordinances may seek to maintain a specific character that may determine parking location, setback, size, street furniture, and landscaping.

Local ordinances include or work with design guidelines that provide details, examples, and illustrations. In order for the planning commission to undertake design review, the ordinance must authorize that role for the commission. If the commission is not authorized to undertake extensive design review, it must review only those things established by the ordinance.

The challenge for planning commissions is not to lose sight of the big picture when acting on individual project applications. These incremental decisions ultimately shape a community's form, function, and character. It is not unusual for the design review function to be given to a panel established for that sole purpose—the rationale being that a design or architectural review board, composed of those with architectural or construction

expertise, can not only determine whether a project meets the criteria, but offer suggestions for improvement. Some communities also provide staff assistance in design projects.

While design controls on new construction in historic areas are most common, many communities now review the design of new buildings in nonhistoric and suburban settings. When adopting one or more design ordinances, local governments describe the review and appeals processes in addition to the guidelines upon which these processes will rely. Such guidelines frequently employ both text and graphics to convey the community's design objectives and establish an identifiable community image.

Design guidelines may go beyond specifications of building height, roof type, building materials, color, and texture to include scale, accessibility, transitions and connections, and cohesion and balance. When implementing a design review program, local governments should:

- involve the community in identifying that which is unique, special, or worth preserving;

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- develop flexible guidelines that include both aesthetic and non-aesthetic (physical safety, comfort, convenience) standards and protect against monotony or sameness;
- confine standards to areas of community importance;
- supplement written standards with visual renderings that demonstrate community expectations;
- develop procedures for both review and appeal;
- ensure administration by a well-qualified review panel;
- devote adequate staff and resources to administering the program.

Some communities promote design standards through recommendations, and others rely on design requirements. For this type of regulation, as with any ordinance, the standards must be applied uniformly to help make certain that they are legally defensible.

In areas that fall short of meeting criteria for historic designation but are otherwise significant, conservation districts may be established to preserve community character. Conservation district standards are less stringent than historic district regulations.

There are many examples of how design control and review is being implemented. The expansion of big box retail outlets—stores that typically occupy more than 50,000 square feet and derive profits from high sales

volume—has led to the enactment of design standards and guidelines to control the aesthetics of such establishments. The standards are intended to move big box retailers away from the one-design-fits-all pattern of development and toward more compatible, site-specific design. Corporate franchises, such as gas stations and fast-food restaurants, also are subject to specific design standards in some communities.

Design review may also consider the protection of natural resources and public amenities. Preserving panoramic vistas, view corridors, and scenic roads are priorities in many communities. Efforts to protect scenic views date back to the late 1800s. The most common type of view protection is that which protects scenic vistas that are visible from multiple vantage points. One type of ordinance imposes height limits, while another sharply curtails the type of permissible development. View corridors—openings that allow glimpses or an extended view of an important resource or natural feature—also can be regulated. Ordinances may attempt to protect the corridor from obstructions or shadows by limiting building height.

Often overlooked in a discussion of community aesthetics are trees and other vegetation which, when properly employed, do much to soften developments. Not only do trees prevent pollution, but they moderate weather effects—sun, wind, cold—and reduce erosion and runoff. Many such ordinances require a permit in order to clear vegetation or remove trees. Some may require the replacement of trees and greenery or specify types of vegetation suitable to the climate.

Aesthetics and design play a significant role in a community's effort to achieve

its vision as defined in its comprehensive plan. Long after a site has been developed, the community will be living with the results. It's in everyone's best interest to ensure that the activity engendered by the project and the architecture embodied in it promote the values the community holds dear. 

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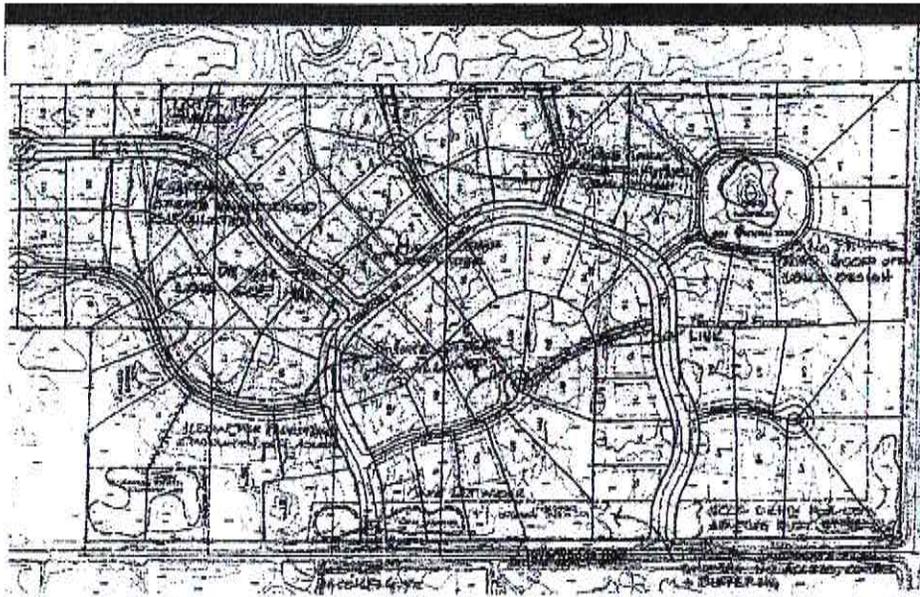
Site Plan Review: A Primer for Planning Commissioners

Les Pollock, FAICP and Stuart Meck, FAICP

Understanding what a site plan is and how to review one has become essential knowledge for local planning commissions and their professional staffs. A site plan is a scaled drawing that shows the layout and arrangement of buildings and open space, including parking and yard areas, the access to and from the public street system, connections to adjacent properties, and, often, the location of facilities such as water and sewer lines, and storm drainage systems. It also includes common open space and identification of specific resources to be protected, such as trees.

Local zoning ordinances may require site plans in one or more of four forms.

- For zoning permits. A site plan of some type is usually required for issuance of zoning permits that involve new construction or expansion of existing uses. Here the purpose of the review is to check for compliance with zoning regulations and to ensure that the applicant knows which lot or parcel is being built upon. This type of review is ministerial or administrative—applying a checklist to various measurable development standards to see that they are satisfied.
- For area or development standard variances (i.e., a requested departure from front, rear, or side lot line requirements, reducing the number of parking spaces, changing landscape materials, or increasing the signable area from that specified in the zoning ordinances). A site plan is necessary to show the precise relationship of the proposed building or use to the lot lines or other features, such as easements. From this, a board of zoning appeals or adjustment can determine whether the area variance is necessary.
- For statutory site plan review. This review applies to proposals for development of nonresidential and multifamily residential uses that are permitted as of right by the zoning ordinance, but where there is a limited degree of discretion in evaluating how well the proposal fits the characteristics of the site itself. The reviewing authority must approve the site plan unless there are reasons why the proposal does not meet the zoning ordinance criteria.
- For discretionary permitting procedures. These include planned unit developments and special permit or conditional uses, where the approving authority has the latitude to decide whether the proposed use is appropriate in the context of the surrounding area. Here, the site plan review criteria in the zoning ordinance will allow the approving authority to consider such issues as placement of buildings on the site, screening, retention of existing site amenities, various types of impacts, and relationship of the buildings and uses to the neighborhood. Where the discretionary permitting process involves an urban design or historic preservation regime, the review may also extend to the appearance of the building.



Les Pollock

This illustrates a work in progress—the marked-up site plan. The plan should be an appropriate scale, such as 100 feet to an inch for a 50-acre site, but 400 feet to an inch for 1,000 acres.

This article focuses on conducting site plan reviews for as-of-right and discretionary uses. Some cautionary advice is in order. Site plan review is not site planning. The role of the reviewer—whether a professional staff member or a planning commissioner—is to make constructive suggestions about the applicant's plan—how to improve it or ensure compliance. The review must be anchored to standards and criteria contained in the zoning ordinance, or guidance from a site plan review manual that interprets the ordinance.

Undertaking a site plan review involves checking the plan submission for five general areas: (1) required information; (2) compliance with objective standards; (3) consistency with the local comprehensive plan; (4) discretionary review of on-site issues; and (5) discretionary review of off-site issues. Many local governments employ checklists that follow the site plan through the review process and serve as permanent records of reviews.

Required Information

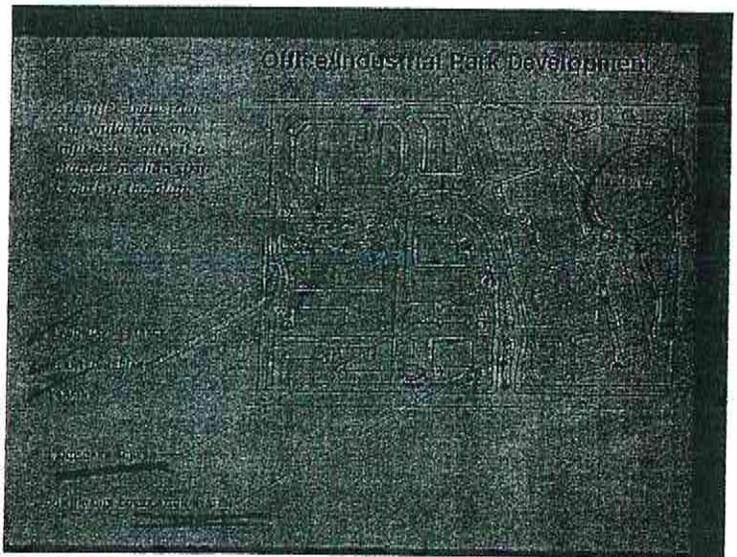
A starting point for all site plan reviews is determining whether the information that the zoning ordinance calls for actually appears on the site plan. This part of the application process is called a completeness review. Site plan requirements are fairly uniform throughout the country: a map of the site drawn to a specified scale that includes a date, north point, and calculation of total area; the location of proposed buildings, existing vegetation or forest structures (including free standing signs), sidewalks, public streets, easements, and off-street parking and loading spaces; distances between all buildings and front, rear, and side lot lines; location, type, and size of fencing,

retaining walls, and screening plants; contours; location of floodplains or wetlands; building plans (if required) and elevations; a landscaping plan; existing and proposed water and sanitary sewer facilities; a stormwater drainage plan with a professional engineer's calculations; a statement of the uses contemplated for the property; and, if required, an erosion and sedimentation control plan. In some cases, the local government may ask for supporting studies such as a traffic analysis or soil study.

Compliance with Objective Standards

The next step is checking to see whether the dimensions shown on the site plan match the ones the staff reviewer measures by using an engineer's or architect's scale, and verifying all calculations. Assuming there are no discrepancies, the reviewer then compares the dimensions and calculations against the requirements in the zoning code. Basic requirements include whether the various lot area, width, setback, building height, and parking requirements are satisfied, and whether the uses proposed are in fact allowed. In addition, the reviewer will compare floor area ratios or maximums, computed from the building plans and elevations, to the limitations in the zoning ordinance. The zoning ordinance may establish landscaping requirements that call for plant materials of a certain size, spacing, and type, and these must be checked as well for compliance.

continued on page 8



Les Pollack

**General Site Planning Considerations
Commercial/Office/Industrial/Multifamily**

- Locate compatible uses adjacent to each other
- Physically buffer incompatible uses with open space, trees and shrubs, fences, earth berms, or transitional use areas
- Locate uses in direct proximity to that portion of the circulation system best suited to it
- Minimize changes in the existing topography and vegetation
- Organize density to place the largest number of people in closest proximity to their destination
- Don't site buildings in floodplains
- Restrict development on sensitive land including steep slopes, wetlands, areas of unique vegetation, and filled areas
- Locate detention or retention ponds to reflect aesthetics as well as utility function.
- Provide sidewalks across front of site
- Provide on-site bicycle storage
- Where campus-like environment is desired, provide large planted medians at entry
- Identify and preserve good views
- Minimize pavement generally
- Avoid forested terrain and maintain buffers
- Don't site within fault lines or soils subject to liquefaction in earthquakes
- Orient parking aisles 90 degrees to store/building
- Separate parking aisles from site circulation routes, and mark on-site pedestrian crossings
- Screen parking and loading areas from adjacent development and road.
- Break up parking lots with landscaped islands
- Place signs and light poles in landscaped areas
- Assure adequate stacking room at driveway/street intersections as necessary
- Separate buildings from pavement with landscaping or walkways
- Orient buildings toward street and buildings and form street patterns to allow for effective drainage off the lot without flooding homes or creating periodic backyard swamps
- For New Urbanist developments, bring buildings forward on site near or at the sidewalk, place parking in back or sideyards, and allow multiple transportation routes through the site
- Limit size of curb radii at driveway intersections with sidewalks to slow down traffic as it turns
- Connect new sidewalks to adjoining sidewalks
- Make open space usable for active and passive purposes in residential development
- Site residential building in clusters rather than strips
- Screen window-to-window view between dwellings

continued from page 7 In some cases, the ordinance may prohibit certain plant species because they are invasive, easily damaged by wind, unable to survive very well in certain climatic zones, or in need of constant watering. In those cases where engineering plans are submitted, the local government's engineer will recalculate runoff formulas and verify conformity with the local government's site development standards, such as driveway width and placement, curb radii, sidewalks, and water and sewer connections. For most garden-variety site plans, this is when the local government would issue a zoning or similar permit. Sometimes, in the process of checking the site plan, the reviewer may determine a condition that may justify a variance and a trip to the board of zoning appeals or zoning hearing examiner, for example, where minimum lot width or setback requirements cannot be satisfied for the particular use.

Consistency with the Local Comprehensive Plan

For discretionary permits, look at what the local comprehensive plan map shows for future land use, community facilities, and transportation facilities. In addition, it may be necessary to review written policies in the plan that amplify the plan map. Indeed, it is often at the site plan level where comprehensive plan policies have the greatest impact, such as those suggesting connections between adjacent residential subdivisions. Some basic questions are whether the specific uses and density or intensities are within the range shown on the map and whether proposed community and transportation facilities will affect site design. It is a good idea to examine the local government's capital improvement program as well to see if there are any current proposals for capital projects that the site plan would need to reflect or accommodate. For example, the local comprehensive plan may propose a public park in the general area of the site. The local government will then need to decide whether it wants to approach the owner about purchasing a portion of the land. A trunk sewer line extension and an easement or recapture agreement for the cost of oversizing sewers in the plan may be necessary so that properties at higher elevations can be served in the future.

Discretionary Review of On-Site Issues

Where the local government has discretion to review a site plan, it can suggest to the applicant that changes be made. Alternately, it can impose reasonable conditions. The nature of the changes or conditions will depend on the site's characteristics and the type of land use. The table at left lists a number of considerations for commercial, office, industrial, and multifamily development. Some of these considerations, it should be noted, might need to be relaxed for a New Urbanist approach, which generally encourages *continued on page 10*

States that Authorize Site Plan Review

THE AUTHORITY FOR SITE PLAN REVIEW in some states is implied from zoning statutes or home rule power. Other states have enabling legislation that specifically authorizes local governments to undertake site plan review. These include:

Connecticut (Conn. Gen. Stat. §§ 8-3(g) *et seq.*) allows local zoning regulations to require that a site plan be filed with the zoning commission or another municipal agency or officials to aid in determining the conformity of a proposed building, use or structure with specific provisions for such regulations. A site plan may be modified or denied only if it fails to comply with requirements already set forth in the zoning or inland wetland regulations. Approval is presumed unless a decision to deny or modify the site plan is rendered within 65 days after receipt, although an applicant may consent to extensions. A decision to deny or modify a site plan must set forth the reasons for such denial or modification and must be sent by certified mail to the applicant within 15 days after the decision is rendered.

Michigan (Mich. Comp. Stats. §125.286e (townships); §125.584d (cities and villages), §125.216g) allows a zoning ordinance to contain procedures and requirements for the submission and approval of site plans, which it defines as "the documents and drawings required by the zoning ordinance to ensure that a proposed land use or activity is in compliance with local ordinances and state and federal statutes." The statute requires that the site plan be approved if it contains information required by the zoning ordinance, is in compliance with the zoning ordinance and the conditions imposed by it, and with other applicable ordinances, and state and federal statutes.

New Hampshire (N.H. Rev. Stat. Ann. §§ 674:431 *et seq.*) allows a municipality that has adopted a zoning ordinance and subdivision regulations to adopt an ordinance or resolution to further authorize the planning board to "review and approve or disapprove site plans for the development or change or expansion of use of tracts of nonresidential uses or multifamily dwelling units, defined as any structures containing more than two dwelling units, whether or not such development includes a subdivision or resubdivision of the site." Before it can conduct site plan review, the planning board must adopt site plan review regulations, the scope of which is described in general terms in the statute.

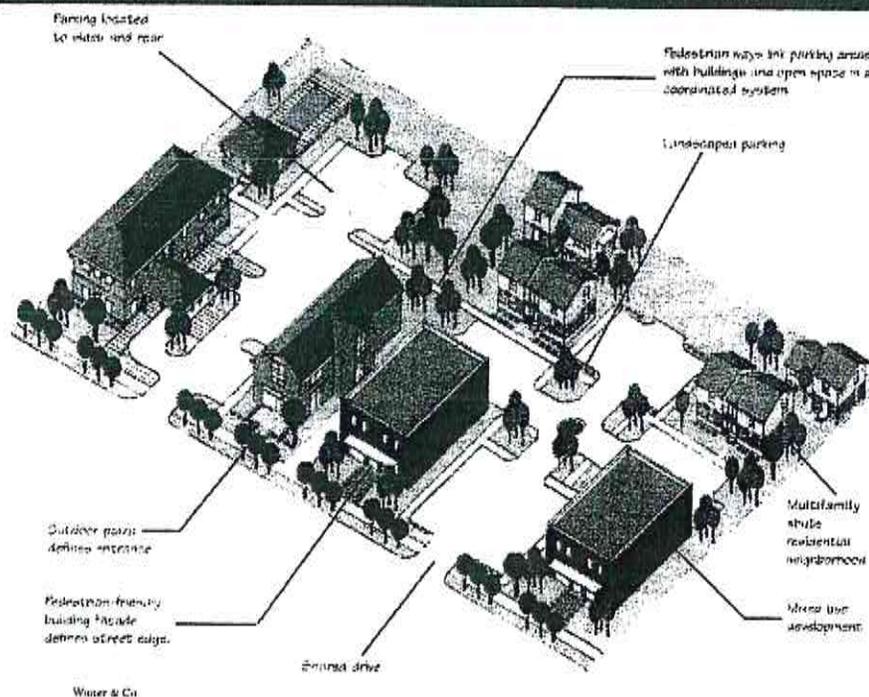
In contrast to other states, **New Jersey's** site plan review requirements (N.J. Stat. Ann. §§40:55D-41, -46 *et seq.*) are lengthy, complex, and are grouped with the subdivision enabling legislation. They provide for a two-step approval process, with preliminary site plan approval, and a final site plan approval. The statute allows an abbreviated review for a "minor site plan," which means a "develop-

ment plan for one or more lots which (1) proposes new development within the scope of development specifically permitted by ordinance as a minor site plan; (2) does not involve a new street or extension of any off-tract improvement, and (3) contains the information required in order to make an informed determination [that it meets the requirements established in the ordinance for approval as a minor site plan.]" The statute includes a list of standards and requirements that may be included in a site plan ordinance.

The **New York** statutes (N.Y. Village Law §7-725-a; N.Y. Town Law §274-a, and N.Y. Gen. City Law §27-a) are similar in approach to New Hampshire's in authorizing the local planning board or other administrative body as the entity to review the site plan. The local government may require a hearing, but the statutes do not mandate one. The New York statutes give the planning board or other authorized body the ability to impose such reasonable conditions and restrictions as are "directly related to and incidental" to a proposed site plan. These conditions must be met in connection with permit issuance. □

In the review of this site plan, you would look to see how designers have handled parking, which is in the interior of the block. In addition, you would look for how landscaping is

handled to buffer the sidewalk and buildings from the street. In a mixed use development, the location of the sidewalks is crucial as is the relationship of buildings to one another.



continued from page 8 mixed use, reemphasizing the street grid, and an additional degree of design formalism in laying out sites.

Discretionary Review of Off-Site Issues

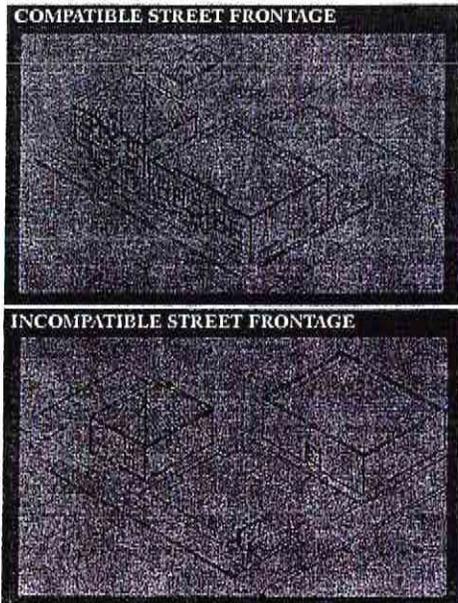
Where the local government has discretionary review, especially where it is considering the use of the property as well as the internal site design, it will look at the relationship of the proposed site plan to the surrounding area. In particular, it should ask these questions:

- Does the scale or massing of proposed buildings relate to the buildings off site? If not, does the site plan propose a step-down arrangement in building volume?
- Where there is an architectural or historic preservation review, is the detailing of the proposed buildings compatible with off-site buildings?
- Do internal streets connect to the adjoining street system? Are any intersections doglegged?
- If a traffic impact analysis has been conducted, what impacts will the site activities have on neighboring streets and intersections? What measures can be taken, if any, to address these impacts?
- How does the site plan relate to off-site public transit stops?
- Will the site plan, as proposed, result in any off-site impacts on storm-water that the existing system cannot accommodate?
- Will the proposed use be compatible with uses in the adjoining neighborhood? If not, what aspects about the use can be mitigated, if at all?

Conclusion

As part of the findings that a planning commission must make, reduce to writing any changes and conditions. The planning staff may take the site plan and mark it up, further illustrating what the commission intended. Then forward both written and graphic changes in a letter to the applicant, clarifying what needs to be done before a final approval can be issued. Don't leave anything to chance or potential misunderstanding. If the findings call for extensive changes in the site plan, it's a good idea to have a revised version of the site plan submitted to the local government before any zoning or building permits are issued, thus ensuring that the applicant acknowledges what the planning commission wanted. □

Bringing buildings, entrances, and windows to the street adds to street activity, surveillance, and a sense of spatial enclosure. Code should include "build-to," "build-near-to," or minimum setback requirements to attain this goal.



Graphic by Mark Tucker, AICP, Chicago, San Francisco

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he ability to analyze a site plan in a thorough manner is a skill that all commissioners should master. These resources can help you grasp the concepts involved and help you create a step by step process to ensure that you examine all the relevant factors.

Site Plan Review

Publications available from APA's Planners Book Service

Planning Made Easy (1994)
by Efraim Gil, Enid Luchesi,
William Toner with Carol Barrett,
NAICP, and Robert Joice, AICP

Developing a program to train planning commissioners and zoning board members takes a lot of time and effort. This manual makes the process easier. It covers the basics of community planning, zoning, subdivision regulation, and ethics. With chapters organized in discrete modules, it's ideal for both self-study and classroom use. Exercises encourage users to think about the planning issues.

Site Analysis (2001)
by James A. LaGro

The complete analysis of a site and its surrounding context can lead to better development proposals, smoother design implementation, and, ultimately, better built environments. This book details each crucial step in the site analysis and planning process, from site selection through design development. It shows how these activities are integrated to arrive at a site plan that successfully balances needs.

Site Design and Management Process (2000)
by George E. Fogg

This "how-to" book covers all aspects of good site design, including preparing master plans and writing ongoing site management plans. Its 11 chapters trace the complete site-design process, from obtaining construction documents and navigating the bidding process to conducting site analysis, planning land use, and proceeding with construction. The book also examines social trends that impact the site-design process. A helpful reference for all beginning planners, landscape architects, and site managers.

Site Planning and Design Handbook (2002)
by Thomas H. Russ

This skillful blending of the technical and artistic aspects of site design was written to spark creativity and improve efficiency in both realms. The author provides standards and guidelines to support design choices and outlines a framework for educating clients and the public. Russ bridges the gap between traditional methods of site planning and design and the growing importance of sustainability.

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8

Zoning, Processes, and Variances

Implementation of the comprehensive plan is achieved, to a large degree, through zoning. Zoning divides the land in a community into districts or zones and regulates uses permitted and development standards for each zone. Common zoning districts are residential, commercial, industrial, mixed use, and agricultural. Zoning delineates the mix of uses, density, and intensity of development for a community.

A community's legal authority to zone comes from the state's enabling legislation. In most jurisdictions, the planning commission is the body that oversees development and adoption of the zoning ordinance. Local governments sometimes separate the responsibility for implementing the zoning ordinance from that of rendering decisions about departures from its requirements. Board of adjustment, board of zoning appeals, and zoning board of review are just a few of the names zoning review panels go by.

While the concept of regulating use and development standards through zoning is simple, its application can be challenging. For each zone there is a list of permissible uses that are allowed "by right." The term "by right" does not mean that a universal right exists to develop a particular use. It means that

the use is one that may be located within the district if it conforms to development standards and other applicable regulations. Development standards regulate things such as building size, height, and setback from lot lines.

In addition to the basic zones, some communities use overlay zones to address certain land use needs within one or more districts. Historic preservation regulations can be administered through overlay districts, as can regulations that deal with development on hillsides or in floodplains. Some communities adopt nontraditional zoning codes, including form-based zoning and performance-based zoning.

Communities with zoning ordinances adopt both a zoning map and text. The map identifies every parcel of land and the zoning district in which it lies. The zoning text explains the rules that

apply in each district, spells out the procedures for administering the zoning ordinance, and establishes the roles and responsibilities of applicants, zoning administrators, hearing boards, and elected officials.

Most zoning texts include a statement of purpose that explains what the community is trying to accomplish through zoning. It also includes definitions that establish the precise meaning of words or terms that are subject to differing interpretations. These definitions are not written in jargon but in clear prose that makes technical and abstract terms understandable to a layperson.

In addition to the general provisions—the overriding rules that apply in each zone—the zoning text also addresses nonconforming uses, special or conditional uses, and procedures for granting variances or allowing the rezoning of land.

While the intent of zoning is to achieve some level of uniformity of use and site design in a given district, new zoning or a change in zoning rarely starts with a blank slate; some development already has taken place. For every zoning

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ordinance adopted, there is a use that does not conform to the rules.

Legal nonconforming uses—or grandfathered uses—generally are permitted for as long as they exist. However, the nonconforming use is not allowed to expand or be replaced if abandoned or destroyed. Occasionally, a planning commission may require that a legal nonconforming use terminate after a reasonable period of time, the idea being to allow the owner enough time to recoup his investment.

While the zoning ordinance authorizes certain uses by right, other uses may be allowed if they meet specific conditions. A typical zoning ordinance allows conditional uses when they are in the interest of the public convenience and necessity and are not contrary to public health, morals, or welfare.

Decisions to grant conditional use permits depend on the fit between the proposed land use and the place that it will occupy. Required reviews of these proposed special uses allow planning commissions to consider potential negative effects and to develop a set of conditions to minimize the impacts before allowing the development to proceed.

The types of conditions imposed on a proposed special use range from additional landscaping and parking to soundproofing or limiting hours of operation. Not only must a condition bear a reasonable relationship to the public need created by the development,

but it also must be supported by fact and evidence.

While the rules in a zoning district apply uniformly to all parcels, all parcels are not uniform. In recognition of that fact, zoning codes allow for variances—a limited waiver of the existing development standards. Variances, minor exceptions to zoning rules, usually are considered when a property's physical characteristics—size, shape, topography, location, or surroundings—pose unique challenges.

Enabling legislation in many states includes requirements that must be met before a variance can be granted. These requirements include situations where:

- the zoning standards would result in a hardship that is not shared by neighboring or similar properties;
- the zoning standards would deny a landowner reasonable use of the property;
- the applicant did not create the hardship (i.e. through modifying the parcel);
- a variance is the minimum necessary to allow reasonable use of the property.

Because requests for variances are determined in a quasi-judicial setting, procedural due process is paramount. All parties must be given notice and an opportunity to be heard. During the hearing, it is incumbent on the applicant to demonstrate the necessity of the variance and how the request meets the standards for variances. Decisions must be based on those standards and upon testimony that relates to those standards. Findings of fact should tie the decision to relevant facts and existing standards.

From time to time, planning commissions will be asked to change the

zoning in an area. Because a change to the zoning map can have unintended consequences, such action should be given careful consideration, to include:

- Is the proposed rezoning consistent with the comprehensive plan?
- How will the proposed rezoning affect neighboring zoning districts?
- Will the rezoning open the door to inappropriate land uses, even if the proposed use is acceptable?

While zoning is just one facet of the land use process, it has enormous potential to shape a community's physical development. Like the comprehensive plan, zoning should be reviewed at regular intervals and in times of dramatic growth for relevancy and effectiveness. ■

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9

Plan Implementation and Amendments

The ultimate success of a comprehensive plan depends upon its implementation. Only when the plan's recommendations are translated into actions can the community's vision be realized. Consequently, an implementation strategy is key to achieving the goals and policies set forth in the plan.

Many comprehensive plans now include a section devoted to implementation. Others incorporate implementation strategies into the sections dealing with specific elements, such as housing or transportation. Implementation plans often include a description of the specific strategy, the party responsible for carrying it out, a timeline, and potential sources for funding.

There is an array of measures— involving various combinations of people, organizations, financing, and processes— available to bring the comprehensive plan to fruition. Some of these measures are short-term and can be easily accomplished; others can take years to properly execute.

Implementation methods fall into several broad categories—regulations, master planning, programs, administration, outreach, and financing. When used in combination, these various types

of methods can lay the groundwork for successful implementation.

A primary means of implementation is through amendments to the comprehensive zoning map or text. While many communities update their comprehensive plans on a multiyear cycle, there are times when it is necessary to amend the existing plan to accommodate change or address specific needs. Most communities establish a process and criteria by which the planning commission may amend the comprehensive plan.

Perhaps the most important and noticeable tools for plan implementation are land development regulations. While the comprehensive plan focuses primarily on the location and timing of development within a community, regulations concern themselves with the site design of permissible development. Basically, the plan determines the categories of land use (residential, industrial,

commercial, agricultural) while land development regulations establish design standards. Implementation strategies related to regulation may call for the modification of existing ordinances or the adoption of new ones. The capital improvements program is another important tool for plan implementation (*more below*).

Development regulations include zoning and subdivision ordinances, as well as ordinances governing things such as signage, landscaping, parking, and adequate public facilities (concurrency). In some communities, the planning commission manages plan development but a development review board handles its implementation, through the application of land-use regulations.

Enforcement of land-use ordinances is imperative if the goals of the comprehensive plan are to be realized. Often, communities assign this function to a zoning administrator who is responsible for the day-to-day interpretation and administration of the ordinance. The zoning administrator will inspect plans for conformance with the ordinance before issuing permits. This individual also

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inspects new construction to insure that the specifications and standards set forth in the approved plans are being observed.

The development of specific programs—such as historic preservation, recycling, or shoreline management—may be necessary to implement the comprehensive plan. The creation and administration of these types of programs frequently require the involvement and cooperation of other area governments, local agencies, or community-based nonprofits. It is not unusual for programs to necessitate the creation of partnerships within government, between governments, or between governmental agencies and nonprofit groups. These partnerships take the form of implementation agreements in several states with authorizing legislation to do so. Implementation agreements are often contracts for the ongoing operation of facilities or services, including wastewater treatment and neighborhood-based economic development. The text of the agreement states the purpose, financing arrangement, and termination criteria.

Implementation also occurs through the creation or updating of detailed plans for systems such as a master plan governing water and wastewater; fire protection; or nonmotorized transportation. Chief among these functional or management plans is the capital improvements program (CIP). The typical CIP lays out a schedule for public improvements over a specific time period. The CIP

is a planning tool that earmarks funding and determines time frames for capital expenditures such as new facilities, building renovations or expansions, infrastructure improvements and construction, and new equipment. Linking the plan to the CIP helps ensure political support and funding for planned programs.

A community's budget process—both for capital improvements and for operations—impacts the implementation of the comprehensive plan. While some measures can be put in place without additional financing, others will not be able to move ahead without the commitment of funds. Department budgets should be reviewed and updated to ensure that money is available to create and staff needed programs; develop systems plans; and review, update, and enforce land-use regulations.

Apart from the local budget, funds for plan implementation may be available from county, state, and federal agencies, as well as nonprofit groups and foundations. Tax Increment Financing (TIF) districts include financial incentives that encourage private developers to implement the plan. Impact fees, designed to help cover the costs associated with new development, may be used to implement comprehensive plan goals in that specific part of the community. Technical assistance—to help communities better utilize geographic information systems, develop landscaping plans, or analyze issues pertaining to housing, the environment, or transportation—also may be available to local jurisdictions. Grants may be used to fund elements of plan implementation. The plan itself should serve as a strong foundation for grant applications.

Measuring implementation keeps the plan on track and can help the community

identify areas that need better implementation programs. Benchmarking is one way to monitor plan implementation. These measurable, numeric goals can be applied to many aspects of the comprehensive plan, and are quantities such as the price of single-family housing; density; the number of units of affordable housing; the increase in neighborhood parkland per capita; the reduction of residential development located in floodplains; the number of non-conforming signs removed; and the number of lane miles of streets resurfaced. Some states require a monitoring, evaluation, or appraisal report on the local comprehensive plan on a regular basis.

In all circumstances, implementation depends on keeping the lines of communication open between government and citizenry. Involving citizens—through the creation of advisory boards—helps create buy-in. Education and outreach is needed to ensure that the public understands the rationale for new programs, facilities, and budget requests. Without citizen support, implementation is anything but assured. 

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10

Subdivision Regulation

Subdivision is the process of dividing land into two or more pieces. All states have statutes allowing the regulation of subdivisions. These regulations establish a process so that proposals for the subdivision of land can be reviewed and recorded. They also allow for the development of subdivisions that satisfy the needs of both the developer and the community.

Subdivision regulations are beneficial in that they guarantee that each piece of land has an accurate description that can be legally enforced. They also ensure that each lot has access to a public right-of-way, as well as a source of water and sanitary sewage, and that roads are adequate to provide emergency services such as fire and ambulance. Along with zoning, subdivision regulations are used to implement a community's comprehensive plan.

When only a few lots are created it often is referred to as a minor subdivision. Minor subdivisions require few public improvements and, therefore, can be reviewed in an expedited manner. Some state and local laws exempt minor subdivisions from local review. Major subdivisions require a more extensive review.

Most subdivision regulations include a timetable for approval, as unexpected delays increase the cost of development.

Fixed time limits allow the applicant to more accurately estimate costs and create a construction timetable.

Subdivision regulations generally incorporate both design and development standards. These can include road design, lot arrangement and dimensions, setbacks, utilities, parks, sidewalks, and fire hydrants, to name a few. While design standards vary in their level of specificity, they reflect community values and goals.

The subdivision approval process often begins with the submission of a sketch plat. Typically, the applicant will meet with planning staff to discuss the review process. Planners will review the sketch to determine if the proposal complies with applicable federal, state, and local laws, local zoning, and the comprehensive plan. Once the sketch has been deemed satisfactory, the applicant will submit a preliminary plat for approval.

The preliminary plat is a detailed rendering that shows topographic contour lines and other features such as streams, large trees, flood hazard areas, and existing structures. It includes lot configuration, street layout, and connections to utilities. Following a staff check for completeness and compliance with design and development standards, the plat is referred to the planning commission.

The primary responsibilities of the planning commission in reviewing proposed subdivisions are to ensure that the development:

- does not create health or safety hazards;
- does not overburden existing community services;
- pays its share of the cost necessary to provide required services and amenities;
- sets aside land for public rights-of-way, facilities, and amenities;
- is compatible with the surrounding area;
- is necessary and not speculative.

As part of its review, the planning commission may hold a public hearing.

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This hearing is quasi-judicial in nature and, therefore, due process should be strictly adhered to. Proper notice and an opportunity to testify should be given to the applicant and all interested parties. The commission's decision should be tied to findings of fact (see *Technical Brief 3: Ethical Meeting Conduct and How to Record Decisions*).

It is not unusual for a planning commission to impose conditions before granting preliminary plat approval. Those conditions might include the dedication of land for public parks, the construction of streets or trails, or the payment of impact fees. These fees are used to help finance off-site facilities needed to accommodate the new subdivision, such as schools, arterial roads, and sewer extensions. Once collected, impact fees are placed in a segregated fund and spent only in the benefit area from which they were collected. The commission must have been granted the authority to impose impact fees or other conditions on subdivisions and the exactions must be fair, reasonable, and rational to avoid legal challenges.

After the preliminary plat receives approval, with or without conditions, a surveyor prepares a final plat. This is a precise rendering that fixes the location of lots and streets. It also is the means by which public improvements are conveyed to the local government. Engineering drawings and technical analysis often accompany the plat when presented to the planning commission for final approval.

In many communities, final plat approval is not granted until the developer provides a guarantee that public improvements—roads, water, sewer, street lights, sidewalks—will be made in a timely manner. The developer also is required to post some form of collateral that the local government can use to finance public improvements should the developer fail to construct them. Such collateral can take the form of a performance bond; letter of credit from a lender; or escrow in cash, stocks, bonds, or title to real property held in trust by a bank or municipality. A subdivision improvement agreement, when properly drafted, serves to protect the community's interests. In some jurisdictions, these agreements are not set in stone but are open to negotiation.

There are communities where land was platted before local subdivision controls were enacted. The result has been the existence of dozens, hundreds or, in some cases, thousands of partially developed or undeveloped lots under separate ownership in subdivisions that did not meet regulatory standards. Local governments were stuck choosing between limiting development rights in the subdivision or allowing development and providing the needed infrastructure itself.

While zoning and subdivision regulations are generally separate and distinct, there are some communities that have moved to a unified code. Such a code brings all development regulations and procedures—not just zoning and subdivision, but floodplain, historic preservation, overlay zones, commission bylaws, and administrative procedures for filing plats and holding hearings—all under one roof. One of the primary advantages inherent in developing a unified code is that conflicting and

inconsistent provisions are discovered and eliminated.

Whether separate and working in tandem, or unified in a single code, zoning and subdivision controls are the backbone of the planning process. When employed wisely, they are useful tools for guiding growth and development and helping achieve the community's vision.

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Citizen Engagement & Conflict Resolution

Citizen participation in community decision making is one of the pillars upon which the U.S. was founded and is at the heart of the planning process. Because the way in which we use our land—a finite resource—affects every member of a community, it is essential that citizens help shape land-use decisions.

One of the main responsibilities of the planning commission is engaging the public in the planning process. By using new technologies and innovative approaches, planning commissions have been able to involve many community groups in the development of a community vision or plan.

Meetings with stakeholders begin the process of public participation. From issue identification to the evaluation of options and designs, meetings can be used at various stages of the planning process. The commission's objective—the exchange of information, problem solving, the creation of a community vision—will determine the forum, format, participants, and location of the meeting.

Commissioners need to decide how to involve the public in the planning process. A well developed public participation program not only informs and involves stakeholders, it develops the community's

capacity for problem solving and creates new partnerships and new processes for decision making. In putting together a participation process, planning commissioners and their staff should consider:

- Who are the key stakeholders and how should they be involved?
- What information does the commission need from the community and how will it be obtained?
- How will citizen participation be structured and financed?
- How much time should be allotted for the public process?

Securing public participation requires effort on a variety of fronts. People acquire information from a multitude of sources and each is a viable option for spreading the word. For various reasons—child care issues, scheduling conflicts, job commitments—some members of the

community will not be able to participate in meetings or events. There are ways to solicit ideas and opinion from the greater community.

- Go where the people are. Be actively involved in community life and invite people to share comments about the community or planning proposals.
- Go online. Post information on the municipality's web page and provide an opportunity for feedback.
- Go to the press. Cultivate a relationship with the local newspaper and help the editor see planning in the community as a newsworthy event.
- Hit the airwaves. Partner with a local television or radio station to hold an electronic town meeting or call-in show.
- Go to school. Involve local youth and, often by extension, their parents.
- Go to the post office. Direct mail remains a potent way of getting information, surveys, or questionnaires into the hands of residents.
- Go door to door. Ask local homeowners or citizens associations to canvass the neighborhood.

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In communities where there are non-English speaking residents, consider outreach efforts in other languages. Also consider other avenues for reaching those individuals. In cultures where churches play a significant role, invitations can be sent to pastors and congregants. Community-oriented policing programs offer another opportunity. Neighborhood officers often have established relationships with community leaders and can emphasize the benefits of participation.

Two of the more popular forums for garnering citizen input are visioning and charrettes. A charrette is an intense session during which teams concentrate on a planning issue and pose solutions. It is an active, hands-on process that is led by a facilitator whose job is to encourage contributions from all participants. Participation often is solicited to ensure that charrette members cut across a community's social, economic, and political divides. Its time limit challenges participants to examine problems in a rapid, open, and honest manner. A charrette often occurs early in the planning process to provide useful ideas and perspectives and to unearth and resolve conflicts. After identifying and defining the issue before them, participants break into small groups for facilitated discussions and goal setting. Toward the end of the event, discussion centers on implementation priorities. Following the charrette, the facilitator summarizes the consensus points. This summary becomes the basis for a plan that can identify changes

in zoning or capital improvements that are needed to achieve the desired results.

Visioning consists of a series of meetings that focus on long-range objectives and ask citizens to imagine their community 20 or more years down the road. Visioning is inclusive, incorporating opinions from all stakeholders. Because visioning looks for common ground among participants and ideas, impartial leadership is key to its success. In order for these groups to do their jobs, information and data are necessary, including census and other demographic information. The result of visioning most often is a document summarizing the vision, which is then adopted or endorsed by the local governing body. The challenge is to move from broad vision to tangible results. Some communities incorporate action planning or benchmarking into their visioning. This provides a level both of accountability and control over a community's destiny.

Soliciting opinions from community members, especially when done face to face, opens the door to conflict that must be addressed. Listening closely to what participants have to say and treating them with dignity is key to resolving conflict. People want their ideas and opinions to be considered, even if they are not ultimately adopted. When rendering a decision, it is helpful for planning commissioners to provide verbal or written references that make it clear that all sides were heard.

During public meetings, commissioners should monitor their nonverbal and verbal communication. Slouching in a chair or burying one's nose in written documents signal a lack of interest in what is being said. Forcefully stating opinions or using sarcasm may discourage further discussion and alienate participants.

In some cases, conflict can be resolved without commission involvement in advance of a public hearing. In many jurisdictions, applicants are encouraged or required to meet with members of the community to present their proposal and listen to concerns. In some cases, developers may modify their plans to mollify community objections. In at least one state, Virginia, these agreed-upon modifications—called proffers—are legally binding.

Despite the best of intentions, there are times when a disgruntled individual can disrupt a meeting. It is in everyone's best interest for commissioners to remain calm, cordial, and polite. Stick to the agenda and timeline. The hearing process should have specific amounts of time allotted to individuals and groups and it is unfair to allow extra time to any point of view. If necessary, call a brief break and offer to meet with a dissenter later on. Meetings can be adjourned, but such a drastic step should be the last option considered.

Planning is a process that ultimately benefits from community involvement, despite the potential for conflict. By building grassroots support for planning efforts, the potential for implementation increases and, as a result, a community comes closer to achieving its vision.

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Roles in Public Decision Making Related to Planning

While planning commissioners are decision makers, they also are educators. Regrettably, community outreach, considered essential by most planning commissioners, often gets pushed to the back burner due to its time-intensive nature.

It is unfortunate that the only time some citizens come in contact with government agencies is when they renew their driver's license, register to vote, or learn of an impending land-use decision in their back yard. Rezoning and other neighborhood land-use issues that directly touch residents present a real opportunity to educate citizens about the planning process.

While most states have minimum requirements regarding notification of applications for variances or conditional use permits, communities may opt to do more. The last thing a commission needs is a constituent who is irate because he wasn't notified. It's difficult to inform in the face of anger.

The Internet offers a wealth of opportunities to planning commissions to provide information and to educate the public. It also provides significant cost savings. No longer does the planning staff have to mail out information in response to an

inquiry. Staff now can direct residents to the appropriate webpage containing information and links that will respond to the question. Many local governments have extensive websites that contain a host of information for local consumers—residents, businesses, developers/builders, and journalists, to name a few.

Most websites contain information about the planning commission's role and responsibilities and list contact information for commissioners. The best webpages are written for the layperson and avoid excessive quotations from ordinances and bylaws. Many websites include answers to frequently asked questions. Examples of these questions include:

- Why did I receive a certified notice of a public hearing? Am I required to attend the public hearing?
- I want to speak to my district planning commissioner. How can I contact that person?

- How can I obtain a copy of the staff report for a pending land-use application?
- When and where does the planning commission hold its meetings? What time do meetings begin?
- What is the order of the scheduled agenda items?
- How do I sign up to testify at a planning commission meeting and how long may I speak?
- If I want to bring copies of my testimony with me, how many do I need?
- How do I get to the planning commission's offices?
- Will I be notified if a public hearing is postponed?
- How can I voice my opinion on an application if I am unable to attend the hearing?
- What does the planning commission do?
- How are commissioners appointed?
- How does one qualify to be a planning commission member?
- Are planning commissioners paid?

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Websites also contain commission meeting dates, agendas, supporting documentation for upcoming meetings, and links for those interested in obtaining more information. Some planning commissions use e-mail to notify interested parties about upcoming meetings. The e-mail message refers them to the website for supporting documentation.

When something happens in a neighborhood it may be the only time a citizen comes into contact with the planning commission and the encounter is almost always emotionally charged. It's imperative that people understand the process and their role in it. A well-written overview of the process and meeting procedures can help interested parties prepare their presentations. Many commissions make this information available online and review the rights and privileges of participants at the start of public hearings. Some jurisdictions allow interested parties to register online to testify or to submit written testimony.

In many cases, planning commissioners are the best source of information about their role and the role of planning within the community. Commissioners tend to be active within the community, using their appearances at community gatherings—such as street festivals, awards ceremonies, school career days, and holiday festivities—to educate the public.

Quarterly or semi-annual newsletters help commissions spread the word about their work. Some commissions use

cable television's government access channel to air commission meetings or to produce shows on specific planning topics.

Citizen planning academies have taken hold in communities across the country. Open to citizens of all ages, occupations, and interests, citizen academies have two goals—to educate citizens about planning services and programs, and to attract and train future community leaders. The underlying premise is that by demystifying the process, people will be more likely to participate and less likely to feel disenfranchised. Topics in these programs range from the basics of the comprehensive plan and zoning to neighborhood planning and how local government works. Legal issues are also covered. Many academies grew out of planning commissioner training programs, and they have enjoyed robust success with the general public.

While community planning is not yet a household word, it is becoming increasingly familiar due to the outreach efforts of commissioners. Whether done formally or more casually, planning commission education efforts are not only enhancing public knowledge but bringing more people into the planning process.

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Sunshine Laws

All 50 states, the District of Columbia, and the federal government have open meeting laws. These laws often are referred to as sunshine laws — an allusion to shedding light on government deliberations. Sunshine laws regulate the conduct of government business by state and local officials and employees. Because the laws vary greatly, it is important that planning commissioners know the requirements of their state's legislation. Those who violate the law may be held legally liable and risk losing their positions, fines, and imprisonment.

In general, the laws require that all official actions be taken and all deliberations concerning official business be conducted in public session. They may prohibit some actions and impose reporting responsibilities for others. While sunshine laws require boards and commissions to open their meetings to the public, they do not necessarily mandate that the public be allowed to address officials during the meetings.

The first open meeting law was passed in Florida in 1967. While all states now have sunshine laws, their provisions vary: 41 states require advance notice of meetings; 37 states require that minutes are taken at every meeting, including executive sessions; and, in 31 states, actions or decisions are legally binding only if

they are decided upon during an open meeting.

Laws apply to a range of state and local commissions, boards, and councils. Some laws apply exclusively to public bodies with the authority to make decisions or expend funds, while others affect any entity that performs a public service and is supported by public funds. In many cases, the laws extend to subcommittees of public entities.

Generally, sunshine laws guarantee public access to meetings only when a quorum of a public body meets to discuss public business. Some states, however, invoke their open meeting laws when communication occurs between two or more members of the same board or commission. Chance social or ceremonial gatherings where commission

members are present usually fall outside the scope of sunshine laws, provided that matters that may come before the panel are not discussed.

Once applicable only when board or commission members physically gathered to conduct public business, some open meeting laws now regulate deliberations via teleconference, videoconference, and e-mail. Sunshine laws have been updated in a number of states to reflect advances in communications technology.

Open meeting laws often draw distinctions between types of meetings—regular, special, and emergency—when it comes to providing notice and taking minutes. Requirements as to advance notice of regular meetings vary widely. Anywhere from 24 to 48 hours' notice tends to be the rule for special meetings. In many states, when emergency meetings are held, boards are required to use the most appropriate and effective means for providing notice. Some state laws set out strict procedural requirements for emergency meetings including an affirmative vote of a percentage of board members to hold the meeting;

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the provision of public notice as soon after the meeting as possible; and complete and accurate minutes that include a description of the nature of the emergency, details about the time, place, and manner in which notice of the meeting was provided, and an explanation as to how the need for such a meeting could not have been reasonably foreseen.

Public notice is required when a board or commission closes its doors to the public and meets in executive session. The permitted reasons for closing meetings vary from state to state, but most sunshine laws allow executive sessions to deal with personnel matters, enter into collective bargaining, confer with legal counsel, and discuss the sale or acquisition of public property. Public bodies, however, generally are prohibited from taking formal action in an executive session. Often, the only vote permitted in regard to a closed meeting is to either adjourn or recess the executive session.

Sunshine laws often dictate the manner in which a public body must take and make available minutes from its meetings. For open meetings, full and accurate minutes that allow the public to understand and appreciate the rationale behind a board's decisions are often required. In some states, minutes from executive sessions are not held to the same level of completeness. Instead, they need only reflect the general subject of discussion during the session.

Some laws require that public bodies allow both audio and video recordings of their proceedings. "Reasonable" rules regulating the use of such equipment in order to ensure that those in attendance can see, hear, and participate are permitted in many states that allow recording devices.

An array of consequences—including personal financial liability—may result from violations of state sunshine laws. Different standards will apply to different types of public officials (elected vs. appointed, for example). These laws often allow any individual who believes the law has been violated to seek judicial relief within a specified period of time. Decisions made or actions taken during a meeting held in violation of the law are generally held to be invalid. That does not mean, however, that a public body may not subsequently convene a public meeting in conformity with the requirements of the law and reconsider the public business that had been invalidated. The intent of most sunshine laws is not to inhibit a public body from performing its governmental functions but to insure that it does so in public. 

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OREGON
GOVERNMENT ETHICS
LAW

A GUIDE FOR PUBLIC OFFICIALS



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Rev. 4/08

DISCLAIMER

This guide discusses how the provisions in Chapter 244 of the Oregon Revised Statutes apply to public officials. ORS 244.320 requires this publication to explain, in understandable terms the requirements of Oregon Government Ethics law and the Oregon Government Ethics Commission's interpretation of those requirements. Toward that end, the statutory language has been summarized and paraphrased in this guide. Therefore, the discussion in this guide should not be used as a substitute for a review of the specific statutes and rules.

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INTRODUCTION

In 1974, voters approved a statewide ballot measure to create the Oregon Government Ethics Commission (Commission). The measure established laws that are contained in Chapter 244 of the Oregon Revised Statutes (ORS).

When the Commission was established, it was given jurisdiction to implement and enforce the provisions in ORS Chapter 244 related to the conduct of public officials. In addition, the Commission was given jurisdiction for ORS Chapter 171, related to lobbying regulations, and ORS 192.660 concerning executive session provisions of Oregon Public Meetings law.

The Commission has prepared a guide for lobbyists and clients or employers of lobbyists regulated under provision in ORS Chapter 171. This guide for public officials includes a discussion of provisions that may interact with Lobbying Regulations. If you have questions regarding lobbying activity or lobbying expenditure reporting requirements, please refer to our guide on lobbying.

ORS 192.660 lists the specific criteria a governing body must use when convening an executive session. The statutory authority for executive sessions is limited to specific topics or procedures. The guide does not discuss this portion of the Oregon Public Meetings law, but there is a detailed discussion of ORS 192.660 in the Attorney General's Public Records and Meetings Manual.

This guide will discuss how the provisions in ORS Chapter 244 apply to public officials and will summarize Commission procedures. This manual is to be used in conjunction with applicable statutes and rules. It is intended to be a useful guide, but should not be used as a substitute for a review of the specific statutes and rules.

You will find links to the ORS Chapters, Oregon Administrative Rules (OAR), and other publications referenced in this guide, on the Commission's website at www.oregon.gov/ogec. Questions or comments may be submitted to the Commission by email at ogec.mail@state.or.us, by Fax to 503-373-1456 or by telephone to 503-378-5105.

JURISDICTION

The jurisdiction of the Oregon Government Ethics Commission is limited. Other Oregon statutes regulate the activities of elected officials and public employees in a number of areas outside the jurisdiction of this Commission. Some examples are:

- The Elections Division of the Secretary of State's Office regulates campaign finance and campaign activities.
- Criminal activity of any type would fall under the jurisdiction of federal, state or local law enforcement.
- The Commission does not have jurisdiction over the laws that govern public meetings or records as set out in Oregon Public Records and Meetings laws, except for the executive session provisions.
- The Oregon Bureau of Labor and Industries investigates cases involving employment related sexual harassment or discrimination on the basis of race, religion, disability or gender.

There are occasions when a public official engages in conduct that may be viewed as unethical, but that conduct may not be covered by Oregon Government Ethics law. Without an apparent statutory violation, the following are some examples of conduct by public officials that are not addressed:

- An elected official makes promises or claims that are not acted upon.
- Public officials mismanage or exercise poor judgment when administering public money.
- Public officials may be rude or unmannerly.
- Public officials using deception or misrepresenting information or events.

While the behavior described above may not be addressed in Oregon Government Ethics law, public agency policies and procedures may prohibit or redress the behavior. Please contact the Commission staff if you need further clarification regarding how the Oregon Government Ethics law may apply to circumstances you may encounter.

HOW DO I KNOW IF I AM A PUBLIC OFFICIAL?

There are approximately 200,000 public officials in Oregon. You are a public official if you are:

- Elected or appointed to an office or position with a state, county or city government.
- Elected or appointed to an office or position with a special district.
- An employee of a state, county or city agency or special district.
- An unpaid volunteer for a state, county or city agency or special district.
- Anyone serving the State of Oregon or any of its political subdivisions, such as the State Accident Insurance Fund or the Oregon Health Sciences University.

[The actual definition of a public official is found in ORS 244.020(13).]

WHAT PUBLIC OFFICIALS NEED TO KNOW!

The provisions in Oregon Government Ethics law restrict some choices, decisions or actions a public official may make. The restrictions placed on public officials are different than those placed on private citizens because service in a public office is a public trust and the provisions in ORS Chapter 244 were enacted to provide one safeguard for that trust.

Public officials are prohibited from using or attempting to use their positions to gain a financial benefit or to avoid a financial cost for themselves, a relative or their businesses if the opportunity is available only because of the position held by the public official. [ORS 244.040(1)]

ORS 244.020(14) provides a definition for the relative of a public official, which is operative in the application of ORS Chapter 244, except for ORS 244.175 through .179, which addresses nepotism and applies a broader definition of relative. Relative, as defined in ORS 244.020(14), includes the public official's spouse or domestic partner and children, siblings, spouses of siblings or parents of the public official and spouse. If the public official has a legal support obligation for an individual or provides or receives benefits from another individual, they also may be defined as a relative of the public official.

There are conditions that must be met before a public official may accept a gift and in some cases, there are limits on the value of gifts that can be accepted. Certain public officials are required to file reports that disclose some gifts accepted and specific economic interests.

When met with a conflict of interest, a public official must follow specific procedures to disclose the nature of the conflict. There are also restrictions on certain types of employment subsequent to public employment and on nepotism. This guide will address how Oregon Government Ethics law applies to various circumstances that are encountered through public employment and service.

There is one element of Oregon Government Ethics law that a public official should understand as it is one of the keys to knowing how the law may apply in a variety of circumstances. That element is found in the phrase **legislative or administrative interest**, which is defined in ORS 244.020(8) as follows:

Legislative or administrative interest means an economic interest, distinct from that of the general public, in one or more bills, resolutions, regulations, proposals or other matters subject to the action or vote of a person acting in the capacity of a public official.

There are occasions when members of the general public may have an economic interest in the actions of a governmental agency. When that economic interest is shared by all members of the general public, it is not defined as a legislative or administrative interest. For example, decisions regarding drivers licenses issued to drivers in the state are likely to have the same general economic impact on all applicants from the general public.

Decisions made with regard to tax rates are also likely to have the same general economic impact on all members of the general public. Decisions on the cost of a sport fishing license are likely to have the same general economic impact on all license applicants from the general public.

Whether a person has a legislative or administrative interest in the governmental agency served by the public official determines whether restrictions apply to offers of gifts or other financial benefits. It also determines what reporting requirements will apply to public officials or others who may provide financial benefits to public officials. This guide addresses those restrictions and reporting requirements, but first, we need to understand how the definition of a legislative or administrative interest applies in various circumstances. The following examples are presented to illustrate how the definition of a legislative or administrative interest might apply, but are **not intended to cover all of the circumstances where there is an economic interest distinct from that of the general public:**

- If a business could sell services or products to a governmental agency, that business would have an economic interest in that agency that is distinctly different than the economic interest held by members of the general public.
- If a business could submit bids on a governmental agency's request for proposals, that business would have an economic interest in that agency that is distinctly different than the economic interest held by members of the general public.
- If a business or person, apart from members of the general public, is regulated or licensed by a governmental agency that business or person would have an economic interest in that agency that is distinctly different than the economic interest held by members of the general public.
- If a business or person must apply for a permit from a governmental agency, that business or person would have an economic interest in that agency that is distinctly different than the economic interest held by members of the general public.
- Lobbyists are advocates for legislative outcomes and have an economic interest in governmental agencies that submit or act on proposed legislative action. The lobbyist's interest is distinct from the economic interest of the general public.
- If a lobbyist is employed or retained to advocate for legislative outcomes through contact with legislative or executive officials, the lobbyist and the lobbyist's client or employer has an economic interest that is distinct from the economic interest of the general public.
- Public employees could have an economic interest in the actions of their agency supervisor that is distinct from the economic interest held by the general public.

PUBLIC OFFICIALS CANNOT:

1. Public officials may not use or attempt to use their official position or office to obtain a **personal** financial gain or to avoid a **personal** financial detriment if the opportunity would not otherwise be available but for their holding the official position or office. [ORS 244.040(1)]
2. Public officials may not use or attempt to use their official position or office to obtain a financial gain or to avoid a financial detriment for a public official's **relative** if the opportunity would not otherwise be available but for their holding the official position or office. [ORS 244.040(1)]
3. Public officials may not use or attempt to use their official position or office to obtain financial gain or to avoid a financial detriment for a **member of the public official's household** if the opportunity would not otherwise be available but for their holding the official position or office. [ORS 244.040(1)]
4. Public officials may not use or attempt to use their official position or office to obtain financial gain or to avoid a financial detriment for a **business** with which the public official, relative of the public official or member of the public official's household are associated if the opportunity would not otherwise be available but for their holding their official position or office. [ORS 244.040(1)]
5. A public official, a relative of a public official or a member of the public official's household may **not accept gifts** that exceed \$50 (*This restriction in ORS 244.025 is discussed later.*) from a source* that has a **legislative or administrative interest** in the public official's governmental agency. [ORS 244.040(2)(e)]
6. Public officials and candidates may not accept the payment of expenses for **entertainment** nor can a source offer such paid expenses. [ORS 244.025(4) and see *entertainment defined in OAR 199-005-0025(4)*]
7. Public officials or candidates for public office, or members of their households, may not solicit or accept **honoraria**. [ORS 244.042(1) and ORS 244.042(2)]
8. Public officials may not solicit or accept the offer, pledge or promise of future employment based on any understanding that a vote, official action or judgment would be **influenced by the offer**. [ORS 244.040(3)]
9. Current or former public officials may not use or attempt to use **confidential information** gained through their positions as public officials for financial gain.

* Source of a gift is defined in OAR 199-005-0030 as the person or organization that pays the cost of the gift and receives no reimbursement for the expense from another person or organization.

[ORS 244.040(4) and ORS 244.040(5) and see confidential information defined in OAR 199-005-0035(5)]

10. Public officials may not represent a **private client** for a fee before a governing body when the public official is a member of that same body. *[ORS 244.040(6)]*

11. After complying with the conflict of interest provisions in ORS 244.120, public officials cannot participate in any personnel action taken by the public agency that would impact the employment of a relative or member of the public official's household. *[ORS 244.177]* Exceptions to the provision are:
 - If acting as a reference, making a recommendation or performing ministerial acts that are normal functions of the position held.

 - If the personnel action involves a relative or member of the household who is an unpaid volunteer.

 - Members of the Oregon Legislative Assembly may employ relatives on their personal staff.

PUBLIC OFFICIALS CAN:

1. Public officials may accept any part of their official **compensation package** from their public employer. *[ORS 244.040(2)(a) and see compensation package defined in OAR199-005-0035(3)]*
2. Public officials may solicit and accept **honorarium, a certificate, plaque, commemorative token or other items** with a value of less than \$50. *[ORS 244.040(2)(b) and ORS 244.042(3)(a)]*
3. Public officials and candidates may solicit and accept **honoraria** for services related to the public official's private profession, occupation, avocation or expertise. *[ORS 244.042(3)(b)]*
4. Public officials may request and accept the **reimbursement of expenses** from their public employer for expenses incurred while on official business. *[ORS 244.040(2)(c) and see reimbursed expenses defined in OAR199-005-0035(4)]*
5. Public officials may accept unsolicited **awards for professional achievement**. *[ORS 244.040(2)(d)]*
6. A public official, a relative of a public official or a member of the public official's household may accept **gifts** from a source when it is reasonable to believe that the **source does not have a legislative or administrative interest** in the public official's governmental agency. *[ORS 244.040(2)(f)]*
7. When it is reasonable to believe that the **source has a legislative or administrative interest** in a public official's governmental agency, the public official, a relative of a public official or a member of the public official's household may accept gifts when the aggregate value in one calendar year from a single source does not exceed \$50. This prohibition also applies to candidates for a position with a governmental agency. *[ORS 244.025(1)]* Sources are also prohibited from offering gifts exceeding \$50. *[ORS 244.025(2) and ORS 244.025(3)]*
8. Public officials **may accept gifts** when the item or event is a specific exception from the definition of "gift" as described in ORS 244.020(5)(b). *[ORS 244.040(2)(g)]* Those events or items that are excluded from the definition of a "gift" are identified in the gift section of this guide.
9. Public officials may accept contributions to their **legal expense trust fund** established under ORS 244.209. *[ORS 244.020(2)(h)]*

GIFTS

A gift is something given to a public official, a relative of the public official or a member of the public official's household when there is no payment, or payment is for a discounted price, and the opportunity (gift) is not available to others who are not public officials on the same terms or conditions. [ORS 244.020(5)(a)]

The following are **NOT GIFTS** and may be accepted:

- Campaign contributions as defined in ORS 260.005. [ORS 244.020(5)(b)(A)]
- Contributions to a legal expense trust fund established under ORS 244.209. [ORS 244.020(5)(b)(G)]
- Gifts from relatives or members of the public official's household. [ORS 244.020(5)(b)(B)]
- Unsolicited gifts with a resale value of less than \$25 and in the form of items similar to a token, plaque, trophy and desk or wall mementos. [ORS 244.020(5)(b)(C) and see resale value discussed in OAR199-005-0010]
- Publications, subscriptions or other informational material related to the public official's duties. [ORS 244.020(5)(b)(D)]
- Waivers or discounts for registration or materials related to continuing education to satisfy a professional licensing requirement. [ORS 244.020(5)(b)(J)]
- Entertainment for a public official, a relative of the public official or a member of the public official's household that is incidental to the main purpose of the event. [ORS 244.020(5)(b)(M) and see "incidental" defined in OAR199-005-0025(3)]
- Entertainment for a public official, a relative of the public official or a member of the public official's household when the public official is acting in an official capacity and representing a governing agency for a ceremonial purpose. [ORS 244.020(5)(b)(N) and see "ceremonial" defined in OAR199-005-0025(5)]
- Food, beverage and admission for a public official, a member of the public official's household or staff when the public official is scheduled to speak or answer questions at an organization's reception, meal or meeting. [ORS 244.020(5)(b)(E) and see this exception discussed in OAR199-005-0015]
- Food and beverage consumed at a reception where the food and beverage is an incidental part of the reception and there was no admission charged. [ORS 244.020(5)(b)(L) and OAR199-005-0025(3)]

- When public officials travel together inside the state to an event bearing a relationship to the office held and the public official appears in an official capacity, a public official may accept the travel related expenses paid by the accompanying public official. *[ORS 244.020(5)(b)(K)]*
- Food, lodging or travel expenses if a public official is scheduled to speak, make a presentation, participate on a panel or represent a government agency at a convention, fact-finding trip or other meeting. The paid expenses for this exception can only be accepted from another government agency, Native American Tribe, an organization to which a public body pays membership dues or certain tax-exempt not-for-profit organizations. *[ORS 244.020(5)(b)(F) and see definition of terms for this exception in OAR 199-005-0020]*
- Food, lodging or travel expenses for a public official, a relative of the public official or a member of the public official's household or staff may be accepted when the public official is representing the government agency or special district at one of the following: *[ORS 244.020(5)(b)(H) and see definition of terms for this exception in OAR 199-005-0020]*
 - Officially sanctioned trade promotion or fact-finding mission;
 - Officially designated negotiation or economic development activity when receipt has been approved in advance.
- Food and beverage when acting in an official capacity in the following circumstances: *[ORS 244.020(5)(b)(I)]*
 - In association with a financial transaction or business agreement between a government agency and another public body or a private entity, including such actions as a review, approval or execution of documents or closing a borrowing or investment transaction;
 - When the office of the Treasurer is engaged in business related to proposed investment or borrowing;
 - When the office of the Treasurer is meeting with a governance, advisory or policy making body of an entity in which the Treasurer's office has invested money.

GIFTS: A DISCUSSION

In understanding issues related to gifts, the operative definition of a "gift" should be used when deciding if Oregon Government Ethics law would apply to a gift offered to a public official. The following is a paraphrase of the definition taken from ORS 244.020(5)(a):

A gift is something given to a public official, a relative of the public official or a member of the public official's household and the recipient either makes no payment or makes payment at a discounted price. The opportunity for the gift is one that is not available to members of the general public, who are not public officials, under the same terms and conditions as those that apply to the gift offered to the public official, the relative or a member of the household.

There is another provision in Oregon Government Ethics law that must be included in any gift discussion. ORS 244.040(1) prohibits public officials from using or attempting to use their official positions to gain a financial benefit or to avoid a financial cost if the opportunity is one that would not otherwise be available but for a public official holding the official position.

There may be occasions when a financial benefit that is available to a public official could meet the definition of gift, but if a public official accepts the financial benefit a violation of ORS 244.040(1) could occur because acceptance would represent the prohibited use of an official position to gain a financial benefit.

It is important to remember that there is a distinction between how the law addresses a financial benefit as a gift in contrast to a financial benefit gained through the use of an official position. The following examples are offered to illustrate, in part, that distinction:

- A salesperson from a software company offers to take a county's information technology manager out to lunch. The meal would be a gift and, if accepted, the value would be included in the aggregate value of gifts, which cannot exceed \$50 in one calendar year. [ORS 244.025(1) and (2)]
- A city recorder has overseen the installation and implementation of a new software program to manage the city's financial records. The software distributor asks the city recorder to participate as a trainer at an event the distributor has planned for public employees who work for different city governments. The distributor has offered to compensate the city recorder and pay expenses for food, lodging and travel. If the city recorder accepted this offer, it could constitute the use of the official position to gain a financial benefit because the opportunity for the compensation and paid expenses would not be available but for being the city recorder.
- A city manager attends a conference on salaried time and is reimbursed for expenses by the city. When the city manager checks out of the hotel, she is offered a coupon for two nights of free lodging at any of the hotel chain's nationwide hotels.

If accepted and used for personal lodging, it could constitute the use of an official position to gain a financial benefit because the opportunity for two nights of free lodging would not be available but for the city sending and paying the travel expenses for the city manager to attend the conference.

- A state employee is sent by his agency to attend a two-day training conference and is reimbursed for his expenses. The salaried employee attends during his regular working hours. A salesperson for a company that sells products to the state agency is near the registration table for the conference and offers a collection of gifts valued at over \$100 to all registrants. If accepted, the gifts could constitute the use of an official position to gain a financial benefit because the opportunity to accept the gifts would not be available but for the state agency paying to send the employee to the conference.
- During the same conference, the state employee is going out to dinner after the conference adjourns for the day. While passing through the hotel lobby, he stops to speak with the salesperson who offered the gifts during the conference registration. The salesperson asks to join the state employee for dinner and offers to pay for the meal. Since the employee is on personal time, if accepted, the value of the meal would be included in the aggregate value of gifts, which cannot exceed \$50 in one calendar year. [ORS 244.025(1) and (2)]
- A city mayor goes out to lunch in a local city restaurant. During lunch a well known developer approaches the mayor and offers to pay for the mayor's meal. The value of the meal, if accepted, would be included in the aggregate value of gifts from a source, which cannot exceed \$50 in one calendar year. [ORS 244.025(1) and (2)]

In the preceding examples the sources of the financial benefits have a legislative or administrative interest in the governmental agencies represented by the public officials. That is important to remember because if there were no legislative or administrative interest the public officials would not be prohibited from accepting the offers. [ORS 244.040(2)(f)]

QUESTION: As a public official, if I, my relative or a member of my household is met with an opportunity to obtain a financial benefit, how do we decide if the opportunity should be avoided or accepted?

To answer this question the following questions are offered to suggest how an opportunity for financial benefit should be examined:

- Does the source of a financial benefit have a legislative or administrative interest in my governmental agency?

If the answer is no, then accepting the financial benefit would not be prohibited. [ORS 244.040(2)(f)]

If yes, then it may be an opportunity that should be avoided [ORS 244.040(1)] or if accepted, be aware of the conditions and restrictions that may apply. [ORS 244.020(5)(b), ORS 244.025 and ORS 244.042]

- Would the opportunity for this financial benefit be available if you did not hold your position as a public official?

If no, then it may be an opportunity prohibited by ORS 244.040(1), unless it is one of the exceptions described in ORS 244.040(2).

- Is the financial benefit defined as a gift?

If yes, then it may be an opportunity you could accept, but be sure you know the conditions and restrictions that may apply. [ORS 244.020(5)(b), ORS 244.025 and ORS 244.042]

WHAT DO PUBLIC OFFICIALS REPORT?

There are approximately 5,000 Oregon public officials who must file disclosure forms with the Oregon Government Ethics Commission. Currently, the report forms are provided to the public officials by the Commission. Beginning in 2010, public officials will file their reports electronically.

There are two report forms that must be filed by public officials who hold positions specified in Oregon Government Ethics law:

1. **Annual Verified Statement of Economic Interest forms (SEI)** filed by April 15 of each calendar year. [ORS 244.050]
2. **Quarterly Public Official Disclosure forms (QPOD)** filed on January 15, April 15, July 15 and October 15. [ORS 244.105].

The **public officials who are required to file reports are specified in ORS 244.050**. Please refer to that section of the law to see if your specific position requires you to file these forms. Generally:

- State public officials who hold elected or appointed executive, legislative or judicial positions are required to file. Additionally, those who have been appointed to positions on certain boards or commissions must file.
- In counties, elected officials, such as commissioners, assessors, surveyors, treasurers and sheriffs must file, in addition to planning commission members and the county's principal administrator.
- In cities, all elected officials, the city manager or principal administrator, municipal judges and planning commission members file reports.
- Administrative and financial officers in school districts, education service districts and community college districts must file.
- Some members of the board of directors for certain special districts must file.
- Candidates for some elected public offices are also required to file the annual and quarterly forms.

The Commission staff has identified the groups of positions that are required to file reports. Each group of officials has a person who acts as the Commission's contact person. The current name and address of each public official filer is obtained from the contact person.

The forms to be completed and filed by the specific public officials are sent either directly to the public official or in some cases, to the contact person for distribution.

The governing body to which you are elected or the public agency with which you are employed should advise you of your reporting requirements. You should also receive information as to the procedures your governing body or public agency follows in assisting you to meet the reporting requirements.

The reporting requirement is the personal responsibility of each public official. Please ensure that you comply and file timely, as the civil penalties for late filing are \$10 for each of the first 14 days and \$50 for each day thereafter. [ORS 244.350(4)(c)]

Annual Verified Statement of Economic Interest Form:

When the forms are distributed, instructions and definitions will be included to assist the filer in completing the forms. The form, which is due on April 15 of each calendar year, requests information that pertains to the previous calendar year. Public officials holding a position on April 15 that requires them to file, must complete the form. The following is a brief description of the information requested in the form:

- Name and address of each business in which a position as officer or director was held by the filer or member of the household. [ORS 244.060(1)]
- Name and address of each business through which the filer or member of the household did business. [ORS 244.060(2)]
- Name and address of the five most significant sources of income for the public official and members of the household, identifying the source and type of income and the name of the person who received it. [ORS 244.060(3)]
- Ownership interests held by the public official or members of the household in real property, except for the principal residence, located within the geographic boundaries of the governmental agency in which the public official position is held or sought. [ORS 244.060(4)(a)]
- Names of each member of the household 18 years or older. [ORS 244.060(5)]
- Names of each relative over 18 years of age who is not a member of the household. [ORS 244.060(6)]

The following information is required if the information requested relates to an individual or business that has been or could reasonably be expected to do business with the filer's governmental agency or has a legislative or administrative interest in the filer's governmental agency:

- Name of each person the filer has owed \$1,000 or more, including the date of the loan and interest rate. Debts on retail contracts or with regulated financial institutions are excluded. [ORS 244.070(1)]

- Business name, address and nature of beneficial interest over \$1,000, or investment held by the filer or a member of the household in stocks or securities over \$1,000. Exemptions include mutual funds, blind trusts, deposits in financial institutions, credit union shares and the cash value of life insurance policies. *[ORS 244.070(2)]*
- Name of each person from whom the filer received a fee of over \$1,000 for services, unless disclosure is prohibited by a professional code of ethics. *[ORS 244.070(3)]*
- Name of each lobbyist associated with any business the filer or a member of the household is associated, unless the association is through stock held in publicly traded corporations. *[ORS 244.090]*

Quarterly Public Official Disclosure:

These forms are available on the Commission website or from the public entity. Instructions and definitions will be included to assist the filer in completing the forms. The forms are filed on the 15th day of the month that follows each calendar quarter. The information requested pertains to the previous calendar quarter. The following is a brief description of the information requested on the form:

- Identify any organization or unit of government that paid over \$50 in food, lodging and travel expenses for the filer to participate in a convention, meeting, mission or trip as described in ORS 244.020(5)(b)(F). Include the date and nature of the event and the sum of expenses paid. *[ORS 244.100(1)(a)]* The source of the paid expenses is required to provide a written notice as to the value of this event. *[ORS 244.100(2)(a)]*
- Provide the name and address of any person who paid over \$50 in expenses for the filer to participate in a mission, negotiations or economic development activities as described in ORS 244.020(5)(b)(H). Include the date and nature of the event and the sum of expenses paid. *[ORS 244.100(1)(b)]*
- List all honoraria received by the filer or members of the household that exceeded \$15. *[ORS 244.100(1)(c)]* Note that honoraria may not be accepted if it is valued at more than \$50. *[ORS 244.042]* The source of the paid expenses is required to provide a written notice as to the value of this event. *[ORS 244.100(2)(b)]*
- List each source of income over \$1,000 for the filer or a member of the household if the source has a legislative or administrative interest in the governmental agency of the filer. *[ORS 244.100(1)(d)]*

The Quarterly Public Official Disclosure forms must be filed even if the public official has no activity to report.

CONFLICTS OF INTEREST

Oregon Government Ethics law defines **actual conflict of interest** [ORS 244.020(1)] and **potential conflict of interest**. [ORS 244.020(11)] In brief, a public official is met with a conflict of interest when participating in official action which could result in a financial benefit or detriment to the public official, a relative of the public official or a business with which either are associated.

The difference between an actual conflict of interest and a potential conflict of interest is determined by the words “would” and “could.” An **actual** conflict of interest occurs when the action taken by a public official **would** affect the financial interest of the official, the official's relative or a business with which the official or a relative of the official is associated. A **potential** conflict of interest exists when the action taken by the public official **could** have a financial impact on that official, a relative of that official or a business with which the official or the relative of that official is associated.

What if I am met with a conflict of interest?

A public official must announce or disclose the nature of a conflict of interest. The way the disclosure is made depends on the position held. The following public officials must use the methods described:

Legislative Assembly:

Members must announce the nature of the conflict of interest in a manner pursuant to the rules of the house in which they serve. The Oregon Attorney General has determined that only the Legislative Assembly may investigate and sanction its members for violations of conflict of interest disclosure rules in ORS 244.120(1)(a). [49 Op. Atty. Gen. 167 (1999) issued on February 24, 1999]

Judges:

Judges must remove themselves from cases giving rise to the conflict of interest or advise the parties of the nature of the conflict of interest. [ORS 244.120(1)(b)]

Public Employees:

Public officials who are appointed, employed or volunteer must provide a written notice to the person who appointed or employed them. The notice must describe the nature of the conflict of interest with which they are met. [ORS 244,120(1)(c)]

Elected Officials or Appointed Members of Boards and Commissions:

Except for members of the Legislative Assembly, these public officials must publicly announce the nature of the conflict of interest before participating in any official action on the issue giving rise to the conflict of interest. [ORS 244.120(2)(a) and ORS 244.120(2)(b)]

- Potential Conflict of Interest: Following the public announcement, the public official may participate in official action on the issue that gave rise to the conflict of interest.
- Actual Conflict of Interest: Following the public announcement, the public official must refrain from further participation in official action on the issue that gave rise to the conflict of interest. [ORS 244.120(2)(b)(A)]

If a public official is met with an actual conflict of interest and the public official's vote is necessary to meet the minimum number of votes required for official action, the public official may vote. The public official must make the required announcement and refrain from any discussion, but may participate in the vote required for official action by the governing body. [ORS 244.120(2)(b)(B)] These circumstances do not often occur. This provision does not apply in situations where there are insufficient votes because of a member's absence when the governing body is convened. Rather, it applies in circumstances where members who must refrain due to actual conflicts of interest make it impossible for the governing body to take official action even when all members are present.

The following circumstances may exempt a public official from the requirement to make a public announcement or give a written notice describing the nature of a conflict of interest:

- If the conflict of interest arises from a membership or interest held in a particular business, industry, occupation or other class that was a prerequisite for holding the public official position. [ORS 244.020(11)(a)]
- If the financial impact of the official action would impact the public official, relative or business of the public official to the same degree as other members of an identifiable group or "class". [ORS 244.020(11)(b)]
- If the conflict of interest arises from a position or membership in a nonprofit corporation that is tax-exempt under 501(c) of the Internal Revenue Code. [ORS 244.020(11)(c)]

How is the announcement of the nature of a conflict of interest recorded?

- The public body that is served by the public official will record the disclosure of the nature of the conflict of interest in the public record. [ORS 244.130(1)]

Is a public official required to make an announcement of the nature of a conflict of interest each time the issue giving rise to the conflict of interest is discussed or acted upon?

- The announcement needs to be made on each occasion the conflict of interest is met. For example, an elected member of the city council would have to make the

public announcement one time during a meeting of the city council. If the matter giving rise to the conflict of interest is raised at another meeting, the disclosure must be made again at that meeting. An employee in a city planning department would have to give a separate written notice on each occasion they participate in official action on a matter that gives rise to a conflict of interest.

If a public official failed to announce the nature of a conflict of interest and participated in official action, is the official action voided?

- No. Any official action that is taken may not be voided by any court solely by reason of the failure of the public official to disclose an actual or potential conflict of interest. [ORS 244.130(2)]

THE RETURN TO PRIVATE LIFE

What are the restrictions on employment after I resign, retire or leave my public official position?

- ORS 244.040(1) prohibits public officials from using their official positions or offices to create a new employment opportunity; however, most former public officials may enter the private work force with few restrictions.
- Oregon Government Ethics law restricts the subsequent employment of certain public officials. The restrictions apply to positions listed below:

ORS 244.045(1)

State Agencies:

Director of Department of Consumer and Business Services
Administrator of Division of Finance and Corporate Securities
Administrator of Insurance Division
Administrator of Oregon Liquor Control Commission
Director of Oregon State Lottery
Public Utility Commissioner

1. One year restriction on gaining financial benefits from a private employer in the activity, occupation or industry that was regulated by the agency for which the public official was the Director, Administrator or Commissioner.
2. Two year restriction on lobbying or appearing as a representative before the agency on behalf of the activity, occupation or industry regulated by the agency for which the public official was the Director, Administrator or Commissioner.
3. Two year restriction on disclosing confidential information gained as the Director, Administrator or Commissioner for the agency.

ORS 244.045(2)

Oregon Department of Justice:

Deputy Attorney General
Assistant Attorney General

1. Restricted for two years from lobbying or appearing before an agency that they represented while with the Department of Justice.

ORS 244.045(3)

Office of the Treasurer:

State Treasurer
Chief Deputy State Treasurer

1. Restricted for one year from accepting financial benefit from a private entity with which there was negotiation or contract awarding \$25,000 in one year by the State Treasurer or Oregon Investment Council.
2. Restricted for one year from accepting financial benefit from a private entity with which there was investment of \$50,000 in one year by the State Treasurer or Oregon Investment Council.
3. Restricted for one year from being a lobbyist for an investment institution, manager or consultant or from appearing as a representative of an investment institution, manager or consultant before the office of State Treasurer or Oregon Investment Council.

ORS 244.045(4)

Public Officials who invested public funds:

1. Restricted for two years from being a lobbyist or appearing before the agency, board or commission for which public funds were invested.
2. Restricted for two years from influencing or trying to influence the agency, board or commission.
3. Restricted for two years from disclosing confidential information gained through employment.

ORS 244.047

Public Officials who authorized a public contract:

1. A public official who authorized or had a significant role in a contract while acting in an official capacity may not have a direct, beneficial, financial interest in the public contract for two years after leaving the official position.
2. A member of a board, commission, council, bureau, committee or other governing body who has participated in the authorization of a public contract may not have a direct, beneficial, financial interest in the public contract for two years after leaving the official position.

OAR 199-005-0035(6) indicates that "authorized by" means that public official performed a significant role in the selection of a contractor or the execution of the contract. A significant role can include recommending

approval of a contract, serving on a selection committee or team, having the final authorizing authority or signing a contract.

ORS 244.045(5)

Department of State Police

Supervising programs related to Native American tribal gaming
Supervising programs related to Oregon State Lottery

1. Restricted for one year from accepting employment from or gaining financial benefit related to gaming from the Lottery or a Native American Tribe.
2. Restricted for one year from gaining financial benefit from a private employer who sells gaming equipment or services.
3. Restricted for one year from trying to influence the Department of State Police or from disclosing confidential information.

Exceptions include subsequent employment with the state police, appointment as an Oregon State Lottery Commissioner, Tribal Gaming Commissioner or lottery game retailer, or personal gaming activities.

ORS 244.045(6)

Legislative Assembly

Representative
Senator

After a legislator's membership in the Legislative Assembly ends, a legislator may not become a compensated lobbyist until adjournment of the next regularly scheduled session of the Legislative Assembly following the end of membership in the Legislative Assembly. *[Note: In 2008 and 2010, the first special sessions are considered to be regular sessions.]*

OREGON GOVERNMENT ETHICS COMMISSION

The Governor appoints all seven members of the Commission and each appointee is confirmed by the Senate. The commissioners are recommended and appointed as follows:

- 1 Recommended by the Senate Democrat leadership
- 1 Recommended by the Senate Republican leadership
- 1 Recommended by the House Democrat leadership
- 1 Recommended by the House Republican leadership
- 3 Recommended by the Governor

No more than four commissioners with the same political party affiliation may be appointed to the Commission to serve at the same time. The commissioners are limited to one four year term, but if an appointee fills an unfinished term they can be reappointed to a subsequent four year term.

The commission members select a chairperson and vice chairperson annually. The commission is administered by an executive director, who is selected by the Commission and legal counsel is provided by the Oregon Department of Justice.

Training:

The Commission has designated training as one of its highest priorities. It has one staff position to provide training on the laws and regulations under its jurisdiction to public officials and lobbyists. Training is provided by making presentations at training events, posting informational links on the website, creating topical handouts and offering guidance when inquiries are received.

Advice:

All members of the Commission staff are cross-trained in the laws and regulations under the Commission's jurisdictions. Questions regarding the Commission's laws, regulations and procedures are a welcome daily occurrence. Timely and accurate answers are a primary objective of the staff. Guidance and information is provided either informally or in written formal opinions. The following are available:

- Telephone inquiries are answered immediately or as soon as possible.
- E-mail inquiries are answered with return e-mail or telephone call as soon as possible.
- Letter inquiries are answered by letter as soon as possible.
- Written opinions on specific circumstances can also be requested.

Requests for written opinions must describe the specific facts and circumstances that provide the basis for questions about how the Oregon Government Ethics law may apply. The written opinions will be in one of the following formats, as requested:

Staff Advice

ORS 244.284 provides for informal staff advice, which may be offered in several forms, such as orally, by e-mail or by letter. In a letter of advice, the facts are restated as presented in the request and the relevant laws or regulations are applied. The answer will conclude whether a particular action by a public official comports with the law. The Commission may consider whether an action by a public official that may be subject to penalty was taken in reliance on staff advice.

Staff Advisory Opinion

ORS 244.282 authorizes the executive director to issue a staff advisory opinion upon receipt of a written request. The opinion is issued in a letter that restates the facts presented in the written request and identifies the relevant statutes. The letter will discuss how the law applies to the questions asked or raised by the facts presented in the request. The Commission must respond to any request for a staff advisory opinion within 30 days, unless the executive director extends the deadline by an additional 30 days. The Commission shall consider whether an action by a public official that may be subject to penalty, was taken in reliance on this staff advisory opinion.

Commission Advisory Opinion

ORS 244.280 authorizes the Commission to prepare and adopt by vote a Commission Advisory Opinion. This formal written opinion also restates the facts presented in a written request for a formal opinion by the Commission. The opinion will identify the relevant statutes and discuss how the law applies to the questions asked or raised by the fact circumstances provided in the request. These formal advisory opinions are reviewed by legal counsel before the Commission adopts them. The Commission must respond to any request for an advisory opinion within 60 days, unless the Commission extends the deadline by an additional 60 days.

The Commission may not impose a penalty on a public official for any good faith action taken by relying on a Commission Advisory Opinion, unless it is determined that the person who requested the opinion omitted or misstated material facts in the opinion request.

Compliance:

The Commission has a program manager who oversees the management and administration of the various reports that are filed with the Commission. There are approximately 2,000 lobbyists and employers of lobbyists who file quarterly lobbying activity expense reports. Each of the nearly 1,000 lobbyists must file or renew their lobbying registrations every two years. There are approximately 5,000 public officials who must file

the Quarterly Public Official Disclosure form after each calendar quarter and an Annual Verified Statement of Economic Interest form each April 15.

Investigations:

Investigations are initiated through a complaint procedure. [ORS 244.260] Any person may file a signed, written complaint alleging that there has been a violation of Oregon Government Ethics law. The complaint must state the person's reason for believing that a violation occurred and must include any evidence relating to the alleged violation. The executive director reviews the complaint and if additional information is needed, the complainant is asked to provide that information.

If there is reason to believe that there has been a violation of Oregon Government Ethics law, the Commission may also initiate an investigation on its own motion. Before approving such a motion, the public official against whom the action may be taken is notified and given an opportunity to appear before the Commission at the meeting when the matter is discussed.

When a complaint is accepted, the public official against whom the allegations are made is referred to as the respondent. The respondent is notified of the complaint and provided with the information received in the complaint and the identity of the complainant. Whether based on a complaint or a motion by the Commission, the initial stage of the Commission procedure is called the Preliminary Review Phase. The time allowed for this phase is limited to 135 days and the Commission must act on the complaint within that period.

If there is a pending criminal matter related to the same circumstances or actions to be addressed in the Preliminary Review, the time period is suspended until the criminal matter is concluded.

There may be a variety of reasons for a respondent to ask for additional time before the Commission determines whether there is cause to investigate the issues raised by the complaint. With the consent of the Commission, a respondent may request a waiver of the 135 day time limit. If a complaint is made against a candidate within 61 days of an election, the candidate may request a delay.

During the Preliminary Review Phase, the Commissioners and staff can make no public comment on the matter other than acknowledge receipt of the complaint. It is maintained as a confidential matter until the Commission ends the Preliminary Review Phase. Under most circumstances, the Commission will end the Preliminary Review Phase by either dismissing the complaint or finding cause to conduct an investigation. The Commission meets in executive session to conduct deliberations and vote on the finding of cause or to dismiss. After the close of the Preliminary Review Phase, the case file is open to public disclosure.

If the complaint is dismissed the matter is concluded and both the respondent and complainant are notified. If cause is found to investigate, then an Investigatory Phase begins. This phase is limited to 180 days.

During each phase, information and documents are solicited from the complainant, respondent, and other witnesses and sources that are identified. Before the end of the 180 day period, the Commission will consider the results of the investigation. Normally, the Commission will either dismiss the complaint or make a preliminary finding that a violation of Oregon Government Ethics law was committed by the respondent. The preliminary finding of a violation is based on what the Commission considers to be sufficient evidence to support such a finding.

If a preliminary finding of violation is made, the respondent will be offered the opportunity to request a contested case hearing. At any time, the respondent is also encouraged to negotiate a settlement with the executive director, who represents the Commission in such negotiations. Most cases before the Commission are resolved through a negotiated settlement, with the terms of the agreement described in a Stipulated Final Order.

The Commission has a variety of sanctions available after making a finding that a violation occurred. Sanctions range from letters of reprimand to civil penalties and forfeitures. The maximum civil penalty that can be imposed for each violation is \$5,000. Any financial gain that a respondent realized from the violation is subject to a forfeiture of twice the gain. Any monetary sanctions imposed and paid are deposited into the State of Oregon General Fund.

Legal Expense Trust Fund

The Oregon Government Ethics Commission can authorize a public official to establish a trust fund to be used to defray expenses incurred when mounting a legal defense in any civil, criminal or other legal proceeding that relates to or arises from the course and scope of duties of the person as a public official. *[ORS 244.205]*

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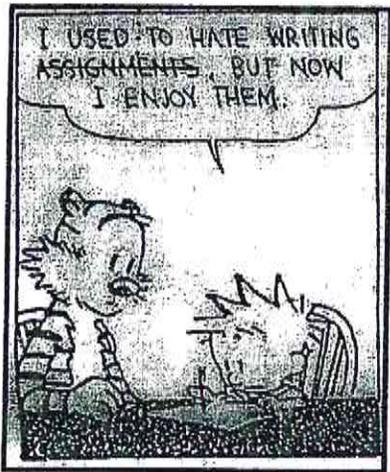
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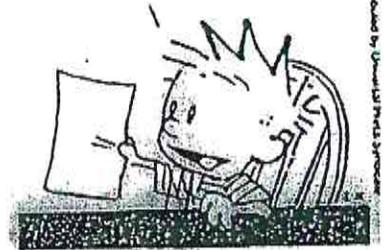
Gary Darnielle, Esq.
Lane Council of Governments

FINDINGS



FINDINGS WITH A LITTLE PRACTICE, WRITING CAN BE AN INTIMIDATING AND IMPENETRABLE FOG!

FINDINGS



With apologies to
Bill Watterson

Oregon Planning Institute
September 12, 2007

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BETTER FINDINGS THROUGH MODERN CASE LAW

Drafting adequate findings of fact have bedeviled planners and decision makers in Oregon for more than 30 years and there is little evidence that the job is any easier now than it was then. By way of example, almost one-third of the decisions codified in the most recent bound volume of Oregon Land Use Board of Appeal (LUBA) opinions (Vol. 43; 2002–2003), were remands due of inadequate findings.

There are no magic words that have to be used in constructing findings of fact, they merely must clearly state what the decision maker believes to be the relevant and important facts upon which its decision is based. *Sunnyside Neighborhood v. Clackamas Co.*, 280 Or 3, 21 (1971) However, there are necessary components of findings that must be present in all land use decisions. The purpose of this document is to provide an overview of the legal requirements, through a review of applicable case law, and to suggest that some inadvertent shortcomings in findings may be prevented by the careful application of good grammar.

The LUBA referees once opined that "...findings of compliance with relevant approval criteria need not be perfect..." *Thormahlen v. City of Ashland*, 20 Or LUBA 218, 229 (1990) If you believe this statement you can skip the remaining 16 pages of this document. Indeed, the fact that findings are reviewed by hearing officials, city and county counsel, parties' counsel, LUBA referees, and appellate judges – all attorneys – offers little hope that writing findings will ever be simple.

A. Why Findings?

In Oregon, the requirement for findings in a land use application process originated with the *Fasano* case. *Fasano v. Washington County Commissioners*, 264 Or. 574, 586, 507 P.2d 23 (1973) This case, decided by the Oregon Supreme Court in 1973, was the first time that the Oregon courts treated local governing body decision-making in a land use case as an exercise in judicial rather than legislative authority. With this characterization came certain procedural responsibilities. Specifically, the Oregon Supreme Court opined: "Parties at the hearing before the county governing body are entitled to an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter--i.e., having had no pre-hearing or *ex parte* contacts concerning the question at issue--and to a record made and *adequate findings* executed." [*emphasis mine*]

The law in *Fasano* regarding findings of fact was soon codified into statute. Thus, approval or denial of a permit application must be "based on standards and criteria" [ORS 215.416(8)(a)/ORS 227.173(1)] and "shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth." [ORS 215.416(9)/ORS 227.173(3)]. Regardless of

what the statutes expect, the Oregon Court of Appeals has recognized that "Brevity in findings of fact is not necessarily a virtue." *Home Plate, Inc. v. OLCC*, 20 Or App 188, 190 (1975)

In practice, the purpose of findings is to enable participants in local government land use proceedings to understand the basis for the local government's decision and to determine whether an appeal is warranted. *Gonzalez v. Lane County*, 24 Or LUBA 251, 258 (1992). The *Gonzalez* decision, at pages 258–259, contains a very good discussion of incorporation of documents by reference.

At the simplest level, findings accomplish three tasks. First, they force the decision-maker to carefully weigh the evidence and the standards. It is much harder to ignore criteria when you are forced to put in writing why you believe that those criteria were met or not. In other words, findings encourage clear reasoning. Second, findings educate parties and the public about why a particular decision was made. They demonstrate that the decision-maker has followed the "rules" (standards) and did not act in an arbitrary manner. A well-written decision that carefully explains how a decision has been arrived at may prevent an appeal if adversely affected parties respect the process even if they object to the decision.

Finally, findings assist an appellate body in determining whether proper procedures and standards were applied and whether the decision was supported by sufficient (substantial) evidence. Clear and carefully reasoned findings also make it easier for appellate courts to "defer" to the judgment of local governments in interpreting their ordinances.

Facts must be stated in sufficient detail so that an appellate body can understand the decision and have access to a thorough outline of the evidence in the record. *Home Plate, Inc.* at 190.

B. Legal Requirements

1. Findings Must be Written

- The decision-making body may make an oral decision and adopt written findings at a later date as long as the final written order and findings are adopted at a public meeting. *Oatfield Ridge Residents' Rights v. Clackamas County*, 14 Or LUBA 766, 770 (1986). (Unfortunately, in the *Oatfield Ridge* case the decision was not signed at a public meeting and therefore had no legal effect.) An oral decision is considered a tentative decision. *Citizens for Resp. Growth v. City of Seaside*, 23 Or LUBA 100, 115 (1992).
- Findings may include other documents incorporated by reference. *Holladay Investors, Ltd. v. City of Portland*, 18 Or LUBA 271, 275 (1989) The incorporated documents must be referenced

specifically and merely referencing “all oral and written information” is insufficient. *Cecil v. City of Jacksonville*, 19 Or LUBA 446, 455 (1990)

- So long as the findings are written, the evidence upon which the local government relies can be either oral or written. *Friends of Neabeack Hill v. City of Philomath*, 30 Or LUBA 46, 62 (1995). Merely having an oral discussion that is captured on tape does not constitute adequate findings unless that discussion is captured in writing. *Allen v. Grant County*, 39 Or LUBA 232, 239 (2000).

2. Findings May Incorporate by Reference Other Documents

- A local government may incorporate all or portions of another document by reference into its findings if it (1) clearly indicates its intent to do so; and (2) clearly identifies the document or portions of the document so incorporated. LUBA has held that these requirements are satisfied if a reasonable person reading the decision would realize that another document is incorporated into the findings and, based on the decision itself, would be able both to identify and to request the opportunity to review the specific document thus incorporated. *Johnson v. Lane County*, 31 Or LUBA 454, 461 (1996).
- One example of the failure to adequately identify a document adopted by reference concerned a case in Albany where the size and density of a proposal was in question. LUBA held that simply referencing the assessor’s records as the basis for the findings was not supported by substantial evidence, where the record did not include the assessor’s records or any other evidence that supported the findings. *Johnston v. City of Albany*, 34 Or LUBA 32, 42 (1998). Contrast this decision with *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 435, 453 (2002), where ODOT was allowed to rely on environmental assessments and technical reports prepared and used by the agency in making its decision to demonstrate compliance with findings requirements, notwithstanding that the documents were not formally adopted as findings. The “reasonable person” in this case was thought to understand that ODOT intended to rely on the documents to support its decision
- A local government decision-maker may adopt staff-prepared findings as its own. *Gettman v. City of Bay City*, 28 Or LUBA 116, 120 (1994). Interestingly, the planner who prepared the findings in this case later advised the decision-maker that the findings were

erroneous but LUBA held that that admission did not establish that the findings in fact were erroneous.

- A decision-maker may use proposed findings submitted by an applicant or other party. *Murphey v. City of Ashland*, 19 Or LUBA 182, 205 (1990) Generally, a party's submission of proposed findings to a local decision maker does not constitute an *ex parte* contact and absent a local code provision to the contrary, there is no error in a local government's utilization of such a process. *Caine v. Tillamook County*, 25 Or LUBA 209, 233 (1993).
- While a decision may incorporate findings in other documents prepared by staff or a party, it may not do so in a way that leaves the parties and LUBA guessing which documents are made part of the decision or where the necessary findings may be located in the record. *DLCD v. Tillamook County*, 33 Or LUBA 323, 325 (1997). Indeed, when local governments incorporate other decisions or documents into their findings they run the risk of adopting inconsistent findings. *Hannah v. City of Eugene*, 35 Or LUBA 1, 4, *aff'd* 157 Or App 396 (1998). An excellent example of such a situation can be found in *Larmer Warehouse v. City of Salem*, 43 Or LUBA 53, 59 (2002), where the City adopted a staff report that recommended denial of a zone change and also adopted an earlier staff report that recommended approval. Suffice it to say that the remand was swift.
- Where a decision expressly incorporates an entire document by reference into its findings and quotes specific findings from the incorporated document, the scope of the incorporation is not limited to the quoted findings. *Winkler v. City of Cottage Grove*, 33 Or LUBA 543, 545 (1997).

3. **Applicable Criteria And Standards Must Be Identified**

It has been said that standards are "verbal yardsticks against which the evidence is to be measured." *Marbet v. Portland General Electric*, 277 Or 447, 465 (1977). Basically, findings must explain how the criteria were met. *Faye Wright v. Salem*, 1 Or LUBA 246, 252 (1980). Put another way, they must both contain sufficient facts to reach the necessary conclusions and explain how the facts lead to those conclusions. *Neuenschwander v. City of Ashland*, 20 Or LUBA 144, 150 (1990) Sometimes, the most difficult aspect of writing findings is to clearly articulate vague or subjective standards. The following are some examples dealing with this type of criteria:

- Consistent with the overall development character of the neighborhood. A city's findings of compliance with this conditional use criteria with regard to building size, height, color, material and form was found to be conclusionary and inadequate where they didn't describe either the boundaries or the characteristics of the relevant neighborhood. Instead, the findings compared the proposed use to development in geographically distant parts of the city without explaining why those areas are part of the relevant neighborhood. *Terra v. City of Newport*, 36 Or LUBA 582, 589 (1999).
- Not materially alter the stability of the overall land use pattern. Identifying the area to be considered and the overall land use pattern of that area are prerequisites to determining whether a proposed partition satisfies a code requirement that it "not materially alter the stability of the land use pattern of the area." *McNamara v. Union County*, 28 Or LUBA 396, 401 (1994). A county's finding that a proposed lot of record dwelling on high-value soils did not materially alter the stability of the overall land use pattern was found inadequate where the county considered only the stability of the *nonfarm* land uses in the area, and failed to consider whether the proposed dwelling will encourage additional nonfarm development in a manner that destabilizes remaining farm uses. *Friends of Linn County v. Linn County*, 37 Or LUBA 844, 856 (2000).
- Not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use. In order to demonstrate compliance with this standard, found in ORS 215.296(1), county findings must: (1) describe the farm and forest practices on surrounding lands devoted to farm or forest use; (2) explain why the proposed use will not force a significant change in those practices; and (3) explain why the proposed use will not significantly increase the cost of those practices. *Brown v. Union County*, 32 Or LUBA 168, 174 (1996).
- Compatible with the surrounding area. A standard requiring that a proposed use be compatible with the surrounding area is not the same as a standard requiring that a proposed use be compatible with farm and forest uses in the area and not interfere with farm or forest practices. A county cannot rely on findings of compliance with one standard to also find compliance with the another, without addressing the differences between the two standards or explaining why compliance with one also demonstrates compliance with the other. *Thomas v. Wasco County*, 35 Or LUBA 173, 185-186 (1998).

- Harmony with the natural environment in the area. Where the local code requires a determination that the proposal met this standard, and there is no dispute that native plant communities are a relevant characteristic of the natural environment, the decision must include findings determining the proposal is in harmony with the native plant communities in the natural environment. *Friends of the Metolius v. Jefferson County*, 28 Or LUBA 591, 596-597 (1995).
- Operating characteristics of the proposed use. Where the local code requires the proposal have only minimal impacts on adjacent properties, considering the operating characteristics of the proposed use, the decision must identify what the operating characteristics of the proposed use are. *Friends of the Metolius v. Jefferson County*, 28 Or LUBA 591, 599 (1995).
- Not interfere seriously with the accepted forestry practices on adjacent lands. Where an approval standard requires that a proposed nonforest dwelling "not interfere seriously with the accepted forestry practices on adjacent lands," a local government must first determine what those accepted forestry practices are. Statements that "logging practices" which have occurred on adjacent properties are "logging" or "salvage logging" are not adequate descriptions of accepted forestry practices. *DLCD v. Klamath County*, 25 Or LUBA 355, 366 (1993).

The burden lies with local government to make the approval criteria clear and understandable. Where an issue is raised concerning whether a particular code provision is an applicable approval standard, and the challenged decision contains no interpretation explaining that code provision is either inapplicable or satisfied, LUBA will remand the challenged decision. *Hixson v. Josephine County*, 26 Or LUBA 159, 162 (1993). In summary, findings must address and respond to specific issues relevant to compliance with applicable approval standards that were raised in the proceedings below. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). In addition, where criteria are not clear they must be interpreted:

- Decision-makers may often have to focus broadly worded policy criteria through interpretation so that reasonable guidance is given to what is substantively necessary for approval. *Commonwealth Properties v. Washington Co.*, 35 Or App 387, 400 (1978). All reasonable land use interpretations will be honored. *Fifth Avenue Corp. v. Washington Co.*, 282 Or 591, 600 (1978).

- Vague criteria must be interpreted. *Philippi v. City of Sublimity*, 10 Or LUBA 24, 30-31 (1984). In *Philippi*, the City had to explain to the applicant what "premature conversion of agriculture land" meant so it was clear under what circumstances the request could be made consistent. The key is that the findings must inform the applicant either what steps are necessary to obtain approval or that it is unlikely that the application can be approved. *Eddings v. Columbia County*, 36 Or LUBA 159, 165 (1999).
- The interpretive process, as expressed through findings, was described by LUBA in regard to a shopping center that was allowed in a particular zone under code "similar use" provisions: LUBA found that the findings must "(1) express an interpretation of the "similar use" provisions that is adequate for LUBA review, (2) actually apply the interpretation adopted, and (3) explain how the decision is consistent with that interpretation." *Loud v. City of Cottage Grove*, 26 Or LUBA 152, 157-158 (1993).

While it is the applicants' burden to demonstrate compliance with relevant approval criteria, if a local government determines an approval criterion is not satisfied, it must adopt findings explaining why it believes the applicants failed to meet this burden. *Neuman v. Benton County*, 29 Or LUBA 172, 177 (1995).

However, where petitioners raise an issue concerning whether a particular code provision is an applicable approval standard, and the challenged decision contains no interpretation explaining that code provision is either inapplicable or satisfied, LUBA must remand the challenged decision. *Hixson v. Josephine County*, 26 Or LUBA 159, 162 (1993). Findings must address and respond to specific issues relevant to compliance with applicable approval standards that were raised in the proceedings below. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992).

Sometimes you don't have to explicitly list or address criteria:

- A local government is not required to make findings to address why it has found certain criteria to be inapplicable. *East Lancaster Neigh. Assoc. v. City of Salem*, 30 Or LUBA 147, 158 (1995).
- If the substance of the plan policy is addressed in the local government's findings, there is no error in failing to specifically address that criterion. *Hannah v. City of Eugene*, 35 Or LUBA 1, 10 (1998) (1998). Again, the "reasonable person" standard is applied to determine if relevant criteria and standards had been adequately identified. *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 312, 320 (1993). A local

government's interpretation of the standard will be discerned from the way the standard is applied. *Port Dock Four, Inc. v. City of Newport*, 33 Or LUBA 613, 618 (1997).

- A local government does not have to make findings regarding criteria that could support approval of an application, or to make findings regarding criteria upon which it did not rely in reaching its decision to deny an application. *Holland v. City of Cannon Beach*, 30 Or LUBA 85, 89 (1995).
- Where a zoning ordinance provision is an aspirational standard, a local government need not make findings pertaining to the aspirational standard. *Sparks v. Tillamook County*, 30 Or LUBA 325, 329 (1996). In this case, the standard was "to protect in other ways the public health, safety, and general welfare" and the petitioner had failed to establish that it was a mandatory criterion.

4. Conflicting Evidence

It has been said that a local government is not required to discuss conflicting evidence in its findings. *Gilchrist v. City of Prineville*, 20 Or LUBA 1, 6 (1990). If it were only that simple...

- While a local government is required to identify in its findings the facts it relies upon in reaching its decision, it is not required to explain why it chose to balance conflicting evidence in a particular way, or to identify evidence it chose not to rely on. But absent an explanation of the basis for its conclusion or failure to state which evidence it finds persuasive, LUBA will remand the decision for additional findings. *Moore v. Clackamas County*, 29 Or LUBA 372, 381 (1995).
- Although a local government is not required to discuss in its findings the evidence it does *not* rely on to support its decision, doing so may improve its chances of success on appeal to LUBA. LUBA will not read such findings as improperly shifting the burden of proof, where the findings read as a whole show the local government was only trying to demonstrate that it considered all relevant evidence. *McKay Creek Valley Assoc. v. Washington County*, 25 Or LUBA 238, 248-249 (1993).
- Remands are most common where there is no response in the findings to testimony and that testimony goes to satisfaction of a criterion. One example is where an approval criterion required driveway improvements be made to ensure emergency vehicle access and there was testimony that the easement the applicant

intended to rely on would not permit the required improvements. It was found to be an error to simply approve the permit conditioned on future construction of the required driveway improvements. *Harshman v. Jackson County*, 41 Or LUBA 330, 337 (2002).

- The bottom line is that where specific issues are raised concerning compliance with an approval criterion, the findings supporting the decision must respond to those issues. *Rouse v. Tillamook County*, 34 Or LUBA 530, 536 (1998).

5. Legislative Findings

There is no legal requirement that a local government adopt findings to support a legislative land use decision, however:

- Where the local government does not adopt findings explaining why a challenged legislative decision complies with applicable approval criteria, LUBA relies upon the responding parties to provide argument and citations to the record to assist the resolution of petitioners' allegations. *DLCD v. Fargo Interchange Service District*, 27 Or LUBA 150, 154–155 (1994).
- Even absent a specific legal requirement that a legislative decision be supported by findings, remand may be necessary if LUBA and the appellate courts cannot perform their review function without the missing findings to determine whether applicable decision making criteria are satisfied. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 435, 450–451 (2002).
- Legislative findings may be required by local ordinance. *Barnard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660, 675 (1998).
- For LUBA review of a legislative land use decision, either the legislative land use decision must be accompanied by findings addressing relevant legal standards or the local government must explain in its brief how the challenged legislative decision complies with applicable legal standards. *McInnis v. City of Portland*, 27 Or LUBA 1, 8 (1994).

6. Common Deficiencies

- a. Conclusionary findings. Asserting that the criteria have been met but no facts are provided in support. *Burlington Northern Railroad v. Jefferson Co.*, 13 Or LUBA 274, 277 (1985).

- b. Findings that merely reference the record. LUBA will not search the record to identify findings necessary to support a decision. *Jackson-Josephine Forest Farm Ass'n v. Josephine Co.*, 12 Or LUBA 40, 42 (1984), *aff'd without opinion*, 71 Or App 355 (1984).
- c. Conditions of approval cannot substitute for findings. The findings must demonstrate that the criteria have been affirmatively met prior to the establishment of conditions. The problem often lies with improper delegation of the decision-making authority to other governmental officials or bodies. *Margulis v. City of Portland*, 4 Or LUBA 89, 98 (1981). Here the decision-maker delegated the determination of the adequacy of off-site parking to the city's Bureau of Traffic Management.
- d. Compliance can be deferred. LUBA has pointed out that when compliance with approval criteria are challenged, the decision-maker has three choices: (1) find that the standards have been satisfied or that it is "feasible" to satisfy the standards; (2) find that the standards have not been satisfied and deny the application; and (3) defer a determination of the standard to a second stage. *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447-48 (1992)

Compliance with an applicable approval standard can be deferred if the decision ensures that the subsequent approval process provides the same notice and opportunity for public input as the original hearing and a finding is made that compliance is feasible. *Harcourt v. Marion County*, 33 Or LUBA 400, 406 (1997).

- A local government cannot defer its obligation to make findings of compliance with applicable approval criteria to a state agency. *Harcourt* at 406.
- In *Tenley Properties Corp. v. Washington County*, 34 Or LUBA 352, 364-365 (1998), Washington County was held to have improperly delegated a finding of compliance with an emergency turnaround requirement to the fire district where there was no turnaround to review. Here there was no opportunity for public comment and the designs required by the fire district could require adjustments to or the elimination of one or more lots.
- Once a local government has determined that compliance with a mandatory criterion is feasible, it

may impose conditions of approval to ensure compliance with that criterion. In this case, the City was found not to have deferred compliance with mandatory approval criteria where it granted tentative subdivision approval with the condition that development plans be reviewed by a geotechnical engineer prior to the issuance of construction permits. Because it had findings that it was feasible to meet the criteria, no hearing on the geotechnical report was required. *Property Rights and Owners, Ltd. v. City of Salem*, 34 Or LUBA 258, 261 (1998).

- Where the city makes a determination that it is feasible to comply with a local code standard requiring that each lot in a proposed subdivision be buildable, it may defer addressing engineering details to a later date. *Brown v. City of Ontario*, 33 Or LUBA 180, 191 (1997).
- A good example of where a local government deferral was improper is where Wasco County deferred a finding of compliance with a standard requiring that a lot be capable of being served with a domestic water supply, where there was no evidence or finding that an adequate domestic water supply was feasible. The county's finding of compliance relied exclusively on a condition requiring that the applicant establish a domestic water supply. *Thomas v. Wasco County*, 35 Or LUBA 173, 194-195 (1998)
- County could not defer a finding of compliance with compatibility standard to a later administrative proceeding where the county subdivision ordinance had a provision regarding infill requirements that was intended to ensure that new development was compatible with existing developed areas in terms of building orientation, privacy, lot size, buffering, access and circulation, etc. *Sunningdale-Case Heights Ass. v. Washington County*, 34 Or LUBA 549, 556-558 (1998) In this case, the applicant did not submit a plan or sketch, as required, and the hearing official adopted a condition prohibiting on-site improvements until a Type II hearing was held on the matter. The petitioners successfully argued that the infill criterion was inextricably entwined with the partition approval (which defined the number and size of the lots).

- The decision-making body could not be delegated to another body where no technical plans of a storm water runoff system had been submitted and therefore no finding of feasibility of compliance with the applicable requirements could be made. See the *Tenley* and *Sunningdale-Case Heights Ass.* cases.
- A finding of feasibility is more problematic where the issues involves an alleged legal impediment that is beyond the local government's jurisdiction or authority to solve. Two cases illustrate this problem:

→ *Butte Conservancy and Erik Nielsen v. City of Gresham*, LUBA No. 2006-084 (9/15/2006). As a condition of approval of a variance to a limitation on culs-de-sac lengths, the City required a secondary access point. It was argued that the CC&Rs prohibited that use and therefore satisfying the standard was not "feasible." The city argued that (1) the CC&Rs could be reasonably interpreted or allow access roads and (2), in any case, they had the legal authority to condemn. LUBA agreed stating that where a legal question must be resolved to allow a condition to be fulfilled so an applicable standard can be satisfied, and neither the local government or LUBA have the jurisdiction to resolve the issue, it is sufficient for the local government to (1) adopt findings that establish that fulfillment of the condition of approval is not precluded as a matter of law, and (2) ensure, in imposing the condition of approval, that the condition will be fulfilled prior to final development approvals or actual development.

→ *Stoloff v. City of Portland*, 51 Or LUBA 560 (2006).

Here the city approved a residential subdivision based, in part, on a finding that sanitary sewer facilities were "available." The city found that the service provider's easement over petitioner's property allowed service to the proposed development and, in the alternative, the service provider had the legal authority and ability to condemn easements necessary to serve the subject property. LUBA agreed.

- e. Compliance with criteria must be affirmatively stated. A finding that no problems have been identified is not adequate. *Margulis v. City of Portland*, 4 Or LUBA 89, 95 (1981). Statements that merely summarize the evidence in the record, and do not state what the decision maker believes to be true,

are not adequate findings of fact. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992).

LUBA has, at times, shown some leniency in this area. In one case where the local government adopted findings contained in staff report that were essentially written by applicant and were prefaced with "Applicant states" LUBA found that the intent to adopt the findings were clear enough. *Etro v. City of Warrenton*, LUBA Nos. 2006-139/149 (3/16/2007)

- f. Permits must be approved if consistency with regulations can be made with "reasonable conditions." ORS 197.522 requires that local governments approve a permit or other land use application if the application can be made consistent with applicable approval criteria through the imposition of conditions.

7. When Do We Get to Stop?

There comes a time when common sense says "enough is enough" in addressing challenges to the findings supporting a decision. LUBA has recognized this situation in several instances:

- In addressing a code requirement concerning visual impacts, Wasco County was not required to establish that every condition imposed would have mitigated all visual impacts. *Mazeski v. Wasco County*, 28 Or LUBA 159, 167 (1994).
- In addressing an "adequate public facilities" zone change criterion, Clackamas County was not required to adopt findings specifically addressing every use allowed in the proposed commercial zone; more general findings were held sufficient. In this case, the rule was essentially that where no party raised any issue concerning potential uses that might have placed more stringent demands on public facilities than the proposed use, the county could limit its consideration to the proposed use. *Swyter v. Clackamas County*, 40 Or LUBA 166, 172 (2001).
- A local code criterion that requires a local government to consider comments and recommendations of adjacent and vicinity property owners does not require that the local government adopt findings that address every comment or recommendation. *Dayton Prairie Water Assoc. v. Yamhill County*, 38 Or LUBA 14, 35 (2000).

- In the absence of a specific provision in the local code to the contrary, there is no general requirement that a party have an opportunity to object to proposed findings submitted to the local decision maker by the prevailing party in a local land use proceeding. *Adler v. City of Portland*, 24 Or LUBA 1, 12 (1992).

8. **Curing Ailing Findings**

ORS 197.835(11)(b) allows LUBA to overlook minor defects in local government findings when substantiating evidence makes the local government's decision obvious or inevitable. This provision authorizes LUBA to review the findings and conclusions made by the governing body and correct minor oversights or omissions if the parties can identify relevant supporting evidence in the record. LUBA may not disregard the local government's actual findings or read into those findings language that is not stated. *Harcourt v. Marion County*, 33 Or LUBA 400, 404-405 (1997)

Thus, the failure to identify the evidence that supports the findings is not necessarily fatal, so long as the response brief or the briefs filed by other parties direct LUBA's attention to evidence in the record that supports those findings. *Johns v. City of Lincoln City*, 35 Or LUBA 421, 430 (1999).

The county must itself analyze and evaluate relevant facts in its findings to show how it reached its decision; it cannot do that analysis for the first time in its brief to LUBA. *DLCD v. Coos County*, 30 Or LUBA 229, 235 (1995). This was a case where there was a failure to adopt findings not a failure to point to the evidence in the record.

C. **Writing Style**

To be successful, findings of fact must reflect not only correct legal requirements but also must communicate effectively. The ability to make a reviewing body understand your findings is crucial and failure to do so may result in an unnecessary remand.

I. **Know Your Audience.**

Findings are written for parties to a land use decision and LUBA. For the former, write simply and clearly so that your intent and logic is understandable. Decisions are often appealed for the simple reason that it is unclear how you arrived at your conclusion. For LUBA, it is important to write logically so that the intent and the rationale of your decision is inescapable.

2. **Be Precise.**

This factor can be described as the ability to use the right term. Proof your work for unintended ambiguities. The examples from the following newspaper headlines illustrate the point:

"Fire Officials Grilled Over Kerosene Heaters" (News Journal)

"Hospitals Are Sued by 7 Foot Doctors" (Providence Journal)

"Many Antiques at D.A.R. Meeting" (Redondo Beach South Bay Daily Breeze)

"Nixon to Stand Pat on Watergate Tapes" (Indianapolis Star)

"Prostitutes Appeal to Pope" (Register-Guard)

Moral: Chose your words carefully.

3. **Be Concise.**

Say what you have to say with the fewest words possible. An example provided by U.S. Tax Court Judge J. Edgar Murdock who, after a taxpayer testified: "As God is my judge, I do not owe this tax," responded "He's not, I am; you do."

- a. Use the active voice. Use subject-verb-object sentences. A good rule of thumb is that a sentence with more than one "of" is usually slipping out of the active voice.
- b. Eliminate unnecessary words. Why say "subsequent to" when you can say "after."
- c. Avoid needless repetition (tautologies). By way of example, are the phrases: "godless atheism" or "widow woman." And how often have you heard the term "advance planning?"

4. **Be Clear.**

Clarity is using the correct terms in the correct order. The following suggestions should help:

- a. Proof your product (or have someone else proof your work.) Put yourself in the position of the reader. Do the facts in your narrative logically lead to your conclusions? Use deductive reasoning when you can; inductive reason when you have to.
- b. SOV. Adhere to the standard sentence order (Subject-Verb-Object)

- c. Modifiers. Try to maintain the proper relationship between modifiers and the terms being modified. The following are two examples of sentences that can use proper "modification:"

"The application was, in the planning commission's opinion, both in form and in substance, seriously defective."

"There are millions of children who do not go to school in Asia."

- d. Pronouns. Be sure that your pronouns clearly refer to a particular antecedent. It is unclear in the following sentence, for example, whether the facts establish first-degree murder or self-defense:

"The defendant killed the deceased when he thought he was raising his gun to shoot him."

You can create pronouns to increase clarity and make your writing more efficient. For instance, I use the term "subject property" whenever I am describing the land that is included in a land use application.

Finally, be wary of starting a sentence beginning with the word "This." It leaves the reader guessing which part of the preceding sentence is meant to be the subject.

- e. Double Negatives. Avoid them. Normally a clear writer, William Brennan, U.S. Supreme Court Justice, provides us with a good illustration in his opinion in *Keyes v. School District No. 1*, 413 U.S. 189, 211 (1973):

"This is not to say, however, that the prima facie case may not be met by evidence supporting a finding that a lesser degree of segregated schooling in the core city area would not have resulted even if the Board had not acted as it did."

Huh?

- f. Conjunctive/Disjunctive. Learn to properly use "and" and "or," especially when drafting ordinances or code language. The problem surfaces most frequently where lists are involved.

- g. Simplicity. The more complex the facts the harder one should strive to write simply. It is an art not exhibited by the following sentence found in an Atomic Energy Commission study: *"The biota exhibited a one hundred percent mortality response."* Translated: all the fish died.

D. Tips

The following are some areas that I have found useful when I am preparing findings.

- a. Plan ahead but think backwards. The quality of your findings will depend upon the facts present in the record. Review the approval criteria ahead of time and be familiar with the information in the record prior to the hearing. Form an opinion of what additional facts are necessary to meet the applicable criteria.

When writing your findings of fact, begin with the approval criteria and list the findings required to meet the criteria. This is a good way to focus on the relevant facts and ignore the rest.

- b. The very first step should be to closely examine your approval criteria and break them down into subcomponents, if necessary. Thus, when you are dealing with a standard that measures the impacts of the proposed use with the character of the neighborhood you should immediately start with at least three categories of inquiry within which to order your facts: (1) the impacts of the proposed use; (2) the geographic boundaries of the neighborhood; and (3) the character of that neighborhood.
- c. Stress contested issues. Don't spend as much time on areas that are not likely to be challenged. Do concentrate your efforts on the findings that relate to approval criterion that are likely to be contested.
- d. I recite my facts in separately numbered paragraphs, each paragraph containing facts that are related to a single aspect or issue of the decision. For instance, in a request for a nonfarm dwelling permit, I might address the farm productivity facts in a single, separately numbered paragraph. Or I might place all facts that I believe relevant to a particular approval criterion in one paragraph. The benefits of this method are threefold. First, it is easier to keep track of all the disparate facts that might be relevant in the decision. By placing similar facts together you can quickly determine if you left any out. Second, it is easier to determine the logic, inductive or deductive, that will lead you to a conclusion as to whether the relevant approval criterion has been satisfied. Thirdly, ordering findings in this way makes it easy to "cut & paste" facts into my discussion under each approval criterion.
- e. Don't state the facts as if they were testimony; i.e., "The soil scientist stated that the soils have poor drainage and have no forest productivity." Rather, adopt the fact as your own (if you find the

testimony credible) and state: "The soils have poor drainage." (The issue about forest productivity is probably an ultimate fact or conclusion of law that will require more information than just drainage characteristics.)

- f. Avoid weak phrases such as "it appears" or "it seems." Findings should be positive statements.
- g. Sometimes it is helpful in complex or lengthy findings to reference important findings to a particular exhibit or testimony. This practice makes it easier to "fact check" later, possibly augment a finding, and prepare for an appeal. The danger is if the cited exhibit doesn't really support your finding.
- h. Closely review your conditions of approval. Do they pass the following tests:
 - i. Are they clearly worded to adequately communicate what is required?
 - ii. Are they effective in accomplishing their goal?
 - iii. Can long-range compliance be monitored effectively?

(Note that if a party questions a local government's authority to impose a particular condition of approval, the justification for that condition must be included in the findings. *Cummins v. Washington County*, 22 Or LUBA 129, 133 (1991))



**PLANNING BASICS:
LEGAL REQUIREMENTS OF THE PLANNING OFFICE**

**Prepared by
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**Lane Council of Governments
September 2007**

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PLANNING BASICS: LEGAL REQUIREMENTS OF THE PLANNING OFFICE

It is a truism in Oregon that the land use process is quite complex. It is a mixture of legal decisions, statutory law that changes every two years, and administrative rules, some of which are so arcane that they may not even be in the local county law library. Much of the complexity is of a procedural nature and dictates the preparations for hearings, the conduct of a hearing and the responsibilities incumbent on planning staff for after a hearing.

Many jurisdictions have resorted to having their legal counsel present whenever they are in a land use decision-making mode. This, of course, is not practical for many jurisdictions and certainly not for staff when they are working on land use matters outside of the hearing room. So what can you do?

Planners, elected officials and appointed officials are often asked to interpret a code or statutory provision as it applies to the decision-making process. More often than not this will occur at the planning commission level as the city attorney or county counsel is usually not present for these sessions. With any luck the following information will assist your task of advising commission members and elected officials and in conducting your duties as staff.

I. THE APPLICATION PROCESS/COMPLETENESS

A. Requirement to Process/Completeness

Under ORS 227.178(2) (cities) and ORS 215.427(2) (counties), a local government must evaluate an application upon receipt and, within 30 days, inform the applicant of exactly what information is missing. The applicant then has two options: (1) It can provide the missing information, and the government is to deem the application complete when it receives the missing information or (2) it can refuse to submit the missing information, in which case the government is to deem the application "complete" on the thirty-first day after it received the application. Regardless of option chosen, the statute requires the government to deem the application complete (whether or not it is in fact complete) and to process it. The government may not reject an application because it is incomplete. *Wiper v. City of Eugene*, 44 Or LUBA 127 (2003).

Under ORS 215.428(1) to (3), an application for permit approval is considered complete when it is filed, unless the county notifies the permit applicant that information is missing. ORS 215.428(2). *DLCD v. Crook County*, 25 Or LUBA 98 (1993).

B. Application Defined

A person files an "application for a permit," as provided in ORS Chapters 215 and 227, when the person makes it known what the person seeks approval for and that local government action to grant approval is requested. A local government may require the person to use county forms and procedures, but may not rely on a lack of county forms or procedures to claim no application for a permit was submitted. *Kirpal Light Satsang v. Douglas County*, 18 Or LUBA 651 (1990).

Where a local code provision does not explicitly state the application requirements for a complete development application are "jurisdictional," the local government's interpretation of the code provision as imposing procedural rather than jurisdictional requirements is not inconsistent with the express words, purpose or policy of the code and, therefore, must be affirmed. *BCT Partnership v. City of Portland*, 27 Or LUBA 278 (1994).

A Wasco County approval of a temporary use permit and a conditional use permit of two wind measuring devices was appealed and one of the issues was the validity of the application. Wasco County's code specifies who may initiate a development permit and includes the owner of the property, the purchaser of the property and a lessee in possession. The application was submitted by an agent for the intervenor, a wind management company. The argument was that the owner gave the agent written permission to file the application but did not say that he was submitting the application on behalf of the owner. Because there was nothing in the county code suggesting that compliance was jurisdictional, LUBA ruled that it was a procedural error that was not prejudicial. *Womble v. Wasco County*, LUBA No. 2006-240/241 (4/10/07)

C. Property Ownership/Signatory Requirements

Where a local code provision requires the consent of all property owners affected by a land use application, a present owner must sign the application, notwithstanding an agreement obligating the present owner to convey the property in the future to a party who signed the application. *Johnston v. City of Albany*, 34 Or LUBA 32 (1998).

Absent a statutory or local code provision to the contrary, a local government may recognize a property owner who signs a permit application as an applicant, or allow a change in the applicants for a permit. *Reeves v. Yamhill County*, 28 Or LUBA 123 (1994).

Where the local code allows a property owner's agent to file a land use application "provided the application is accompanied by proof of the agent's authority," but proof of the agent's authority was not submitted until after the application was filed, the local government at most committed a procedural error, not grounds for reversal or remand unless the petitioner can show prejudice by the delay in

submitting the authorization. *Bridges v. City of Salem*, 19 Or LUBA 373 (1990).

Where the applicant is a general partnership, a code requirement that the application bear the signature of the applicant is satisfied if the record indicates the person who signed the application is a general partner. *BCT Partnership v. City of Portland*, 27 Or LUBA 278 (1994).

D. Compliance With Application Requirements

The omission of information required by a local code from development application is harmless procedural error if the required information is located elsewhere in the record. *Brown v. City of Ontario*, 33 Or LUBA 180 (1997).

Where required information from an application is not located elsewhere in the record and such information is necessary for a determination of compliance with relevant approval standards, such an error is not harmless and warrants reversal or remand of the challenged decision. *Shapiro v. City of Talent*, 28 Or LUBA 542 (1995).

E. Modification of Application

In the absence of a code provision to the contrary, a local government is not required to allow modifications to a subdivision application to enable its approval. *Schatz v. City of Jacksonville*, 25 Or LUBA 327 (1993).

If the application morphs too much over the course of the land use decision-making process then LUBA may determine it to be a new application, subject to additional notice and hearing requirements. *Baker v. City of Garibaldi*, Or LUBA 2004-154 (March 23, 2005) In Baker, the planning commission's approval of a PUD was appealed to the city council, which scheduled a de novo hearing. The day before the hearing the applicant submitted a revised preliminary plan. LUBA found that references to "revised plan" supported a conclusion that the city considered the revised plan to be more than mere evidence and actually a new application.

F. Remand

In the absence of a code prohibition or some other obstacle identified by petitioner, a city may find a proposal that is substantially modified on remand from LUBA to be a continuation of the original application. *Sullivan v. City of Woodburn*, 33 Or LUBA 356 (1997).

II. NOTICE

A. Generally

- Golden Rule: LUBA will not reverse or remand a decision for procedural error unless the error causes prejudice to a petitioner's substantial rights. *Stockwell v. Clackamas County*, 24 Or LUBA 358, 361 (1992)
- If notice is not received but is mailed the notice requirements are not violated. If notice is sent to the incorrect address, then notice requirements may not be satisfied. *Norway Development v. Clackamas Co.*, 40 Or LUBA 276, 281 (2001). In *Norway*, the petitioner's name was illegible on the sign-up sheet and his notice of the decision was mailed to the wrong address. However, the record indicated that the error had been noted prior to the mailing but the correction was not made.

ORS 197.763(8) requires that local governments demonstrate the required mailing by affidavit if challenged. A good policy for all mailings is to have a "certification of mailing" form or cover sheet that asserts that an identified person mailed a specified notices to the post office on a certain date. Attach a copy of the mailing labels to the certification and sign the form.

A secretarial processing sheet that did not list the names of persons who testified at a hearing but noted that "Persons testifying/submitting comments" were sent notice of the decision was insufficient to demonstrate that petitioner was actually sent the required notice. *Shaffer v. City of Salem*, 23 Or LUBA 57, 61 (1997)

- Notice requirements are not violated if a mailed notice is not sent to a person who is required to get such mailed notice but that person shows up in person. *Ruef v. Stayton*, 7 Or LUBA 219, 230 (1983)

A problem may occur if they state that they didn't have sufficient time to prepare for the hearing. In that case, the decision-making body should find out if keeping the record open for seven days or more would satisfy the individual. The question is open as to whether such a person, who can show prejudice, can force a continuance of the hearing. (The discussion by the Court of Appeals in *Venable v. City of Albany*, 149 Or App 274, 280 (1997) suggests that written comment procedure cannot substitute for a public hearing process.)

- When the property owner is mailed notice but not the renter there is no procedural error as ORS 197.763(2) requires that notice to go to the applicant and owners of record.

- ORS 197.763(3) provides the minimum contents of a notice for a quasi-judicial land use hearing. The contents include:

1. Explain the nature of the application and the proposed uses which could be authorized. For a zone change, attaching a copy of the applicable zoning district which shows the allowable uses is sufficient. *Caine v. Tillamook County*, 22 Or LUBA 687, 692 (1992)

Where no specific use is proposed in conjunction with a zone change, the notice does not have to indicate all possible uses of the property. If a “reasons” goal exception is proposed, however, the notice must identify the particular use.

2. List the applicable criteria from the ordinance and the plan that apply. If the notice does not adequately identify the approval criteria, there is no prejudice to a petitioner’s substantial rights when the criteria are identified in the staff report and were addressed at the hearing. *Turrell v. Harney County*, 34 Or LUBA 423, 430–431 (1998)

It is sufficient to identify the development code section number to provide notice of the applicable criteria. You don’t have to interpret the section to identify the pertinent sections. *Fjarli v. City of Medford*, 33 Or LUBA 451, 454 (1997)

The listing of the entire zoning ordinance as the applicable criteria does not satisfy the statute. *ONRC v. City of Oregon City*, 29 Or LUBA 90 (1995) Neither does a statement that a list of the applicable approval criteria are available at City Hall seven days prior to the hearing. *ONRC v. City of Oregon City*, 28 Or LUBA 263, 267 (1994)

ORS 197.763(3)(b) only requires that the county list in its notice applicable comprehensive plan and land use ordinance criteria. It does not require that the county list statutory or administrative rule criteria. (Here the notice did not list the “reasons exception” criteria of Goal 2 and OAR.) *Rhinhart v. Umatilla County*, LUBA No. 2006–128 (2/2020/07)

3. Set forth the street address or other easily understood geographical reference to the subject property. The addresses of all properties included within the proposal do not have to be set out in the notice; an “easily understood geographical reference” is sufficient. *Kevedy, Inc. v. City of Portland*, 28 Or LUBA 227, 236 (1994) In this case, a map showing all three tax lots included in a proposal

was adequate despite the failure of the notice to list each tax lot's address and the attachment of other maps that only showed a portion of the property.

4. State the date, time and location of the hearing.
5. State that failure of an issue to be raised in a hearing, in person or by letter, or failure to provide statements or evidence sufficient to afford the decision maker an opportunity to respond to the issue precludes appeal to the board (LUBA) based on that issue. A statement that "failure to raise an issue before the planning commission precludes appeal to the local governing body" does not satisfy the statute. *Murphy Citizens Advisory Comm. V. Josephine County*, 25 Or LUBA 312, 317 (1993)
6. Include the name of a local government representative to contact and the telephone number where additional information may be obtained.
7. State that a copy of the staff report will be available for inspection at no cost at least seven days prior to the hearing and will be provided at reasonable cost.
8. Include a general explanation of the requirements for submission of testimony and the procedure for conduct of hearings. Reversal or remand only where this procedural error prejudices the substantial rights of the petitioners. *Stefan v. Yamhill County*, 21 Or LUBA 18, 28-29 (1991)

LUBA has said that it is procedural error not to include notice of the right to request a continuance under ORS 197.763(4)(b) or that the record may be held open under ORS 197.763(6) in the hearing notice. *Reed v. Clatsop County*, 22 Or LUBA 548, 554-555 (1992) The statute does not explicitly state this requirement but is considered to be included within the explanation of the submission of testimony and hearing procedure. *Wissusik v. Yamhill County*, 20 Or LUBA 246, 252 (1990) In *Reed*, LUBA said that the parties substantial rights are violated where it is clear from the record that they would have exercised their rights if they had known about them.

- ORS 197.763(5) requires that a statement containing the following should be made at the commencement of a hearing:
 1. List the applicable substantive criteria;

2. State that testimony, arguments and evidence must be directed toward the criteria listed or other criteria believed to apply to the decision;
3. State that failure to raise an issue accompanied by statements or evidence sufficient to afford the decision maker and the parties an opportunity to respond to the issues precludes appeal to LUBA based on that issue;
4. State that the failure of the applicant to raise a constitutional or other issue relating to the proposed conditions of approval with sufficient specificity to allow the local government or its designee to respond to the issue precludes an action for damages in circuit court.

A local government must make clear prior to the commencement of a local appeal period that a local appeal is available or it cannot contend that a petitioner who fails to appeal locally has not exhausted all local remedies. *New v. Clackamas County*, 30 Or LUBA 453, 458 (1995).

- ORS 197.763(2)(a) requires that quasi-judicial land use notice be provided to applicant and to owners of record of property on the most recent property tax assessment roll where the property is located. The failure to use the most recent property tax assessment roll is not error where it is established by affidavit that a notice was actually mailed to the petitioner's residence. *Epling v. Washington County*, 33 Or LUBA 392, 397 (1997)

On the other hand, a local government may not rely on its failure to update its tax rolls as soon as possible to defeat the purpose of the notice requirements. *Walz v. Polk County*, 31 Or LUBA 363, 369 (1996) In *Walz*, the petitioner recorded the purchase of his property in April. Notice of the disputed administrative land use decision went out in August. Polk County "updates" its tax assessment rolls annually, in September, and therefore the petitioner did not receive notice of the decision. The Polk County Assessor, however, said that property purchases are placed on the assessment roll no later than one month from recording. LUBA distinguished between the annual printing of the tax assessment roll and its actual electronic update.

- Separate or additional notice of a continued hearing is not required if it is announced at the hearing held pursuant to public notice. *Apalatequi v. Washington Co.*, 80 Or App 508, 524 (1986) Failure to specifically state the location of a continued hearing is harmless error where the continued hearing was held in the same place from which it was continued and petitioners showed up and participated. *West Amazon Basin Landowners v. Lane County*, 24 Or LUBA 508, 517 (1993)

- Notice of administrative decisions must go to persons within 500 feet of the proposed use, and who are adversely affected or aggrieved. *Wilbur Residents v. Douglas County*, 151 Or App 523, 530 (12/17/97)

In *Wilbur*, Douglas County approved a septic waste treatment facility (sewer lagoon) and mailed notice of the decision to property owners within 500 feet of the property on which the facility was sited. The petitioners, who did not live within 500 feet and did not get notice, appealed the decision to LUBA more than 21 days after the decision but within 21 days of having actual notice of the decision. They argued that their homes were within “sight, sound and smell” of the agricultural fields upon which the treated effluent would be disposed. LUBA dismissed, holding that since the challenged decision did not address where the effluent would be applied, the petitioners were not aggrieved, even if they lived within sight, sound, and smell of where it would be dumped.

The Court of Appeals reversed, holding that the petitioners had a “tenable basis for showing they were adversely affected by the proposed facility. Remanded to LUBA to determine whether landowners were entitled to notice of hearing

ORS 215.416(11)(a) states that notice of a permit decision rendered without a hearing must be given to persons within 500 feet of the proposed use, or who are adversely affected or aggrieved. Even though the word “or” is a disjunctive term, it does not mean the County has a choice of which category but rather means that a person need not meet all three categories to be entitled to notice. [ORS 227.175(1)(a) is the analogous provision for cities.]

- Notice of an impending land use action must reasonably describe the local government’s final action. A case in Portland involved whether notice of a conditional use permit proposal for a master plan for the zoo was adequate where it called for a temporary parking lot but, two years later, the parking lot was made into a permanent one. LUBA said notice was OK and that the appeal was too late (beyond 21 days) but this decision was reversed by the Court of Appeals which found that the original proposal did not reasonably describe the final action. The 21-day appeal period to LUBA did not begin until the neighbors actually discovered the final action — the permanent parking lot. *Bigley v. City of Portland and Metro*, 168 Or App 508, 514 (2000)

B. DLCD notice

- Must be given 45 days prior to the first evidentiary hearing. ORS 197.610

- Must include a certification of mailing. ORS 197.615. Failure to comply with this requirement, however, does not render the notice invalid or otherwise carry a penalty.
- Must be given of any change in the date of the final hearing. Prior to the modification to ORS 197.610, notice had to be given 45 days prior to the date of final adoption. In a case where the City of Cornelius gave DLCD less than 45 days notice of the date of final adoption but subsequently adopted the regulation after 45 days, LUBA held that the notice was defective because the City failed to send notice of the date of the new hearing. Whether LUBA will extend the logic of this case to the amended version of ORS 197.610 is any one's guess. *Old Town Cornelius Neighborhood Association v. City of Cornelius*, 38 Or LUBA 921, 926 (2000)
- In a Medford case, notice was not given to DLCD because the removal of the overlay district was a "small tract zoning map amendment" and notice was not required under DLCD rules. LUBA, however, focused on ORS 197.610(1), which makes no such distinction. (DLCD's administrative rule was not updated in 1989 to tract the change in the statute.) *NE Medford Neighborhood Coalition v. City of Medford*, LUBA No. 2006-132 (2/120/07)

C. Ballot Measure 56 Notice

Ballot Measure 56, codified in ORS 215.503 and 227.186, requires notice to all owners whose property will be "rezoned." "Rezoned" is defined as when the base zoning classification of property is changed or where land uses previously allowed in an affected zone are limited or prohibited. The definition is broad enough to be applied to ordinances that increase setbacks, change siting requirements, increase open space or landscaping requirements or even change building codes, fire codes, tree cutting ordinances and sign codes. As a result of this ordinance, all legislative acts relating to comprehensive plans, land use planning and zoning must be adopted by ordinance. Notice must be provided at least 30 days prior to adoption.

- Consistent with Ballot Measure 56 notice requirements, Multnomah County sent individual notice to property owners affected by a plan and zone change. Unfortunately, the county did not provide advance published notice of the public hearing as required by ORS 215.060. Absence of published notice was found to be substantive error, resulting in the ordinance having "no legal effect." *Ramsey v. Multnomah County*, 43 Or LUBA 25, 31 (2002). On remand the county readopted the ordinance after publishing notice of the public hearing. The county did not repeat its individual mailing of notice. Again, the ordinance was challenged, this time on the basis that no individual notice was given.

LBUA held that just because the ordinance had no legal effect that didn't mean that the procedures followed and the notices provided had no effect. State statutes did not require a second notice and therefore the notice was adequate. *Ramsey v. Multnomah County (Ramsey II)*, LUBA No. 2002-157 (June 18, 2003).

D. Post-Decision Notice

ORS 197.830(2) provides that any person who "[a]ppeared before the local government ...orally or in writing" may petition LUBA for review of a land use decision. ORS 197.830(7) provides that any person who has made such an appearance may intervene in such a review proceeding.

- The appeal of decision on the application of a land use regulation must be filed with LUBA within 21 days of its becoming final. *Wicks-Snodgrass v. City of Reedsport*, 148 Or App 217, 224 (1997)

Previous law, established in *League of Women Voters v. Coos County*, 82 Or App 673, 681 (1986), was that a decision became final, for purposes of appealing to LUBA under ORS 197.830(7), only after the written notice is mailed or delivered personally. In that case, the County mailed its decision over 21 days after the decision became final.

In the *Wicks* case, the City's decision was mailed the day after it became final. Petitioners filed their appeal with LUBA 21 days after the mailing but 22 days after the decision became final. LUBA refused to dismiss the appeal, relying upon the *League of Women Voters* case, and the Court of Appeals reversed.

The Court of Appeals admitted they had made an error in the *League of Women Voters* case and that ORS 197.830(8) means what it says: Notice of intent to appeal shall be filed not later than 21 days after the decision becomes final.

- An appeal of the adoption or amendment of a plan or land use regulation must be appealed to LUBA within 21 days of its mailing. *ODOT v. City of Oregon City*, 153 Or App 705, 708 (1998)

In this case, ODOT filed its appeal of Oregon City's amendment to its comprehensive plan 32 days after the decision became final but within 21 days of its mailing. Both LUBA and the Court of Appeals upheld the appeal. Since the decision in *League of Women Voters* case, the Legislature amended 197.830(8) to add a sentence saying "A notice of intent to appeal plan and land use regulation amendments....shall be filed no later than 21 days after the decision is mailed." This provision does not apply to the application of a land use regulation or plan.

- “Actual notice” of the decision under ORS 197.830(3)(a) for a land use decision without a hearing or which is different from mailed notice, depends upon whether petitioner has received written notice of the decision. Petitioner’s conversations with the county planner or the applicant’s real estate agent are not sufficient to give petitioner “actual notice.” *Bowlin v. Grant County*, 35 Or LUBA 776, 785 (1998)

III. STANDING

A. Generally

Standing is the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged. The party suing must have something to lose in order to sue unless they have automatic standing by action of law.

B. Local Government as Gatekeeper

- Local governments have the right to establish rules of standing to appeal land use decisions on the local level. Examples would be where the local government requires that a person appealing a planning commission decision to the city council or a hearings official decision to the planning commission has to show that they are adversely affected by the decision.
- As a practical matter, local government rules may not thwart standing to appeal to LUBA as it is a matter of state law and a local government may not adopt code provisions that enlarge or diminish standing requirements. *Multnomah County v. Multnomah County*, 46 Or LUBA 365 (2004)

C. Level of Local Participation May Vary to Establish Standing

- The level of participation required at local level to establish standing differs depending upon whether you are appealing the adoption of a comprehensive plan or land use regulation. In the former, you must participate (assert your position on the merits) [ORS 197.620(1)]. In a land use decision under ORS 197.830(2) you only have to “appear.” *Century Properties v. Corvallis*, LUBA Nos. 2005–004,017 (4/7/2006) Under ORS 197.830(2)(b), a persons appearance before a city planning commission is adequate to constitute an appearance before “the local government” and need not appear before the city council that rendered the final decision. *Thomas v. City of Veneta*, 44 Or LUBA 5 (2203)
- To “appear,” is more than just being in attendance, you must at least present oral or written testimony. *Lester v. City of Eugene*, 26 Or LUBA 453 (1994) Where a local government denies a person the right to present

testimony on their own behalf, that person "appeared" within the meaning of ORS 197.830(6) *Sorte v. City of Newport*, 25 Or LUBA 828 (1993). The issue of whether or not the person was properly excluded from testifying will then be argued before LUBA.

- Generally, when a local government makes a land use decision regarding a permit without providing a hearing or makes a land use decision that is different for the proposal described in the notice of the hearing, a person adversely affected may appeal the decision to LUBA. ORS 197.830(3) In cases where the local government provides post-decision notice a person required to get notice but does not has automatic standing to appeal the decision to LUBA. Where a person is not required to get notice but is adversely affected or aggrieved by the decision has automatic standing to appeal to LUBA. ORS 197.830(3)
- To have standing to LUBA you must be identified in the local level. Thus, where an attorney appeared during local land use proceedings and stated that he represented unspecified "appellants" and "opponents," the attorney's appearance is inadequate to confer standing on the unspecified individuals where there was nothing in the record to establish who they were. *Townsend v. City of Newport*, 21 Or LUBA 286 (1991)
- Local governments do not have standing to appeal their own decision but they adopt code provisions that allow them to "appear" before local government decision-maker to preserve their right to appeal to LUBA. *Multnomah County v. Multnomah County*, 46 Or LUBA 365 (2004) A member of the local governing body who adopted a land use decision is not a person who "appeared" before that body and may not intervene as a party in a LUBA appeal. *Roe v. City of Union*, 45 Or LUBA 726 (2003)

A Decision Maker
not a "Party"

D. Standing to Appeal to LUBA and the Oregon Court of Appeals Used to Differ

- In 2001, the Oregon Court of Appeals determined that standing to appeal a land use decision to LUBA does not guarantee standing to appeal LUBA's decision to the Oregon Court of Appeals. *Utsey v. Coos County*, 176 Or App 524 (2001) Based upon the federal judicial concept of justiciability, the court determined that a party seeking judicial review of a LUBA decision must demonstrate that the decision will have a practical effect on the appealing party's rights. The controversy was settled prior to its review by the Oregon Supreme Court. In October of 2006, the Oregon Supreme Court did address the issue and overruled *Utsey*, finding that standing was a creature of legislative authority not federal constitutional law. *Kellas v. Department of Corrections*, 341 Or 471 (2006)

IV. 120-DAY RULE (ORS 215.429/227.178)

The 120-day rule essentially provides that the local government must take final action on a land use application within 120 days of its being deemed complete. The local government must either deem the application complete or notify the applicant that more information is needed within 30 days. The application is deemed complete and must be processed if:

1. The local government does not complete its completeness determination within 30 days of the submission of the application;
2. The applicant is notified of deficiencies and supplies all of the missing information;
3. The applicant supplies some of the missing information and provides written notice that no other information will be provided; or
- * → 4. The applicant provides written notice that none of the missing information will be provided.

The application is void if on the 181st day after submission the applicant has been notified that the application is incomplete and has either not provided the missing information or has not provided notice that the missing information will not be provided.

The 120-day rule does not apply to the processing of an amendment to an acknowledged comprehensive plan.

- A mandamus action cannot be brought after a local government has made a final land use decision, even if that decision is made more than 120 days after the application is accepted. The local government loses jurisdiction the moment a petition for a writ of mandamus is filed. ORS 215.429(2) and 227.179(2)
- The applicant may “waive” or extend the 120-day limitation but the local government may not require that waiver. ORS 215.427(8)/ORS 227.178(10)
- ORS 227.178(5) provides that waiver extensions are limited to 245 days for applications filed within cities. ORS 215.427(4) provides that extensions may be granted for a “reasonable period of time” for applications filed within counties.
- A final action by the local government after 120 days has expired and after a mandamus proceeding has been instituted will not divest the Circuit Court of its jurisdiction. *State ex rel Compass Corp. v. City of Lake Oswego*, 319 Or 537, 546 (1993)
- Notice of the petition for a writ of mandamus must be sent to any party that participated at any evidentiary hearing during the local process. ORS 215.429(3) and 227.179(3)

- If the local government makes a tentative oral decision beyond the 120 days (150 days for counties), the applicant must wait 14 days to provide the decision maker an opportunity to make a final written decision before going to circuit court. ORS 215.431(4) and 227.179(4)
- 1999 legislation (ORS 215.435 and 227.181), fix the 1998 Court of Appeals decision that the 120-day rule does not apply to proceedings on remand. *State of Oregon ex rel Holland v. City of Cannon Beach*, 153 Or App 176,181, (1998) The statutory changes require that local governments take action within 90 days of the remand. The clock starts when the applicant requests, in writing, that the local government start the process. The normal mandamus process is available if action is not taken within the 90 days.
- Local decision in response to a “writ of mandamus” is not a land use decision. This statutory change overrules *Murphy Citizens Advisory Committee v. Josephine County*, 325 Or 101, 111 (1997) which held that a local government decision to settle a mandamus action was, in itself, a land use decision. ORS 215.429(2) and 227.179(2)
- Can’t turn back the clock to avoid the 120 day rule. *Miller v. Multnomah County*, 153 Or App 30, 38 (1998)

A hearing official’s denial of a permit application for a forest dwelling was appealed to the County Commissioners who orally affirmed the hearing official’s decision within the 120-day period. The final written decision, while issued after the 120-day period, was back-dated to the date of the oral decision. The applicant appealed to LUBA, asking for a refund under ORS 215.428(7)(a), and for LUBA to reverse the decision under ORS 197.840(10)(a)(B) on the basis that the local governments action was for the purpose of avoiding the requirements of ORS 215.428 (120-day rule).

The Court held that in regard to the question of whether the County intended to avoid the 120-day rule, the burden was on the petitioner to ask for an evidentiary hearing to present evidence of that intent.

- The deference for local interpretations of local code, codified by ORS 197.829, does not apply in a mandamus proceeding. *State ex rel Coastal Management v. Washington County*, 159 Or App 533, 542, 979 P2d 300 (1999).
- Be cautious if you are thinking about intervening to oppose a mandamus action as you may be held liable for attorney fees along with the local government. Thus, in the *Coastal Management* case, Baker Rock Crushing, a primary opponent during the local process, intervened in the mandamus action and the trial court awarded attorney fees against the county and the Baker Rock Crushing , as intervenor.

- Laches, the equitable doctrine that prevents someone from benefiting from the failure to do something or enforcing a right that results in the defendant being placed in a worse condition, does not apply to the 120-day requirement. *State ex rel K.B. Recycling v. Clackamas Cty*, 171 Or App 46, 51, 14 P3rd 643 (2000) In this case, a county hearings officer issued a decision denying an application more than 120 days after it was filed. The hearings official decision is normally final unless a petition for rehearing is filed. The plaintiffs filed a timely petition for rehearing and then, a few minutes later, filed a mandamus action in circuit court. The county opposed the issuance of the writ, arguing that the plaintiffs could not take advantage of the mandamus proceeding when it was they who caused the delay of the final decision. The circuit court agreed but was reversed by the Court of Appeals, which emphasized that the purpose of the 120-day rule was to assure prompt governmental action.
- The above-cited “intent” of the 120-day rule was most recently employed by LUBA in deciding whether the Central Point City Council’s expedited land use review to meet the statutory deadline was legal. In that case, the planning commission held two hearings to consider whether a proposed Wal-Mart store qualified as a “community shopping center” and therefore did not require a conditional use permit. The city council understood that if it waited for the planning commission written decision there would be insufficient time to schedule and conduct a hearing and issue a written decision within the 120 days and the applicant refused to waive the 120-day period. The city council called up the matter for its review, held a hearing and issued its written decision denying the application 12 days before the planning commission issued its written decision. LUBA held that the purpose of the 120-day rule was to ensure timely decisions and that it does not preclude expedited reviews as long as the substantial rights of the parties are preserved. *Wal-Mart Stores, Inc. v. City of Central Point*, LUBA No. 2004-075 (June 9, 2005)

V. IMPARTIALITY

As mentioned before, as a planner or as an elected or appointed official, you will often be asked to interpret your jurisdiction’s code or state statute as it applies to the decision-making process. More often than not these questions will focus on the subject of impartiality. This subject encompasses three distinct topics:

A. Conflicts of interest

I. Statutory basis

- a. ORS 244.135, which consolidates ORS 215.035 and ORS 227.035, addresses conflicts affecting planning commission members. Participation or action by that the city or county commissioner is prohibited if there is a direct or substantial

financial interest. Any actual or potential interests must be disclosed at the meeting.

- b. ORS 244.120 indicates how to handle conflicts, actual or potential.
- (1) For an appointed public official, including planners, the person who appointed the official must be notified in writing as to the nature of the conflict and the "appointing authority" must either designate an alternate or allow the official to go forward as specified. (ORS 244.120(1)(c).)
 - (2) For a public official elected to a board or commission, that official must (1) publicly announce the potential conflict before taking any action, or (2) not participate in discussion or debate on that issue unless that official's vote is needed to meet the required minimum votes. (ORS 244.120(2)(a)-(b).)

2. Strict Code Of Ethics For Public Officials

-
- "But-For Rule": You may not use or attempt to use your official position or office to obtain financial gain or to avoid financial detriment that would not otherwise be available but for the position or office other than salary, honoraria, reimbursement of expenses or an unsolicited award for professional achievement for you or a relative or for any business that you or a relative is associated.
 - You may receive honoraria unless you are legislative (including staff or employees of agencies, committees or commissions that are part of the legislative branch) or statewide (i.e Secretary of State, Superintendent of Public Instruction, etc.) official. ORS 244.040(1)(d)
 - No public official or candidate for office or a relative of the public official shall receive, directly or indirectly, any gift or gifts with an aggregate value in excess of \$100 from any single source who could reasonably be known to have a legislative or administrative interest in any governmental agency in which the official has an official position or which the official exercises authority. [This amount drops to \$50 January 1, 2009.]
 - No public official shall solicit or receive and no person shall offer or give to any public official any pledge or promise of future employment based upon any understanding that the public

official's vote, official action or judgment would be influenced thereby.

- No public official shall attempt to further or further the personal gain of the public official through the use of confidential information gained in the course or by reason of the official position or activities.
- No person shall attempt to represent or represent a client for a fee before the governing body of a public body of which the person is a member.

3. Annual Statement Of Economic Interest

If you are an elected city or county official; member of planning or development commission, or chief executive officer of a city or county ... unless a majority of the voters in your city or county voted against filing such statements) ORS 244.050

You must file by April 15 of each year. Failure to file is a prima facie evidence of violation of the statute. The Oregon Government Standards and Practices Commission will notify you within 5 days of missing the deadline and must give you at least 15 days to cure the problem. If you fail to meet the Commission's deadline they can fine you \$5 per day for each day beyond their deadline, up to \$5,000. ORS 244.050(7)(c)

Civil penalty in addition to Commission fines. ORS 244.050(7)(d)

4. Actual Conflict Of Interest

'Actual conflict of interest' means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person's relative or any business with which the person or a relative of the person is associated unless the pecuniary benefit or detriment arises out of circumstances described in subsection (14) of this section." 244.020(1)

If an Appointed Official (except judges): If the public official is any other appointed official subject to this chapter, notify in writing the person who appointed the public official to office of the nature of the conflict, and request that the appointing authority dispose of the matter giving rise to the conflict. Upon receipt of the request, the appointing authority shall designate within a reasonable time an alternate to dispose of the matter, or shall direct the official to dispose of the matter in a manner specified by the appointing authority. ORS 244.120(1) (c)

If an Elected Official (except state legislators): 244.120(2) (b) When met with an actual conflict of interest:

1. Announce publicly the nature of the actual conflict on the issue.
2. Refrain from participating as a public official in any discussion or debate on the issue out of which the actual conflict arises or from voting on the issue. ORS 244.120(2)(b)(A)

*Quorum
Issues*

Unless

Your vote is necessary to meet a requirement of a minimum number of votes to take official action. But you may not participate as a public official in any discussion or debate on the issue out of which the actual conflict arise. ORS 244.120(2)(b)(B)

5. Potential Conflict Of Interest

'Potential conflict of interest' means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person's relative, or a business with which the person or the person's relative is associated, unless the pecuniary benefit or detriment arises out of the following:" 244.020(14)

244.020(14)(b) "Any action in the person's official capacity which would affect to the same degree a class consisting of all inhabitants of the state, or a smaller class consisting of an industry, occupation or other group including one of which or in which the person, or the person's relative or business with which the person or the person's relative is associated, is a member or is engaged. The commission may by rule limit the minimum size of or otherwise establish criteria for or identify the smaller class that qualify under this exception."

If an Appointed Official (except judges): If the public official is any other appointed official subject to this chapter, notify in writing the person who appointed the public official to office of the nature of the conflict, and request that the appointing authority dispose of the matter giving rise to the conflict. Upon receipt of the request, the appointing authority shall designate within a reasonable time an alternate to dispose of the matter, or shall direct the official to dispose of the matter in a manner specified by the appointing authority. ORS 244.120(1) (c)

If an Elected Official (except state legislators): Announce publicly the nature of the potential conflict prior to taking any action thereon in the

capacity of a public official. ORS 244.120(2)(a)

The existence of a potential conflict of interest does not disqualify an elected official from voting on a legislative land use decision. *Rea v. City of Seaside*, 27 Or LUBA 443, 445 (1994)

6. Definitions

'Public official' means any person who, when an alleged violation of this chapter occurs, is serving the State of Oregon or any of its political subdivisions or any other public body of the state as an officer, employee, agent or otherwise, and irrespective of whether the person is compensated for such services." ORS 244.020(15)

"Gift" means something of economic value given to a public official or the public official's relative without valuable consideration of equivalent value, including the full or partial forgiveness of indebtedness, which is not extended to others who are not public officials or the relatives of public officials on the same terms and conditions; and something of economic value given to a public official or the public official's relative for valuable consideration less than that required from others who are not public officials. However, "gift" does not mean:

1. Campaign contributions, as described in ORS chapter 260.
 2. Gifts from family members.
 3. The giving or receiving of food, lodging and travel when participating in an event which bears a relationship to the public official's office and when appearing in an official capacity, subject to the reporting requirement of ORS 244.060 (6).
 4. The giving or receiving of food or beverage if the food or beverage is consumed by the public official or the public official's relatives in the presence of the purchaser or provider thereof.
 5. The giving or receiving of entertainment if the entertainment is experienced by the public official or the public official's relatives in the presence of the purchaser or provider thereof and the value of the entertainment does not exceed \$100 per person on a single occasion and is not greater than \$250 in any one calendar year.
- ORS 244.020(7)

"Honoraria" means a payment or something of economic value given to a public official in exchange for services upon which custom or propriety prevents the setting of a price. Services include, but are not limited to, speeches or other services rendered in connection with an event at which the public official appears in an official capacity. ORS 244.020(8)

“Relative” means the spouse of the public official, any children of the public official or of the public official’s spouse, and brothers, sisters or parents of the public official or of the public official’s spouse. ORS 244.020(16) [HB 2595 adopted during the 2007 legislative session, bars public officials from hiring, firing or supervising a relative or a household member.]

7. Investigation by the Oregon Government Standards and Practices Commission [Formally renamed as the “Ethics Commission” by the 2007 Legislature in SB 10.]
 1. Begins with the filing of a complaint or at the commission’s instigation.
 2. The public official is notified upon receipt of the complaint or motion by the Commission to take any action against the official.
 3. The Commission must first make a finding that there is cause to undertake an investigation, notify the public official who is the subject of the investigation, and identify the issues to be examined. It must confine its investigation to those issues. During this preliminary phase, the Commission may seek, solicit or otherwise obtain any books, papers, records, memoranda or other additional information, administer oaths and take depositions necessary to determine whether there is cause. This preliminary phase can take no longer than 90 days unless waived by the public official. The Preliminary Review Phase is confidential.
 4. If the Commission finds no cause it will dismiss the complaint.
 5. If the Commission finds cause it will begin an Investigatory Phase. In this phase it may require any additional information, administer oaths, take depositions and issue subpoenas to compel attendance of witnesses and the production of books, papers, records, memoranda or other information necessary to complete the investigation.
 6. The investigatory findings are reported to the Commission and they must take action by order. They may dismiss the complaint, continue the investigation, move to a contested case hearing, enter into a stipulated settlement with the public official, or take other appropriate action.
 7. Contested case hearings are held before an Administrative Law Judge. The public official may no longer elect to have the

Commission file a lawsuit against the official in the Marion County Circuit Court in lieu of the contested case proceeding.

8. Penalties

A penalty for violation of the Oregon Ethics Laws is up to the discretion of the Government Standards and Practices Commission and they may levy a fine of up to \$5,000 for each violation.

Violations of the “But-For” Rule (Where you use or attempt to use your official position for personal gain) can result of a fine of twice the economic value gained.

A public official who prevails in a contested case hearing regarding an ethics penalty can collect reasonable attorneys fees.

The Commission may levy penalties not to exceed \$1,000 for violation of the executive session requirements of the Public Meetings Law (ORS 192.660) except when the action was taken on advice of the public body’s legal counsel.

House Bill 2595, effective July 31, 2007, provides that a public official who acts in accordance with an Ethics Commission Advisory opinion shall be held harmless.

9. Quick Summary

Public Official:

- Any person
- Serving any government
- In any way
- Whether paid or not

Relative

- Spouse
- Children or spouse
- Brother or sister
- Parents

Business:

- Any operation for economic gain
- Except for a non-profit if public official is only a board member or unpaid member

“Business with which a person is associated:”

- Any private business in which you or a relative has \$1,000+ worth of interest;
- Any public business in which you or a relative has \$100,000 of interest or you or a relative are an officer or director;
- If you are required to file a Statement of Economic Interest and you or your household members get 50% of income from the business.

Gift:

- Something of economic value
- Given to a public official or relative w/o receiving value back
- Not given to the general public on the same terms (Given by someone who has an economic interest in your official actions.)
- But a gift is not (1) a campaign contribution; (2) gift from family; (3) food, lodging, travel related to official capacity; (4) entertainment in presence of purchases under \$100 per occasion or single source and \$250 per year.

Potential Conflict of Interest:

- A financial conflict could happen unless the financial benefit or detriment happens because of (1) membership required by law; (2) membership of a class; (3) membership of a non-profit.
- Duty:
 - State the nature of the potential conflict
 - Announce the conflict before taking any action
 - Make the announcement on the record.
 - Announce the potential conflict at each meeting the issue is discussed.

Actual Conflict of Interest:

- An action, decision, recommendation by
- A public official
- That results in a financial gain or avoidance of a financial detriment to
- The public official, a relative of the official, of a business associated with the public official or relative
- Duty:
 - State the nature of the potential conflict
 - Announce the conflict before taking any action
 - Make the announcement on the record.
 - Announce the actual conflict at each meeting the issue is discussed.
 - No talking and no voting UNLESS
- The Governing Body cannot act without you and then you can vote but not talk.

B. Bias

A bias is a predisposition by a decision-maker that makes it impossible for that person to be impartial. It may be personal (the applicant is pond scum and I'll never vote to approve his zone change request) or factual (I'll never allow mobile home parks in this city). Bias is not grounds for disqualification in legislative proceedings.

The standard for determining bias is whether the decision maker has “prejudged the application, and did not reach a decision by applying the relevant standards based on the evidence and argument presented.” *Oregon Entertainment Corporation v. City of Beaverton*, 38 Or LUBA 440, 445 (2000), *aff’d* 172 Or App 417 (2001)

Since an “appearance of impropriety” is an inadequate basis for disqualification, actual bias has to be established. *Rath v. Hood River Co.*, 23 Or LUBA 200 (1992). Petitioner has the burden, when alleging bias, to show the decision maker is incapable of making a decision based on the evidence and arguments or the application was prejudged and the decision was not reached by applying the appropriate standards. *Richards-Kreitzberg v. Marion Co.*, 32 Or LUBA 76, 79 (1996). Actual bias must be demonstrated in a clear and unmistakable manner. *Lovejoy v. City of Depoe Bay*, 17 Or. LUBA 51, 66 (1988) Findings describing a commercial development as “garish” have been held not to demonstrate bias or prejudgment. *Carsey v. Deschutes County*, 21 Or LUBA 118, 125 (1991)

A local government decision-maker will not be presumed to be partial simply because it is the applicant for a land use approval. *Oregon Worsted Company v. City of Portland*, 22 Or LUBA 452, 454 (1991) See also *Waite v. Marion County*, 16 Or LUBA 353, 357 (1987); *Gordon v. Clackamas County*, 10 Or LUBA 240, 245 (1984); and *Christie v. Tillamook County*, 5 Or LUBA 256, 260 (1982). Even if the administrative decision-maker was not impartial, there would be no reversal or remand if it was cured by a de novo review of the administrative decision. (*Waite* at 455)

The most recent case involving bias occurred in *Woodard v. City of Cottage Grove*, LUBA No. 2006-055/056/057 (5/3/2007) which involved the ongoing saga of the Cottage Grove Speedway. This case has began with Lane County through an application for the verification of a non-conforming use and evolved to an annexation proceeding before the City Council. While the annexation proceeding was pending, one of the councilors co-signed a letter to the editor supporting a decision by a local merchant to refuse service to one of the petitioners because of the latter’s opposition to the speedway. The letter asks the petitioner to relocate to another town. Later, the councilor requested that the city police chief provide “police logs” on three of the named petitioners. A second councilor took the lead role in disseminating the police logs and attempting to get them into the record. LUBA ruled that the record reflected the first councilor’s animus towards the opponents to the point of actual bias. It pointed to his selective request of evidence and his personal animosity towards one of the petitioners and, in regard to the former, it was highly unusual for a decision-maker to independently seek out or attempt to obtain additional evidence outside the scope of a public hearing with respect to a pending quasi-judicial application. LUBA also found bias in the second councilor for his role in disseminating the police logs. The mayor, who was a vocal supporter of the

speedway, was cleared of bias, as his statements were characterized as mere economic boosterism. LUBA remanded the decision so the council could deliberate without the participation of the two councilors.

In *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702, 711 (2001), LUBA found that a city councilor had prejudged an application for a real estate office and was incapable of rendering an impartial decision. In this case, the councilor wrote several letters to the mayor and city council in which he stated that the petitioner did not have the right to use a recreational building as a real estate office and implied that approval of the request would subvert the zoning ordinance. Noting that bias of one councilor prevented the petitioner from receiving a full and fair hearing, LUBA also refused to allow as a defense to the decision the fact that the council majority was greater than one vote.

In one case considered by LUBA, several decision-makers were members of the congregation of a church that had applied for a land use permit. *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137, 143-146 (2002) One of these decision-makers declared that she was able to render a decision based on the facts and law although she did have some concern over effect of the proposed conditions of approval on church operations. LUBA held that she did not have actual bias. Another decision-maker had testified in favor of the application prior to his being elected and had stated that he did not have to be objective regarding the application. He also stated that he would support the application "all the way to the Supreme Court." LUBA found this individual to have impermissible prejudged the application and that he should have recused himself.

In the *Jacksonville* case, LUBA analyzed the bias claims in light of a 1981 Attorney General's opinion that set out three factors to be considered in determining whether an elected official should refrain from decision-making due to bias: (1) whether the decision-maker's participation was necessary in order for a valid decision to be made; (2) whether the actions that gave rise to the accusation were the result of actions by the elected official in a public capacity or whether those actions were in the elected official's individual capacity; and (3) evidence of a strong emotional commitment on the part of the elected official.

LUBA has found a statement by a decision-maker that he was "kinda prejudged" to be insufficient, based upon the context of the whole hearing, to demonstrate bias. *Potts v. Clackamas County*, 42 Or LUBA 1, 8 (2002)

LUBA found it to be harmless error where a planning commissioner recused himself and did not participate in the evidentiary hearing or in the vote to grant a variance but did vote to adopt a final written decision. *Reagan v. City of Oregon City*, 39 Or LUBA 672, 692 (2001)

The failure to challenge for bias or *ex parte* contacts at the local level may constitute a waiver of that challenge on appeal. *Green v. City of Eugene*, 22 Or App 231, 234–235 (1975).

Tip: Counsel the decision-makers to avoid pre-hearing statements or judgments about the merits of a case.

C. Ex Parte Contacts

1. Statutory basis

ORS 215.422(3)/227.180(3) indicates the procedure regarding *ex parte* contact or bias. An action or decision will not be invalid due to *ex parte* contacts if the written or oral *ex parte* communication is placed on the record and a public announcement is made regarding the content and the right to rebut the information.

2. Burden

The person raising an issue of an *ex parte* contact or bias must offer some substantial reason to believe the existence of the contact or bias. Mere speculation is not sufficient. *Tri-River investment Co. v. Clatsop County*, 36 Or LUBA 743, 746 (1999) Where an *ex parte* contact is disclosed, there must be an opportunity provided for rebuttal (where the disclosure was made at the end of the hearing). *Garrigus v. City of Lincoln City*, 25 Or LUBA 754, 756 (1993)

3. Definition

Ex parte contacts are oral or written communications made by a party to the matter that are not part of the public record and apply to the substance of the matter.

The issue is whether the contacts led to a bias not if the contacts are *ex parte*. *Neuberger v. City of Portland*, 288 Or 585, 590 (1980).

Discussion between a decision maker and legal or planning staff is not *ex parte* communication requiring rebuttal. Communications made publicly with staff are not *ex parte* contacts that require disclosure. *Hick v. Marion County*, 30 Or LUBA 1, 14 (1995).

Submission to the decision maker of proposed findings is not an *ex parte* contact. *Caine v. Tillamook Co.*, 25 Or LUBA 209, 233 (1993).

4. Absolution

An *ex parte* contact can be cured by a disclosure regarding the nature of the communication and a statement that it did not affect your ability to render an impartial decision. The parties must be given a chance to rebut the communication substantively. (ORS 215.422(3)(b)) Consider disqualifying yourself if the contact was substantial and it affected your judgment.

Technically, you can disqualify yourself but continue to participate if your opinion does not prejudice one or more of the parties. *Yost v. Ontario*, 2 Or LUBA 49, 52–53 (1980). However, the practice does not look good and you won't know if prejudice lies until LUBA remands the decision.

Communication with staff is not considered an *ex parte* contact but local ordinances may be more restrictive.

It is not enough to admit to an *ex parte* contact but not be able to recall the substance of the contact. LUBA has held that this situation constitutes a failure to disclose and a denial of a petitioner's right to a full and fair hearing. *Opp v. City of Portland*, 38 Or LUBA 251, 264–265 (2000). A decision made after receiving undisclosed *ex parte* contacts is invalid (ORS 227.180(3)) and unless the councilor subject to the contact remembers more about the discussion he must withdraw from the decision-making process.

On remand from the Court of Appeals, the city did determine that the communication constituted an *ex parte* contact and held an evidentiary hearing where the affected decision maker testified that he did not recall the substance of the communication. The petitioner then requested a plenary (complete) rehearing on the underlying application, the city refused, and the petitioner appealed to LUBA. LUBA agreed with the petitioner and remanded the matter to the city to either adopt a new decision or support the old decision based on evidence not tainted by the uncured *ex parte* contacts. The Court of Appeals affirmed, holding that the "plenary" was an unfortunate term and that the adequate remedy was one that assured (1) the interested persons are made aware of the *ex parte* contact; (2) that they are afforded an opportunity to prepare and present evidentiary responses to the substance of the communication; and (3) that the deciding body reevaluate its original decision and issue an appropriate new written decision. *Opp v. City of Portland*, 171 Or App 417, 423, 16 P3rd 520 (2000), *rev den* 332 Or 239 (2001)

D. Site Visits

Site visits present a potential for ex parte contacts in that they represent a potential for decision-makers to acquire evidence not a part of the record but which goes to the substance of the matter that they will be adjudicating. Thus, failure to place on the record the subject of site observations and failure to provide parties an opportunity to rebut the evidence obtained during the site view constitutes prejudicial error. *McNamara v. Union County*, 28 Or LUBA 396, 399 (1994) Further, the decision of a governing body that relies upon findings generated by an improper site view taken by either a hearings official or planning commission is subject to remand or reversal. *Wilson Park Neigh. Assoc. v. City of Portland*, 24 Or LUBA 98, 118 (1992) This error can be cured by a de novo review conducted by the governing body.

Where the evidence obtained on a site view is not the sole basis for a finding but rather provides a context for integrating other evidence into the findings, an opportunity to rebut the site view evidence is not required. *Sanders v. Yamhill County*, 34 Or LUBA 69, 122-123 (1998) But a recent case out of Polk County seems to suggest otherwise. *Gordon v. Polk County*, Or LUBA 2005-095 (10/31/05) In this case, two county commissioners were taking a site view to determine whether a piece of property would pass the forest template test. The petitioner observed one of the commissioners talking to the applicant. The commissioner later explained that he didn't want to be rude and had not intention of using the substance of the communication but LUBA remanded anyway on the basis that there must be an opportunity for rebuttal after a disclosure.

Information gathered from a site view taken prior to the filing of a land use application has been held not be an *ex parte* contact. *Richards-Kreitzberg v. Marion County*, 31 Or LUBA 540, 542 (1996)

A proper site view takes place when (1) it was announced at a public meeting; (2) sufficient notice was given; (3) parties attended; and, (4) there was an opportunity to present rebuttal testimony. *Pierron v. Eugene*, 8 Or LUBA 113, 119 (1983).

If a commission member visits a site without prior notice, prejudicial error can be avoided if (1) observations are disclosed, and (2) conclusions from these observations are stated. *NOMORE v. Polk Co.*, 7 Or LUBA 1, 6 (1982).

Procedural safeguards:

- Provide notice of time and date of site view.
- Do not allow substantive discussions on site unless you are prepared to tape record them or adopt minutes.

- All substantive evidence taken during the site view should be included in the findings of fact.
- Provide for an opportunity for written rebuttal if the findings from a site view are placed into the record after the public hearing.

VI. THE RECORD

A. Responsibility

It is the responsibility of the parties to insure that the record includes all material believed to be appropriate and necessary. *Bonner v. Portland*, 11 Or LUBA 40, 61 (1984).

Parties have a duty to familiarize themselves with the record and do not have a right to be served with documents submitted by others. *Chauncey v. Multnomah Co.*, 23 Or LUBA 599, 603 (1992).

B. "Raise It. Or Waive It"

ORS 197.763(1) requires a party to have raised an *issue* regarding a proposal's compliance with an approval criterion with sufficient specificity to afford other parties the opportunity to respond. It does not require a party to have specifically challenged findings that were adopted as part of a local government's decision below, or to raise the precise *argument* below that they assert on appeal to LUBA. *Friends of Linn County v. Linn County*, LUBA No. 2006-223 (5/9/2007)

Where city council included information in the record after the hearing was closed LUBA determined it was reasonable for the petitioner to believe that there was no more opportunity to rebut the presentation. LUBA rejected respondent's contention that in order to preserve its opportunity to respond to the new evidence, petitioners should have interrupted or disrupted the council's deliberations after the evidentiary record had nominally closed. *Gunzel v. City of Silverton*, LUBA No. 2006-086 (12/28/2006)

Impacts on transportation facilities was the issue in an Albany redesignation and rezoning of property from residential to commercial. The issue of contention was the assumption of floor area ratio (FAR) for commercial development, upon which a trip cap was calculated. The city's TSP assumes a .27 FAR for commercial development but the trip cap was alleged to have been based upon a .40 FAR. The latter estimate did not appear in testimony but was contained in the staff report. LUBA found that the topic was raised in a manner that did not suggest that there was any issue left to be resolved and therefore insufficient to "raise" the issue within the meaning of ORS 197.763(1). *Fleming v. City of Albany*, LUBA No. 2006-238 (4/26/2007)

C. Evidence

1. Generally

Like it or not, the procedural and substantive requirements of the land use decision-making process requires that the decision-maker operate as an attorney or a judge. They must be able to determine whether evidence is relevant, whether it is substantial and must be able to weigh its credibility.

2. Relevant Evidence

Evidence that is relevant is evidence that either supports or opposes a conclusion that an approval standard has been met. In most cases, evidence can be relevant only if it has been placed into the record. Relevancy is only the first requirement for evidence that can be used in a land use decision. It also must be deemed to be "substantial."

3. Substantial Evidence

The applicant has the burden of proof. This burden requires that he or she provide evidence that satisfies all of the applicable approval standards. This general burden cannot be shifted to the opponents *Rochlin v. Multnomah County*, 35 Or LUBA 333, 348 (1998) The opponents, however, have the burden of demonstrating that the applicant's evidence is flawed or that insufficient facts have been introduced to satisfy the burden. (In regard to this latter point, see the discussion in the Findings of Fact section of this manual regarding the limitations on issues that can be raised.)

When a local government land use decision is appealed to LUBA, the referees review it to see if it is supported by "substantial evidence." In general, substantial evidence is evidence that a reasonable person would rely upon to reach a conclusion. *Brandt v. Marion County*, 23 Or LUBA 316, 318 (1992). Evidence can be substantial even if reasonable people could draw a different conclusion from it. *Adler v. City of Portland*, 25 Or LUBA 546, 554 (1993).

The substantial evidence rule applies even to the adoption of land use permit fees. *Landwatch v. Lane Co.*, LUBA 2006-039 (June 27, 2006). In this case the Board of Commissioners made findings regarding the cost of maintaining a planning program but ORS 215.422(1), which requires that

fees represent an average cost or the actual cost, requires that each fee be supported by substantial evidence of compliance with this statute.

4. Conflicting Evidence

Oftentimes, the record contains conflicting evidence. In these cases, LUBA will review the record to determine whether the evidence relied upon by the local government is refuted or undermined by other evidence in the record. When LUBA determines that a reasonable person could reach the decision of the local government, then it will defer to the local government's choice between conflicting evidence. *Port Dock Four, Inc. v. City of Newport*, 36 Or LUBA 68, 76 (1999) Basically, LUBA will determine whether the evidence relied upon by the local government is credible and whether the opposing evidence so undermines the evidence relied upon to render that reliance as unreasonable. *Aman v. City of Tigard*, 35 Or LUBA 353, 358 (1998) Accordingly, where there are factual inconsistencies in the evidence relied upon, the government must explain a reasonable basis for its choice. *Le Roux v. Malheur County*, 32 Or LUBA 124, 138 (1996)

Even when credible evidence apparently weighs overwhelmingly in favor of one finding the decision maker may make a contrary finding if it gives a persuasive explanation of why. *Wal-Mart Stores, Inc. v. City of Bend*, LUBA No. 2006-040 (July 19, 2006) This is essentially a component of the substantial evidence rule.

5. Expert Testimony

Expert testimony is often very valuable to the decision-maker, especially where the approval criteria are complex. The decision-maker, however, is not bound to blindly accept the testimony offered by experts and may judge the evidence on the basis of the experts' knowledge of the particular issue, his or her familiarity with the subject property, consistency, credibility and for other reasons. A good example of this is where a witness presented population projections in a land use case out of Jackson County. LUBA held the testimony of that witness not to be substantial evidence as that individual was not shown to be qualified by education or experience to evaluate evidence and draw conclusions concerning that technical subject raise substantial evidence concerns. This was especially true where his conclusions conflicted with official population estimates and letters from Center for Population Research and Census (CPRC) experts. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70, 100-101 (1997)

Be especially vigilant regarding conclusions offered by experts. Such testimony does not constitute evidence, despite the credentials of the

individual offering it, if it is not based upon evidence in the record. Thus, an architect's unsupported statement that a proposed structure was of a certain size and would comply with the relevant lot coverage standard was held not to be substantial evidence supporting a finding of compliance with that standard where opponents offered detailed evidence showing the structure exceeded the maximum size and the applicant did not present the architect's supporting calculations or refute the opposing evidence. *Weaver v. Linn County*, 40 Or LUBA 203, 212 (2001)

LUBA seems a little more lenient on this issue when the expert is representing a government agency. In *Citizens for Resp. Growth v. City of Seaside*, 26 Or LUBA 458, 465-466 (1994), for instance, LUBA held that it was reasonable to rely upon an ODOT representative's statement that that his agency's requirements had been met though the evidence underlying the statements were not included in the local record. Another example is where a planning report that a riparian vegetation plan had been reviewed and found adequate by ODFW was held to be substantial evidence supporting a finding that a proposal would not have "an adverse impact on fish and wildlife resources in the area." *Willhoft v. City of Gold Beach*, 41 Or LUBA 130, 145 (2001)

The decision-maker may give greater to weight from the testimony of a layperson, depending upon that individual's experience and the credibility of the evidence, than they do that to an expert. Thus, Lincoln City decision-makers chose to believe a neighbor's testimony regarding adverse impacts of vibration from construction on the integrity of a sand bluff underlying adjacent properties. LUBA found this evidence to be substantial and sufficient to support the denial of a house to be built on the bluff, notwithstanding a contrary conclusion from geotechnical reports supporting the application. *Johns v. City of Lincoln City*, 37 Or LUBA 1, 11-12 (1999)

Expert testimony is not always appropriate when the issue is one of statutory or code interpretation. An example is a case out of Washington County where the question was whether composting qualifies as a farm use under ORS 215.203(2)(a). LUBA noted that the issue was not whether composting fell within the scientific definition of farm use but rather whether it was the Legislature's intent that it should. *Best Buy in Town, Inc. v. Washington County*, 35 Or LUBA 446, 453 (1999)

The following are some tips to consider when evaluating the testimony of one or more expert witnesses:

- a. Is the witness's expertise relevant to the approval standard? Thus, a civil engineer may not have the adequate training or expertise

when determining the presence of landslide hazard. The knowledge of a geotechnical engineer may be required.

- b. Does the witness have a familiarity with the subject property or his he offering “text book” expertise that might have only limited applicability to the situation?
- c. Are there inconsistencies or qualifications in the evidence the expert provides?
- d. Is there credible conflicting testimony?

D. When does evidence become part of the record?

Generally speaking, material that is physically placed before and not rejected by the decision maker becomes a part of the record. *McKenzie v. Multnomah County*, 30 Or LUBA 461, 462 (1996) A statement in the findings that a document has been “incorporated into the record” does not make the document part of the record unless it has actually been placed before the decision-maker and accepted by that body. *Hoffman v. City of Lake Oswego*, 10 Or LUBA 607, 610 (1990). Even if evidence is subpoenaed it does not become a part of the record unless it is actually placed before the decision making body. *Panner v. Deschutes Co.*, 14 Or LUBA 512, 514 (1985).

The test LUBA applies to determine whether a land use decision has adequately incorporated a document as part of its decision or part of its supporting findings is set out in *Gonzalez v. Lane County*, 24 Or LUBA 251, 259 (1992). The local government it must clearly (1) indicate its intent to do so, and (2) identify the document or portions of the document so incorporated. LUBA opined: “A local government decision will satisfy these requirements if a reasonable person reading the decision would realize that another document is incorporated into the findings and, based on the decision itself, would be able both to identify and to request the opportunity to review the specific document thus incorporated.”

The term “placed before the decision-maker” is a term of art. Where a local government has no procedures for how documents must be submitted into the record, the test is whether the conduct of the staff and the decision-maker could reasonably lead a party to believe they were in the record. *Home Depot, Inc. v. City of Portland*, 36 Or LUBA 783, 784–785 (1999). Thus, wetland maps placed on the wall and discussed (*Redland/Viola Fisher’s Mill CPO v. Clackamas County*, 27 Or LUBA 645, 647 (1994)) and documents taken notice of by the decision-makers (*Veatch v. Wasco County*, 23 Or LUBA 676, 677 (1992)) were considered to be “placed before the decision-maker.”

Normally, documents that are in the local government's planning files, but not placed into the record, have not been considered to be in the record. *Sequoia Park v. City of Beaverton*, 34 Or LUBA 808, 815 (1998) A local ordinance or practice to the contrary can be an exception to this rule. Also, LUBA has found that a planning file has been properly considered to be part of the record when it was in the room during the hearing. (*Redland*) Whether the planning file is to be considered to be part of the record depends upon "the decision-maker's conduct, or acquiescence in the conduct of the staff" and whether it is reasonable to believe that the items are part of the evidentiary record.

Simply referring to document does not place such documents before the local decision-maker. *Homebuilders Assoc. of Metro v. Metro*, 41 Or LUBA 616, 617 (2002) (where Metro legal counsel brought a copy of a document to the hearing, and referred to it in the course of a dialogue with the Metro Council, the document was not placed before the decision-maker).

The decision-maker can take "official notice" of comprehensive plans, land use regulations, and other land use decision standards where these documents are not included into the record but notice must affirmatively be given. A mere request is not sufficient. *Hillsboro Neighborhood Dev. Comm. v. Hillsboro*, 15 Or LUBA 628, 630 (1987).

Submission of evidence to a government official and requesting that it be placed in the record does not automatically make it part of the record unless the official is the official custodian of the record. This is true even at the hearing. The best practice is that the evidence be formally presented to the decision-maker at the hearing. *Blatt v. City of Portland*, 20 Or LUBA 572, 573-574 (1991).

Where the local government has explicit procedures for placing evidence into the record then those procedures must be followed. Thus, if a local planner is designated as the person to whom comments should be directed, then comments directed to that person are considered to be placed before the decision-maker and are part of the record. *Home Builders Assoc. v. City of Portland*, 28 Or LUBA 725, 726 (1994) Mailing or submitting a document to a local planner not charged with "keeping the record" does not make the document a part of the record even if it was requested that it be placed into the record. *Terra v. City of Newport*, 24 Or LUBA 579, 581 (1992)

Without evidence that a disputed item was placed into the record, LUBA will generally accept the local governments conclusion that it was not placed into the record. *Opp v. City of Portland*, 33 Or LUBA 772, 773 (1997) Decision-makers may not implicitly reject evidence, but must "clearly" reject something before it is excluded from the record. *Central Klamath Co. Comm. Action Team v. Klamath Co.*, 41 Or LUBA 579, 582 (2002). This is a case where the County Board did not reopen the record on remand but its notice of

the remand hearing stated that “[a]ll written comments to the record must be received by 5:00 p.m. the day prior to the hearing.” The petitioner complied with this directive and LUBA held that the materials had been placed before and had not been rejected by the final decision maker.

The relevance or evidentiary value of the item has no bearing on whether it is part of the record. *McKenzie v. Multnomah County*, 30 Or LUBA 461, 463 (1996). By the same token, a document placed before the decision-maker is considered to be in the regard regardless of its evidentiary value or accuracy. *Gray v. Clatsop County*, 21 Or LUBA 574, 578 (1991).

Evidence submitted after a vote but before the adoption of a decision and findings of fact is in the record. *Sellwood Harbor Condominium Ass’n v. Portland*, 16 Or LUBA 1021, 1022 (1987). Minutes prepared after final action are also included. *Schooner v. Klamath Co.*, 16 Or LUBA 1086, 1087 (1988).

In determining the record for a permit application, the record begins when the application is submitted. The record includes things physically before and not rejected by the decision-maker. *Forest Highlands Neighborhood Assoc. v. City of Lake Oswego*, 23 Or LUBA 723, 724–725 (1992). Decision-makers may not implicitly reject evidence, but must “clearly” reject something before it is excluded from the record. *Central Klamath Co. Comm. Action Team v. Klamath Co.*, 41 Or LUBA 579, 581 (2002). This is a case where the County Board did not reopen the record on remand but its notice of the remand hearing stated that “[a]ll written comments to the record must be received by 5:00 p.m. the day prior to the hearing.” The petitioner complied with this directive and LUBA held that the materials had been placed before and had not been rejected by the final decision maker.

E. Types of Material

Tape recordings do not have to be prepared but if they are, they are considered to be part of the record. *Ramsay v. Linn County*, 29 Or LUBA 559, 560 (1995) (However, they do not have to be submitted to LUBA with the record but do have to be available at the time of oral argument.) Tape recordings of lower level local proceedings are not part of the LUBA record unless they have been placed before the final decision-making body or incorporated into the record by reference. *Sequoia Park Condo Assoc. v. City of Beaverton*, 34 Or LUBA 808, 811 (1998) Like tape recordings, minutes leading to the final decision are part of the record while minutes from lower level proceedings become part of the record only through incorporation. *Carlson v. Benton County*, 33 Or LUBA 767, 770 (1997)

Transcripts of tapes of local government proceedings are not usually required but can be made a part of the record if they are prepared and submitted by the local government. Transcripts prepared by other parties are not a part of the record. A

local government, however, may choose to submit a transcript prepared by party. An exception to the rule is where a transcript is necessary to challenge the accuracy of the minutes. LUBA will not accept the transcript unless the objecting party demonstrates how the minutes are defective and explains why the defect is material. *Boyer v. Baker County*, 34 Or LUBA 758, 759 (1998) defect is material only if it is relevant to the issues on appeal.

Oversized exhibits and other items that are difficult to duplicate may be retained by local government until the time of the LUBA hearing. At that time they must be delivered to LUBA. Materials retained by the local government must be clearly identified in the Table of Contents of the record submitted to LUBA.

F. Post-Hearing Materials

ORS 197.763(6) provides for circumstances where the record can be held open after the hearing. The local government is not required to accept new material after it closes the record but if it does the evidence becomes part of the record whether or not the correct procedural rules were followed. *Richards-Kreitzberg v. Marion County*, 30 Or LUBA 476, 477 (1996) One LUBA opinion, however, suggests that in order to accept new evidence after record closure, the local government must affirmatively reopen the record and offer parties the opportunity to respond. *Brome v. City of Corvallis*, 36 Or LUBA 225, 234–235 (1999)

One difficulty encountered during an open record is where a party who has been given the right to provide post-hearing written rebuttal includes new evidence in the supplemental material. The decision-maker has the right to open the record to allow the other party the right to review and respond to the new evidence or determine that they will not consider the new evidence in their decision.

If a record of the proceedings is reopened pursuant to LUBA's direction on remand, the "new issues" include remanded issues but not those that LUBA affirmed or reversed on their merits. *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992)

If a city relies upon evidence submitted after the close of the record it is considered procedural error (not harmless error) even if the decision did not change in light of the evidence. *Delk v. Salem*, LUBA No. 2005-064 (January 25, 2005)

G. Inspection of the record by the public – Public Records Law

A public record includes "any writing containing information relating to the conduct of the public's business ... regardless of physical form or characteristics." ORS 192.410(4) A "writing" includes handwriting.

typewriting, printing, photographs, papers, maps, files, facsimiles and electronic recordings. ORS 192.410(6)

The "custodian" of a public record must provide "proper and reasonable opportunities" for inspection and examination of the records in the office of the custodian during normal business hours. The amount of time that is reasonable will depend upon the volume of records requested, the staff available, and the difficulty in determining whether any of the records are exempt from disclosure. The reasonable opportunity for inspection extends to records in "machine readable or electronic form." ORS 192.430(1)



SB 554, adopted by the 2007 Legislature, requires that a government entity must respond in writing to a public records request in as timely a manner as possible. The written response must formally acknowledge receipt of the request and include at least one of the following:

- A statement that the public body is not in possession of the record;
- A request from the public body to clarify the request;
- Copies of the requested records;
- A statement that the public body is in possession of at least some of the requested records, the amount of time the public body needs before the records will become available, and a cost estimate for providing the records.
- A statement that the public body is uncertain if it is in possession of the records and the amount of time it will need to search its records; or
- A statement that the public records requested are exempted from public disclosure under state or federal law.

SB 554 also requires that the governmental entity have adopted and available to the public a written procedure for making a public record requests that includes:

- The name of one or more persons to whom public record requests may be sent, with addresses; and
- The amounts of and the manner of calculating fees that the public body charges for responding to requests for public records.

The custodian of a public record must furnish a certified copy of the record on demand. The law also requires the custodian to "furnish reasonable opportunity to inspect or copy" public records. This duty extends to allowing requestors to use their own equipment to make copies, subject to rules protecting the integrity of the records and to prevent interference with the regular duties of the public body (staff). The Oregon Attorney General concludes that a requestor must be allowed to use his own equipment to copy records and cannot be compelled to accept records in a form that the custodian would provide. 39 Op Atty Gen 721 (1979)

Even if a record is a public record under the Oregon Public Records Law, portions of the record may be exempt. An example of an exempt part of the record would be information concerning the location of an archaeological site or objects in the record of a local land use decision. ORS 192.501(11) This exemption does not include information relating to a site that is all or part of an existing, commonly known and publicized tourist facility or attraction. Information about threatened or endangered species is also exempt. ORS 192.501(13)

While the statutory right to inspect public records includes the right to examine "original records," this does not include the right to examine original records that contain some information that is exempt from disclosure. In those cases a public body may act "reasonably" if it provides a copy of the original with the exempt portions blanked out. ORS 192.505

The burden is on the public body that denies a record inspection to prove that the record information is exempt from disclosure. The exemptions are interpreted narrowly and the courts "presume" that exemptions do not apply. *Morrison v. School Dist.*, 53 Or App 148, 152 (1981)

It is a crime to knowingly destroy, conceal, remove or falsely alter a public record. ORS 162.305

A denial of the disclosure of a record can be appealed to the Oregon Attorney General, if the custodian is a state agency, or otherwise the local district attorney. The request is considered denied if either of the above does not respond within 7 days. Appeals of decisions by the AG office or the district attorney go to the circuit court.

Areas of concern:

- Disclosure of an exempt public record to a specific private individual may jeopardize the public body's discretionary power to claim the exemption.
- The names, addressees and telephone numbers of persons filing a complaint with the public body may or may not be confidential. This is an important issue in enforcement proceedings and it is clear that while a public body may promise confidentiality it may not be able to deliver on this commitment. Under ORS 192.502(4) information submitted to the public body in confidence and not otherwise required by law to be submitted *may be exempt* where the information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information and the public interest would suffer by the disclosure.

- Are staff notes and internal memoranda, etc. exempt? Probably not, given the broad definition of “public record” and “writing” contained in ORS 192.410(4).
- E-mail is a public record!
- How long must planning records be retained? The State Archivist has adopted a retention schedule by administrative rule for city planning records (OAR 166–200–0095) and county planning records (OAR 166–119–0010) Briefly, comprehensive plan, land use hearings official, planning commission records (minutes, exhibits, resolutions, indexes, findings) must be retained permanently. Conditional use, flood plain permit, variance and zone change records (maps, site plans, findings, staff reports, significant related records) must be retained 10 years after approval or expiration. Temporary use permit records must be retained 5 years after expiration of the permit. Neighborhood association meeting records (minutes, exhibits, resolutions, and indexes) must be retained permanently. Tape recordings of meetings may be destroyed after one year. These administrative rules can be found online at:

http://arcweb.sos.state.or.us/rules/0298_Bulletin/0298_ch166_bulletin.html [city]

and

http://arcweb.sos.state.or.us/rules/OARS_100_1998/OAR_166_1998/166_1ofc_1998.html [county]

H. Are minutes required?

Yes, the Open Meetings Law requires written minutes for all meetings of governing bodies. ORS 192.650 City councils and county commissions qualify as “governing bodies.” Planning commissions also qualify whether they are making a decision or merely a recommendation to their governing body. A hearings official, however, is not a “governing body.”

Minutes should include at least the following:

- members present;
- motions, proposals, resolutions, orders, ordinances, and measures proposed and their disposition;
- results of all votes and the vote of each member by name (unless the body consists of more than 25 members);
- the substance of any discussion on any matter; and
- a reference to any document discussed at the meeting.

Minutes do not have to be recorded or be verbatim. They must be available within a reasonable time after the meeting. After they are prepared they cannot be withheld from the public even though they have not been approved. If your tape recorder has malfunctioned you can cure the problem by either conduct another hearing or create a set of minutes that are acceptable to all parties.

The Oregon Court of Appeals has construed ORS 92.650(1) to require that minutes be preserved for at least one year. *Harris v. Nordquist*, 96 Or App 19, 26, 771 P2d 637 (1989) However, minutes are considered "public records" under ORS 192.000(5) and are therefore subject to the public records retention law. The State Archivist may require that they preserved longer than one year. ORS 192.105

Minutes and records available to the public must be made available to persons with disabilities in a form usable by them, such as in large print, braille or audio tape. Under some circumstances a public body may conclude that compliance with such a request would cause an undue financial burden and refuse. A public body cannot charge a person of disability with a fee to cover the cost of providing a record in an alternative form but it may charge "all other actual costs" associated with providing the record.

I. Archiving

Record retention times are determined by administrative rule; OAR 166-200-0095 for cities and OAR 166-119-0010 for counties.

J. Management techniques

1. Index and label materials as they come into the record.

LUBA requires that the record be organized in inverse chronological order although this rule is not violated where there is good reason for placing the documents in some other order and this does not affect the amount of effort needed to use the record. *Mintz v. Washington County*, 34 Or LUBA 781, 788 (1998)

2. Use a consistent indexing scheme.
3. Have a mechanism to allow the easy labeling of evidence when it is submitted into the record. Lane County, for instance, has a stamp that provides lines for the file number and an exhibit number.
4. Screen out redundant or irrelevant evidence. Require specificity and a showing of relevance for requests for incorporation by reference.

5. Give a different indexing number to attachments not otherwise numbered or a part of the main submittal. (i.e., letters in support attached to supplementary statement by applicant or opponent.)

LUBA requires that where an exhibit comprises many non-related documents, but are submitted by the same party, each document should be listed separately in the record's table of contents. *D.S. Parklane Development, Inc. v. Metro*, 33 Or LUBA 848, 858 (1997)

6. LUBA has noted that failure to follow its rules regarding pagination is a serious defect where the record is long and materials cannot be easily identified. *D.S. Parklane Development, Inc. v. Metro*, 33 Or LUBA 848, 854 (1997)

VII. FINDINGS OF FACT

A. Identification of applicable criteria and standards

- Standards are “verbal yardsticks against which the evidence is to be measured.” *Marbet v. Portland General Electric*, 277 Or 447, 465 (1977).
- Decision-makers may often have to focus broadly worded policy criteria through interpretation so that reasonable guidance is given to what is substantively necessary for approval. *Commonwealth Properties v. Washington Co.*, 35 Or App 387, 400 (1978). All reasonable land use interpretations will be honored. *Fifth Avenue Corp. v. Washington Co.*, 282 Or 591, 600 (1978).
- Vague criteria must be interpreted. *Philippi v. City of Sublimity*, 10 Or LUBA 24, 30–31 (1984). In *Philippi*, the City had to explain to the applicant what “premature conversion of agriculture land” meant so it was clear under what circumstances the request could be made consistent.
- There is a statutory duty to orally recite criteria prior to the hearing. ORS 197.763(5)(a).
- Since 1992, it has been generally understood that appellate courts would give deference to local decision makers interpreting their local code provisions unless an interpretation was “clearly wrong.” *Clark v. Jackson Co.*, 313 Or 508, 518 (1992). In 2003, the Oregon Court of Appeals has backed away from this position in holding that a local interpretation will be affirmed unless it is “inconsistent with express language in the ordinance or its apparent purpose or policy.” *Church*

v. Grant County, 187 Or App 518, 524 (2003) (On appeal from *Church v. Grant County*, 43 Or LUBA 291 (2003)) This determination is more in line with the actual language of the *Clark* case and ORS 197.829, which was enacted after that case and which explicitly addresses LUBA's authority in regard to local governments interpretation of their comprehensive plans and land use regulations.

- In 1998, the Oregon Court of Appeals set out the analysis that is applied to determine whether it is error for a local government decision maker to adopt an interpretation of a relevant approval standard for the first time in the final written decision, after public hearings have concluded, without providing an additional opportunity for the parties in a land use proceeding to expand on their evidentiary presentation after learning that interpretation. In its 1998 opinion the court opined: "First, the interpretation that is made after the conclusion of the initial evidentiary hearing must either significantly change an existing interpretation or, for other reasons, be beyond the range of interpretations that the parties could reasonably have anticipated at the time of their evidentiary presentations. Second, the party seeking reversal must demonstrate to LUBA that it can produce specific evidence at the new hearing that differs in substance from the evidence it previously produced and that is directly responsive to the unanticipated interpretation." *Gutoski v. Lane County*, 155 Or App 369, 373-374 (1998)

B. What are facts?

- Facts must be stated in sufficient detail so that an appellate body can understand the decision and have access to a thorough outline of the evidence in the record. *Home Plate, Inc. v. OLCC*, 20 Or App 188, 190 (1975).

C. Conclusion: Tying the findings to the criteria

- The findings must explain how the criteria were met. *Faye Wright v. Salem*, 1 Or LUBA 246, 252 (1980).

D. Adoption

- You don't have to discuss your findings prior to adopting them. *McCoy v. Linn Co.*, 16 Or LUBA 295, 306 (1987).

E. Miscellaneous problems

1. Conclusionary findings. Asserting that the criteria have been met but no facts are provided in support. *Burlington Northern Railroad v. Jefferson Co.*, 13 Or LUBA 274, 277 (1985).
2. Findings that merely reference the record. LUBA will not search the record to identify findings necessary to support a decision. *Jackson-Josephine Forest Farm Ass'n v. Josephine Co.*, 12 Or LUBA 40, 42 (1984), *aff'd without opinion*, 71 Or App 355 (1984).
3. Conditions of approval cannot substitute for findings. The findings must demonstrate that the criteria have been affirmatively met prior to the establishment of conditions. The problem often lies with improper delegation of the decision-making authority to other governmental officials or bodies. *Margulis v. City of Portland*, 4 Or LUBA 89, 98 (1981). Here the decision-maker delegated the determination of the adequacy of off-site parking to the city's Bureau of Traffic Management.
4. Compliance with an applicable approval standard can be deferred if the decision ensures that the subsequent approval process provides the same notice and opportunity for public input as the original hearing and a finding is made that compliance is feasible. *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447-8 (1992) **But be careful:**
 - County cannot delegate finding of compliance with emergency turnaround requirements to the fire district where there was no turnaround to review. *Tenley Properties Corp. v. Washington County*, 34 Or LUBA 352, 364-365 (1998) Here there was no opportunity for public comment and the designs required by the fire district could require adjustments to or elimination of one or more lots.
 - County could not defer a finding of compliance with compatibility standard to a later administrative proceeding where the county subdivision ordinance had a provision regarding infill requirements that was intended to ensure that new development was compatible with existing developed areas in terms of building orientation, privacy, lot size, buffering, access and circulation, etc. *Sunningdale-Case Heights Ass. v. Washington County*, 34 Or LUBA 549, 556-558 (1998) In this case, the applicant did not submit a plan or sketch, as required, and the hearing official adopted a condition prohibiting on-site improvements until a Type II hearing was held on the matter. The petitioners successfully argued that the

infill criterion was inextricably entwined with the partition approval (which defined the number and size of the lots).

- The decision-making body could not be delegated to another body where no technical plans of a storm water runoff system had been submitted and therefore no finding of feasibility of compliance with the applicable requirements could be made. See the *Tenley* and *Sunningdale–Case Heights Ass.* cases.
5. Compliance with criteria must be affirmatively stated. A finding that no problems have been identified is not adequate. *Margulis v. City of Portland*, 4 Or LUBA 89, 95 (1981).
 6. Permits must be approved if consistency with regulations can be made with “reasonable conditions.” ORS 197.522, a 1999 amendment, requires that local governments must impose conditions in order to make a deficient application consistent with approval standards.
 7. Take Care in Drafting Land Division Codes. A subdivision code that requires compliance with a city’s comprehensive plan is not enforceable as it violates ORS 197.195(1). A subdivision is a limited land use decision and the statute says that comprehensive plan requirements must be incorporated into the subdivision ordinance. A reference to the entire plan is not sufficient. *Patterson v. City of Bend*, 201 Or App 344 (10/20/2005)
 8. Be Thorough. Where a code provision required preservation of trees “where possible,” LUBA remanded to the city to explain in its findings why 14 trees could not have been preserved. *Frewing v. Tigard*, Or LUBA 2005–042 (September 20, 2005)

VIII. THE DECISION

A. What classifies as a “decision” of a “permit”?

- ORS 197.014(10) defines what actions a “land use decision” includes and specifically exempts other actions. The courts have also included actions that have a “significant land use impact.” This latter test focuses on the impacts to land use, as opposed to impacts on economic or property interests. *Hashem v. City of Portland*, 34 Or LUBA 629, 631–632 (1998)
- The director’s decision to reject an appeal is not a “land use decision.” *Kevedy v. City of Portland*, 28 Or LUBA 227, 240 (1994).
- A recommendation is a final land use decision if it amends or is contrary to the recommending body’s own plan and can be carried out

without their further action. *Central Eastside Industrial Council v. City of Portland*, 128 Or App 148, 153, 875 P2d 482 (1994).

- In 1997, the Oregon Supreme Court held that a stipulated agreement in the settlement of mandamus action was a land use decision subject to LUBA review. *Murphy Citizens Advisory Committee v. Josephine Co.*, 325 Or 101, 934 P2d 415 (1997). This “problem” was fixed by the 1999 Legislature in ORS 197.015(10)(e)(B), which makes it clear that after a writ of mandamus is filed, jurisdiction for all decisions related to the application lie with the Circuit Court.
- An administrator’s letter discussing the city’s opinion of a previous decision that approved petitioner’s application is not a land use decision subject to review. *Owen Development Group, Inc. v. City of Gearhart*, 111 Or App 476, 480–481 (1992).
- A land use compatibility statement may be a land use decision. LUBA found this to be the case where Jackson County staff was asked to sign off on a land use compatibility statement concerning the City of Ashland’s proposal to apply effluent and sludge on EFU land in the County. LUBA held that this was an exercise of policy or legal judgment and thus was a “land use decision” under ORS 197.015(10) and a “permit” under ORS 215.402, requiring notice and a hearing. *Friends of the Creek v. Jackson County*, 36 Or LUBA 562, 567–568 (1999)
- A DEQ LUCS signoff by Douglas County that grading activity was consistent with County land use regulations was found to be a land use decision. Since no findings were made to support that position it was remanded. *Wolfgram v. Douglas County*, LUBA No. 2006–073 (9/14/2006)
- Douglas County issued a Land Use Compatibility Statement (LUCS) to DEQ regarding an 8–lot subdivision that had been approved by the County. Instead of answering the question: “Does the activity or use comply with all local land use requirements...? By checking either the box marked “yes” or “no,” the County drew a third box, checked it, and wrote “See attached informational memo.” The memo merely informed DEQ that the subdivision approval was currently on appeal. LUBA found the LUCS not to be a land use decision under the ORS 197.015(11)(b)(A) exception to the definition of a “land use decision,” because it was not an interpretation or the exercise of policy or legal judgment. *Wolfgram v. Douglas County*, LUBA No. 2006–207 (4/5/2007)

- A use determination (whether in-custody youth housing facilities were “household living” uses) made by a city will not be considered a “permit” (ORS 227.160(2)(b)) where the City follows ORS 227.175(11), which requires that the decision be entered into a registry available to the public. The decision is subject to the jurisdiction of LUBA and the statute gives the applicant the option of providing notice as if the use determination was a normal land use decision. *Buckman Community Ass’n v. City of Portland*, 36 Or LUBA 630, 634 (1999), *aff’d* 168 Or App 243, 247 (2000) The Court of Appeals affirmed LUBA but, in dicta, suggested that it might consider the interpretation a “permit” if it involved a significant amount of discretion. A contrary decision occurred where a letter from the Ashland Planning Director interpreted whether a driving range was an accessory use to a golf course. In this case, the City did not follow the provisions of ORS 227.175(11). *Davis v. City of Ashland*, 37 Or LUBA 224, 234 (1999) ***It should be noted that statutory protection of “use determinations” are only available to cities.***
- A jurisdiction may create a process for informal interpretations that are not land use decisions. This is the case with Deschutes County where the County’s code provides that informal interpretations or determinations regarding the uses to which property can be put, made outside a declaratory ruling process or a land use permit approval process, are not deemed to be final actions effecting a change in the status of a person’s property. *Yost v. Deschutes County*, 37 Or LUBA 653, 661–662 (2000)
- A determination by planning staff that land use approval for a development has expired was held not to be a land use decision. LUBA distinguished between merely determining whether a condition of approval had been met and the application of a plan policy or land use regulation. *Balk v. Multnomah County*, 38 Or LUBA 1, 7 (2000). The *Balk* decision should be contrasted with the situation in *Weeks v. City of Tillamook*, where the city’s decision that a one-year permit period had not started was held to be a land use decision by LUBA since it applied provisions of the zoning code to a particular permit’s conditions.
- A letter from county counsel to the county cartography office regarding the effect of a judicial partition of property on the county’s tax maps and records was held not to be a land use decision. *Stricklin v. Clatsop County*, LUBA No. 2006-208/231 (5/31/07)
- In 2003, the Oregon Court of Appeals held that in certain circumstances, the approval of a final plat may be a land use decision. *Hammer v. Clackamas County*, 190 Or App 473, 79 P3d 394 (2003) The 2005

Legislature amended ORS 92.100(7) and ORS 197.015(13), effectively overruling *Hammer*. [HB 3025, passed in the 2007 legislative session, further amends the definitions of “land use decision” and “limited land use decision” to clarify that such decisions do not include decisions that approve or deny a final subdivision or partition plat.]

LUBA was asked in *Wagon Trail Ranch Property Owners Assoc. v. Klamath County*, LUBA No. 2007-076 (8/1/2007) to remand a Klamath County decision approving a final plat. In 1975, the county expanded and revised the a planned unit development by approving a conditional use permit known as CUP 75-9, which approved preliminary subdivision plats for Wagon Trail Acreages, Third and Fourth Additions. CUP 75-9 included no expiration date. The appeal involves the Fourth Addition which was illegally partitioned into two parcels sometime after 1978. The petitioner acquired the northern 10.5 acre parcel and in 1983 the intervenors acquired the southern parcel. In 2006 the intervenors applied for final subdivision plat approval for a 24-lot subdivision on their property. The Planning Director concluded that the proposed subdivision conformed to the conditions associated with CUP 75-9 and approved the final plat without a hearing. LUBA indicated that the 2005 statutory changes removed any jurisdiction that they might have, even if the approval was discretionary, and transferred the matter to the circuit court.

B. Requirements

- Must be in writing. *Astoria Thunderbird v. Astoria*, 13 Or LUBA 297, 299 (1985), *aff'd without opinion*, 74 Or App 365 (1985).
- Must be based upon the approval criteria in existence at the time the application was accepted. *Territorial Neighbors v. Lane Co.*, 16 Or LUBA 641, 647 (1988), applying ORS 215.428(3).
- ORS 215.248(3) Approval or denial of the application shall be based on standards that were applicable at the time the application was submitted if (1) the application was complete when submitted, or (2) applicant submits additional requested information within 180 days of date application was submitted, and (3) the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251.

ORS 197.195, CH 844 HB No 2245 – limited land use decision not subject to 215.4416(9) or 227.173(2). In making the decision, the procedures within the acknowledged comprehensive plan and land use regulations must be complied with. ORS 197.195 provides guidelines as to who must receive notice of limited land use decisions.

- There is no requirement that a local government decision be consistent with past decisions, only that they be correct when made. *Okeson v. Union Co.*, 10 Or LUBA 1, 5 (1983). Put another way, prior decisions are not binding if they can be distinguished on their facts. *Patterson v. City of Bend*, 201 Or App 344 (2005) In the *Patterson* case, the issue was an interpretation about whether private streets constituted “orderly development.”

C. Finality

- A decision is not final until findings are adopted. *Heilman v. City of Roseburg*, 39 Or App 71, 75 (1979).
- Where the local code is silent upon when a decision becomes final, OAR 661–10–010(3) specifies that the decision becomes final on the date it is reduced to writing and signed by the decision-maker. *Adams v. City of Ashland*, 33 Or LUBA 552, 554 (1997)
- Erroneous information provided by the local government to a petitioner does not change the date upon which a decision becomes final. *Friends of Yamhill County, v. Yamhill County*, 33 Or LUBA 530, 531 (1997)
- *League of Women Voters* is overruled in that counting the 21-day period for appealing a decision begins when the decision is final not when it is mailed or notice is given to the parties. Consequently, ORS 227.173(3) and 215.416(10) have nothing to do with when a decision becomes final. *Wicks-Snodgrass v. Reedsport*, 148 Or App 217 (1997).
- Proceedings become moot when the application is withdrawn. *Friends of Lincoln Co. v. Newport*, 5 Or LUBA 346, 352 (1982).
- An applicant can withdraw an application prior to the time when the decision becomes final, even if an oral decision was already made. *Witzel v. Harney County*, 34 Or LUBA 433, 436–437 (1998)
- Whether the withdrawal of an application after a decision can prevent an appeal is unclear but the answer apparently depends upon local hearing rules. *McKay Creek Valley Ass’n v. Washington Co.*, 16 Or LUBA 1028, 1029 (1987). Issues of whether a refund of appeal fees may be relevant!
- The City of Portland was asked to adjust its required loading standards. The city issued a single decision, a portion of which was immediately appealable to LUBA; and a portion that was subject to a local appeal to an

adjustment committee. LUBA held that you cannot break up a single decision into “final” and “non-final” components and therefore the decision was not final for purposes of appeal to LUBA. *Yun v. City of Portland*, LUBA No. 2007-003 (4/24/2007)

- Douglas County extended CUP for aggregate removal one month after it expired. LUBA held that without language giving the County the right to waive the timelines the extension was erroneous as the permit was dead. *Michaels v. Douglas County*, LUBA No. 2005-138 (11/15/2006)

D. Who can prepare findings and the final order?

- Staff may prepare the final order or that task can be delegated to the prevailing party. *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3. 21 (1977). However, the decision making body must formally adopt the final order and findings.

E. When does a decision become a taking?

Land development drives the need for public services to support it and it is common for local governments to charge developers for part of the cost of these services. Traditionally, the government may require, as a condition to a land use approval, that a developer contribute land or pay fees to offset some of the costs of development on the public infrastructure. Courts have recognized that land development conditions, such as impact fees, dedications and other exactions are an exercise of the police power and therefore subject to the prohibition of taking private property without just compensation guaranteed by the Fifth Amendment to the U.S. Constitution.

Current law in this area largely stems from two court cases, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994). The Nollan case involved a situation where a coastal landowner wanted to tear down a beach house and build a larger one. The California Coastal Commission imposed a condition that required the granting of an easement to allow the public to use one-third of the property on the beach side. The U.S. Supreme Court held that the Fifth Amendment requires that land use regulations must substantially advance a legitimate state interest and not deny an owner the economically viable use of his land. In its examination of these two principles, the Court held that there must be an “essential nexus” between the exaction and what is being proposed. In the *Nollan* situation, the Court did not except that there was any nexus between the government’s interest and the condition attached to the beach house permit.

In the *Dolan* case, the U.S. Supreme Court struck down a city building permit condition that required a landowner to dedicate a bike path and greenway

easement to the city. Refining the principles of *Nollan*, the Court held that the amount of the required dedication must be related both in nature and extent to the impact of the proposed development. From the *Dolan* case comes a three-part test that is currently applied to taking claims:

1. Does the permit condition attempt to promote a legitimate state interest?
2. Is there an essential nexus between the legitimate state interest and the permit condition?
3. Is there a required degree of connection between the exactions and the projected impact of the development?

In regard to the third factor, known as the “rough proportionality” test, the Court held that the local government must make an individualized determination that the required dedication is related both in nature and extent of the impact from the development.

The principles of the *Dolan* case were soon applied to a Grants Pass decision where the City required a 20,000 square foot land dedication in return for a partition approval. *Shultz v. City of Grants Pass*, 931 Or App 220, 226, 884 P.2d 569 (1994)

Case law subsequent to the *Dolan* case have crafted a general definition of the “rough proportionality” test. The courts have held, for instance, that the nexus between an exaction and the impacts from development must be rationally demonstrated but not down to a mathematical certainty. Further, it has been made clear that the burden of showing that the “rough proportionality” exists lies with the local government.

Local governments that have been successful in defending exactions against takings claim uniformly have based their dedication requirements on comprehensive studies. One court, for instance, approved of a traffic impact fee that was applied through volume-capacity, traffic ratio formulas based on industry standards, observations and empirical data. *F & W Associates v. County of Somerset*, 648 A.2d 482 (N.J. Super. Ct. App. Div. 1994) This New Jersey court also noted with approval that the implementing ordinance provided for adjustments of the developer’s pro rata share if conditions change or if the developer does not benefit from the highway improvement.

- The 1999 Legislature streamlined the process by which an unsuccessful applicant can ripen their taking claim. ORS 215.433 & 227.184 allow an applicant who has been denied a permit to submit a supplemental application for “any and all other uses” allowed under the applicable comprehensive plan and land use regulations. The local government has 240 days to take final action.

- ORS 197.796 provides that a successful applicant now has 180 days from the date of permit approval to file suit in circuit court challenging the constitutionality of conditions of approval. It is unclear whether this statute invalidates prior case law where an applicant was held to be estopped from disputing the conditions of approval after he received conditional approval, built the development and then appealed the conditions. *L.A. Development v. City of Sherwood*, 159 Or App 125, 132, 977 P2d 392 (1999)
- Local government may be able to shift the burden of doing the “rough proportionality” test required by *Dolan*. Lincoln City, for instance, has adopted an ordinance that requires applicants for building permits to submit a “rough proportionality report” from a qualified engineer regarding exactions that the applicant does not consent to. LUBA and the Court of Appeals upheld the requirement. *Lincoln City Chamber of Commerce v. City of Lincoln City*, 164 Or App 272, 279, 991 P2d 1080 (1999).
- The impacts of a proposed development must be quantified with sufficient particularity to justify the exactions imposed. In this case, a limited land use decision involving a partition, the City of Springfield required the dedication of 20-foot of right-of-way for street development, a 100 square foot area for sight visibility and turning radius, and a 5-foot strip along the frontage to widen sidewalk and to provide street lighting. Applying the *Schultz* case, LUBA demanded more proof from the City regarding the impacts from two additional dwellings. *McClure v. City of Springfield*, 39 Or LUBA 329 (2001); *aff'd* 175 Or App 425 (2001); *cert denied* 334 Or 327 (2002). This is an excellent case addressing the quantification of impact issue.
- The City of Redmond has developed a model, based upon the principles of Springfield’s process, that compares the impact of newly created trips generated by a proposed development with the percentage of land that is required for dedication.

By way of example, if the Redmond model was applied to a partition located along an arterial or a collector, it would first calculate the amount of right-of-way that the city wished to have dedicated against the total area of the street to be created or improved. For instance, the proposed dedication might represent 8 percent of the total street area. Next, the total impacts of the proposal are calculated by dividing the number of new trips generated against the total amount of trips on the street.

As of yet, Redmond has not had to defend its exaction model before LUBA. As a matter of strategy, the application of this methodology

probably should be first adopted by ordinance and then, if not successfully challenged, it would seem that only the application of the methodology could thereafter be challenged.

- Recently, the Oregon Court of Appeals found that *Dolan* decision did not require the local governments make findings regarding “rough proportionality” in the land use decision but that they may raise them for the first time on appeal. *Hammer v. City of Eugene*, 202 Or App 189 (2005), rev den 340 Or 308 (2006).

IX. APPEALS

ORS 197.830(2) provides that any person who “[a]ppeared before the local government ... orally or in writing” may petition LUBA for review of a land use decision. ORS 197.830(7) provides that any person who has made such an appearance may intervene in such a review proceeding.

After the petitioner withdraws from the appeal, intervenors may not continue the appeal, and the appeal must be dismissed. *Marylhurst Neighborhood Association v. City of West Linn*, LUBA No. 2006-140 (9/29/2006)

In *Butte Conservancy v. City of Gresham*, LUBA No. 2006-084 (9/22/2006), LUBA distinguishes the differences in standing for the appeal of a permit as opposed to a PAPA. Under ORS 197.830(9), the 21-day appeal period commences on the date the decision is final, under ORS 197.830(9), which applies to PAPAs, the notice of intent to appeal a PAPA to LUBA must be “filed not later than 21 days after notice of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615.”

In late September, 2001, the Oregon Court of Appeals, relying upon the separation of powers rationale, held that the legislature did not have the constitutional authority to confer the right to seek a court decision in a nonjusticiable case. *Utsey v. Coos County*, 176 Or App 524, 550 (2001); cert allowed 334 Or 75 (2002). In this case, the League of Women Voters filed a letter in opposition to a conditional use permit for a motocross racetrack. The letter did not give any explanation regarding the League’s interest in the application. LUBA allowed the League to intervene in the appeal of the county’s decision to approve the application and subsequently the League sought Court of Appeal review of LUBA’s decision. The crux of the decision is that despite ORS 197.180(2), a party may not appeal a land use decision unless they have shown that they will sustain “direct or indirect, personal or representative” effects from the outcome. Statutory standing will no longer, by itself, establish that a claim is constitutionally justiciable.

Utsey was overturned by the Oregon Supreme Court in *Kellas v. Department of Corrections*, 341 Or. 471 (2006) in acknowledging that the legislature lawfully may authorize any person to seek judicial review to challenge the validity of a

governmental action, such as an administrative rule, without a showing that the governmental action or the court's decision will have a practical effect on that person's individual rights or interests. The plenary lawmaking authority of the Oregon legislature was distinguished from the limitations that pertain to lawmaking by the United States Congress. For example, in authorizing litigation in the courts of the United States, Congress must respect the limitation in Article III, Section 2, of the United States Constitution, which provides that the judicial power of the United States extends to the resolution of "cases" or "controversies." That clause has given rise to an extensive body of federal law regarding the justiciability of disputes in federal court.

In filing an appeal with LUBA, it is important to remember that while a petition is considered "filed" upon its delivery to the United States Post Office the same is not true with other delivery services. The petitioner in *Doob v. Josephine County*, 43 Or LUBA 473, 476 (2003) learned this lesson the hard way when he delivered his petition for review to UPS within the 21-day limit but it took three days for the petition to arrive at LUBA – one day too late.

A local government lacks jurisdiction to readopt or amend land use decision while appellate review is pending. *Rose v. City of Corvallis*, Or. LUBA 2004-221/222 (April 15, 2005) In this case, a zone change was appealed on the basis of the adequacy of findings addressing the Transportation Planning Rule (TPR), among other issues. LUBA remanded on that issue but the petitioner appealed LUBA's decision to the Court of Appeals. While that appeal was pending, the city conducted proceedings on remand to address the TPR issue and to adopt a new decision. LUBA reversed.

If there are no rules regarding resubmission of applications then it is permissible for the applicant to resubmit the same application based on identical evidence after denial even though no appeal was filed with LUBA. *Gordon v. Polk County*, Or LUBA 2005-095 (October 31, 2005)

ORS 197.830(6)(a) is called the "Statute of Repose." It provides that an appeal of a land use decision must be made within three (3) years of the decision. The exception is when the local government fails to provide either (1) "notice of a hearing" on a quasi-judicial land use decision, as required by ORS 197.763, or (2) notice of an "administrative decision" on a limited land use decision, as required by ORS 197.195. In *Michaels v. Douglas County*, LUBA No. 2005-138 (11/15/2006) Douglas County ministerially approved a CUP for aggregate removal in 1997 and issued one-year extensions through 2001. One month after the last extension expired the applicant applied for and the County approved another one-year extension. The intervenor argued that NITA was not filed within 3 years of extension decision. LUBA held that the county should have held a hearing as the challenged decision was a "permit." Since no notice was given of the hearing then ORS 197.830(6) did not apply. LUBA then went on to hold that the extension was erroneous as the permit was "dead."



X. THE OPEN MEETING LAW

A. Requirements

- All meetings of the governing body, except those subject to the exceptions concerning executive sessions, shall be open to the public and quorums may not meet in private to decide any matter. ORS 192.630.
- At least 24 hours notice for a special meeting unless an emergency and then the emergency must be described in the minutes. ORS 192.640. Notice of regular meetings must be given far enough in advance to provide actual notice to interested persons and an opportunity to attend.
- Meetings shall not be held at any place where discrimination on the basis of race, creed, color, sex, age, national origin, or disability is practiced. ORS 192.630.
- Meetings shall be within geographic boundaries over which the governing body has jurisdiction or at the nearest practical location. (A joint meeting between two or more governing bodies must be held within the jurisdiction of one or at the nearest practical location.) These rules do not apply in an emergency. Training sessions can be held outside of the jurisdictions as long as no deliberations occur. ORS 192.630.
- Must meet in a place accessible to the disabled. Good faith effort must be made to have an interpreter for the hearing impaired provided at a regularly scheduled meeting. At least 48 hours notice should be given regarding a request for an interpreter. ORS 192.630.
- Written minutes shall be taken and shall include (1) names of members present; (2) all motions, proposals, resolutions, ordinances, etc. proposed and their disposition; (3) the results of all votes, unless body consists of more than 25 members, and the vote of each member by name; and (4) the substance of any discussion on any matter. ORS 192.650. The governing body must prepare minutes and have them available within a "reasonable time" after the meeting. After the minutes are prepared, they cannot be withheld from the public merely because they have not been approved by the governing body. The Oregon Court of Appeals has interpreted ORS 192.650(1) to require that minutes be preserved for a reasonable time and that one year is a reasonable time unless a longer period is necessary. *Harris v. Hordquist*, 96 Or App 19, 26, 771 P2d 637 (1989)

- The results of “all votes” requirement in subsection (3) does not require a formalized vote on all actions or any particular action be taken. *Morrow Co. Health Dist. v. Account Control Consult. Enter.*, 174 Or App 153, 160 (2001). In this case, the Health District Board minutes reflected that the Board authorized its administrator to exceed her contractual authority but the minutes did indicate the results of any vote on that issue.

B. When does it apply?

- A meeting of a governing body to make a decision or to deliberate toward a decision on any matter.
- A “governing body” is defined as any public body of two or more members, including advisory bodies empowered to make decisions for or recommendations to a public body on policy or administration. ORS 192.610.
- A “meeting” has been defined to mean the convening of a governing body to make a decision or deliberated towards a decision on any matter. A meeting solely for the purpose of receiving information qualifies although an on-site inspection does not. ORS 192.610.

C. Executive Sessions

- Executive sessions are meetings where a meeting or part thereof is closed to certain persons. ORS 192.610(2) A governing body may hold an open session even if the law permits it to hold an executive session.
- ORS 192.660(1) sets out the permissible subject matter of executive sessions.
- The governing body may not take final action in an executive session but may reach consensus on an issue. ORS 192.660(2)
- If a meeting will consist only of an executive session the meeting notice must state the specific legal provision authorizing the session. The notice must go to the general public and news media that have requested notice.
- Members of the news media cannot be excluded from executive sessions except in sessions involving labor negotiation deliberations and regarding the expulsion of students. The news media should be allowed to take notes but the Oregon Attorney General believes that tape recordings or video recordings can be prohibited.

- The governing body may require that specified information that is subject of the executive session not be disclosed. Absent any such specification, the entire proceedings may be reported!
- The governing body may permit other persons than the news media to attend an executive session.

D. Enforcement (ORS 192.680)

- Any person affected by a decision and representatives of the press have standing to file a suit in circuit court. The action must be filed within 60 days of the date of the decision becomes public record.
- Conscious violation of the open meetings law may lead to personal liability for attorneys' fees or civil penalties for the members of the governing body. ORS 192.680(3) & (4) and ORS 192.685.
- A decision in violation of the open meetings law may be voided. The decision may be reinstated with proper compliance with the law.

E. Miscellaneous

- A meeting may be held through the use of a telephone or other electronic communication device but must comply with law and there must be at least one listening place provided for the public. ORS 192.720.

XI. ENFORCEMENT OF LAND USE DECISIONS

- The Circuit Court has jurisdiction in an enforcement matter where the matter is not subject to a land use decision process or is not susceptible to resolution through a land use decision. *Clackamas County v. Marson*, 128 Or App 18, 23-24 (1994) In this case, the court held that the county code did not require the Planning Director to issue a determination that an ordinance forbade the parking of trucks in an EFU zone but rather made the procedure available. The ordinance, however, required the Director to "decide all questions of interpretation or applicability to specific properties in question."
- ORS 197.825(3)(c) grants to the circuit court the authority to grant declaratory injunctive or mandatory relief arising from decisions described by ORS 197.015(10)(b) — Types of local government decisions that are not land use decisions.
- Circuit court authority ends where the granting or denial of a permit involves the exercise of judgment or interpretation of an ordinance. *Campbell v. Bd. Of*

County Commissioners, 107 Or App 611, 616 (1991) Here, the neighbors filed a mandamus seeking the county to deny the issuance of a building permit for a substandard parcel. It was held that the county had to interpret the definition of "lot" and therefore LUBA had jurisdiction.

- There is no statute or local law that *obligates* the county to initiate enforcement action against any violation of its zoning ordinance that is called to its attention. *Love v. Klamath County*, LUBA No. 2006-174 (6/11/2007) However, local governments and owners of real property whose interests are affected by violations have a *right* to initiate legal action to enforce the local government's zoning ordinance under ORS 197.825(3)(a). (Circuit Court review)

XII. TORT LIABILITY

Public officials are immune from liability if they are acting within the scope of their duties. The sole cause of action for any tort of officers or agents of a public body acting within the scope of their duties shall be an action against the public body only. ORS 30.265(1)

The governing body must "defend, save harmless and indemnify any of its officers or agents, whether elective or appointive, against any tort claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring in the performance of duty."

Exceptions to the immunity rule occur when:

1. The actions taken are outside the scope of official duty;
2. The actions constitute malfeasance in office;
3. The actions taken represent a willful or wanton neglect of duty (intent to do harm or injury as opposed to an intent to do the act);
4. The official charged with the tort fails to cooperate with the Attorney General in the defense of the action.

In general, planning commission members and elected officials have 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 that purpose. Public official immunity does not extend to actions taken outside a public meeting. An example of this limitation is presented in the case of *Adamson v. Bonesteele*, 295 Or. 815, 671 P2d 693 (1983) where a member of city council who chaired an ambulance advisory committee gave a derogatory statement about an ambulance operator to the media. The Oregon Supreme Court held that neither common law nor statutory law extended immunity to remarks made outside the legislative meeting place and outside the legislative process itself.