AGENDA

MOLALLA CITY COUNCIL & PLANNING COMMISSION
JOINT SESSION
November 17, 2021
6:30 PM
Molalla Civic Center
315 Kennel Ave, Molalla, OR 97038

Mayor Scott Keyser

Council President Leota Childress
Councilor Elizabeth Klein
Councilor Terry Shankle
Councilor Jody Newland
Councilor Crystal Robles
Councilor Vacancy

The On-Demand replay of the Molalla City Council Meetings are available on Facebook at "Molalla City Council Meetings – LIVE" and "Molalla City Council Meetings" on YouTube.

1. CALL TO ORDER AND FLAG SALUTE

2. ROLL CALL

3. DISCUSSION ITEMS

A. Define Roles of:
   1. City Council
   2. Planning Commisssion
   3. Administration/Staff

B. Conflict of Interest
C. State vs. Local Law
D. Lifecylce & Involvement of Type I, II, III, and IV Applications

4. ADJOURN

DOCUMENT KEY:

Agenda posted at City Hall, Library, and the City Website at http://www.cityofmolalla.com/meetings.This meeting location is wheelchair accessible. Disabled individuals requiring other assistance must make their request known 48 hours preceding the meeting by contacting the City Recorder's Office at 503-829-6855.

Land Use Cheat Sheet: *Ex parte* contacts, conflicts of interest and bias

State law and constitutional standards require the City to provide a fair and impartial hearing process for most land use matters coming before the Council. To achieve this standard, members of the Council are required to disclose information about conflicts of interest, bias and *ex parte* contacts at the beginning of a land use hearing. The purpose of this "cheat sheet" is to provide members of the Council with an overview of these disclosure requirements. Questions about a specific situation and your disclosure duties should be directed to the City Manager and/or the City Attorney's Office.

Ex parte Contacts

What is an *Ex Parte* Contact? An *ex parte* contact is any communication between an interested party and a Councilor made outside the scope of the hearing process. *Ex Parte* contacts come in many forms: conversations, written letters or emails, information from a site visit, an editorial in a newspaper, a radio program, etc. Basically, *ex parte* contacts include any and all information gathered or received by a Councilor regarding a land use application outside the scope of the public hearing.

Should you disclose an *Ex Parte* contact? Yes. Always! *Ex parte* contacts do not render a decision unlawful so long as there is full disclosure. Disclosure must occur at the earliest possible time in the decision-making process and must include enough detail to provide an interested party the opportunity to support or rebut the information you received outside of the hearing process.

How to I disclose? (1) Place the substance of the written or oral *ex parte* contact on the record at the first hearing following the contact and (2) publicly announce the *ex parte* contact and your ability to render an impartial decision. Both requirements are satisfied by disclosure at the initial public hearing (public announcement that is included as a part of the record). In addition, the presiding officer of the hearing body is required to provide the general public with an opportunity to rebut the substance of the *ex parte* contact.

Sample Disclosure: "I would like to disclose that I have had the following ex parte contacts [list details of each contact]. Notwithstanding these contacts, I will be able to render an impartial decision in this matter."

What about communications with Staff? Communications with staff are not considered an *ex parte* contact. However, City staff may not serve as a conduit for obtaining information outside of the public process unless that information is disclosed.

How often do you disclose? Once – at the first hearing following the contact.

Conflicts of Interest

What is a conflict of interest? A conflict of interest arises when a decision you are making would or could result in a "private pecuniary benefit or detriment" to you, your relatives, or a businesses with which either you or your relatives are associated. Conflicts of interest come in two forms – actual conflicts and potential conflicts.

What is the difference between an actual and potential conflict of interest? An actual conflict of interest arises when any decision or act by you ***would*** result in a "private pecuniary benefit or

detriment" to you, your relatives or an associated business; while a potential conflict arises when a decision or act by you ***could*** result in such an outcome.

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

Sample Disclosure: "I would like to disclose an actual conflict of interest because [disclose nature of conflict, i.e., the applicant is my brother], and therefore I will not be participating in this matter." Or "I would like to disclose a potential conflict of interest because [disclose nature of conflict – i.e., the applicant's property is in the general vicinity of property I own and therefore could have an impact on my property value]. Notwithstanding this potential conflict, I will be able to render an impartial decision in this matter."

Who is a relative? Under state law, a relative includes your spouse; a domestic partner; your children or your spouse's children; your siblings; spouses of your siblings or your parents or the parents of your spouse. Relatives also include any individual for whom the public official has a legal support obligation; 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 individual's employment.

What is a business with which I or my relatives are associated? A "business" includes any legal entity that has been formed for the purpose of producing income. You or your relatives are associated with a business if you or your relatives currently or during the preceding calendar year: (1) held a position as director, officer, owner, employee or agent of the business; (2) held stock, stock options, equity interest or debt instrument in the business in an amount greater than $1,000; (3) held stock, equity interest, stock options or debt instruments of $100,000 or more in a publicly held corporation; or (4) are a director or officer of a publicly held corporation. In addition, you are associated with a business if you were required to report that business on your annual Statement of Economic Interest form as a source of household income.

Are there exceptions? Yes, certain exceptions exist that would permit you to participate in making a decision even if it will have a financial effect on you, your relatives or businesses with which either of you are associated. For example, there is a "class" exception that permits you to participate when the decision will affect a larger group of people in the same manner as you. However, you should never rely upon this or any other exception without first consulting the City Attorney's Office.

How often do I disclose? You must make the required disclosure every time the matter comes before the council.

Bias

What is bias? Bias means a prejudice or prejudgment of the parties or the case to such a degree that you are incapable of being persuaded by the facts to vote another way. This can include: (1) personal interest; or (2) personal prejudgment. Bias has to be an actual bias; there is no "apparent bias."

What is a Personal Interest? *Personal interest* is an actual interest in the outcome of the proceeding. For example, when you live in or near a development and actively support or oppose the development.

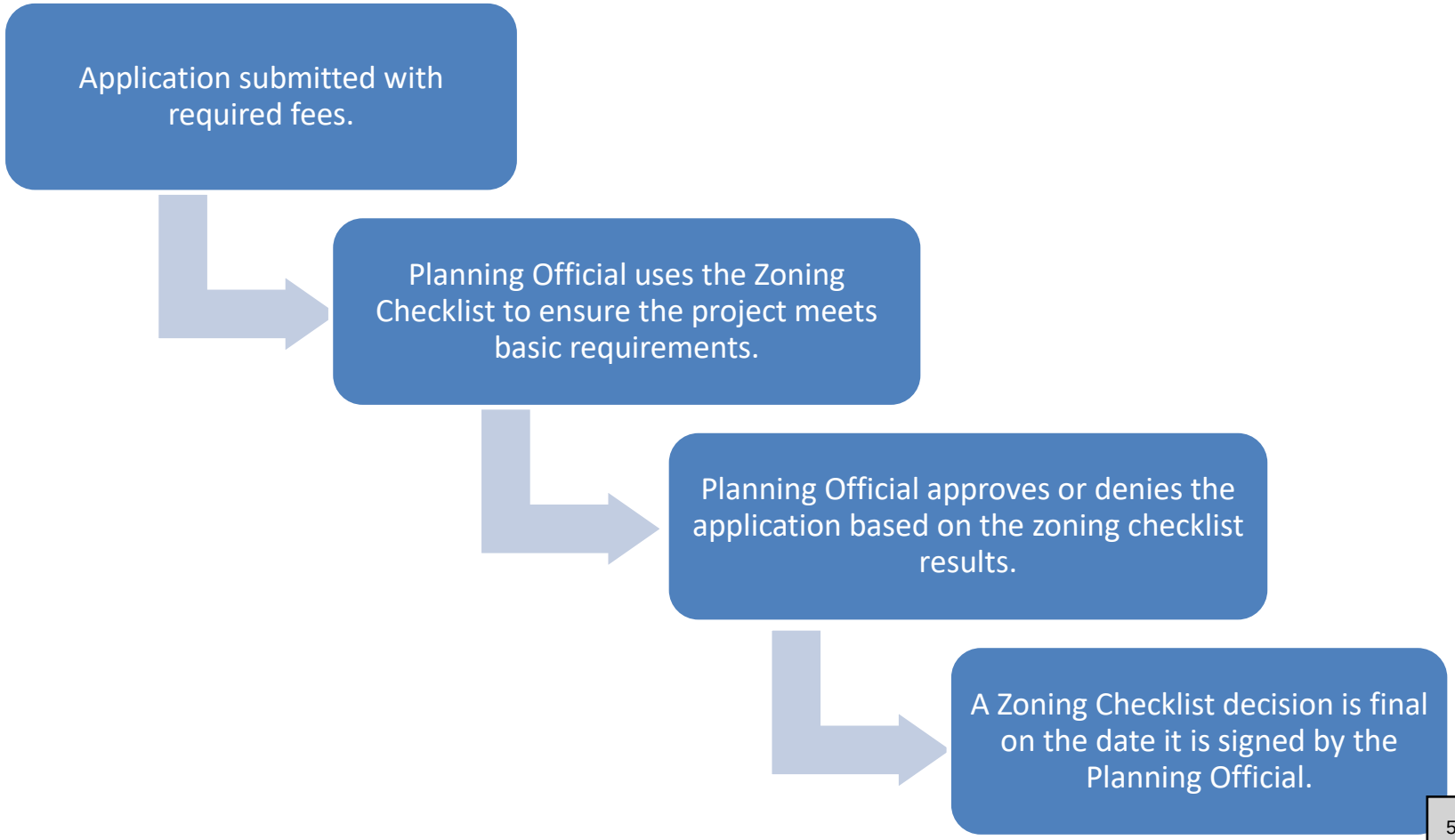
What is Prejudgment? *Prejudgment* exists when you have so prejudged the particular matter as to be incapable of determining its merits on the basis of the evidence and arguments presented at the hearing. Prejudgment must be proven with explicit statements, pledges, or commitments on the specific matter before the commission.

What if there is a bias? If there is an actual bias, you must recuse yourself. Even if there is not an actual bias, you may want to disclose information that gives an appearance of bias in order to preclude post-hearing challenges to your participation.

Sample Disclosure: "I have an actual bias in this matter because [disclose nature of bias, i.e., I publicly opposed development at this location during my campaign as I believe it should be used for open space], and therefore I will not participate in this matter." OR "[Disclosure facts that could give rise to an apparent bias, i.e., I have known the applicant's architect for 20 years]. Notwithstanding this fact, I believe I can serve as an unbiased decision-maker and render an impartial decision in this matter."

Type I decision (Staff Review) – MMC 17-4.1.020

Type I decisions are made by the Planning Official or designee, without public notice and without a public hearing. These are ministerial decisions, meaning decisions where City standards and criteria do not require the exercise of discretion. Examples: access to a street, legal lot determination, property line adjustments. Decisions are not land use decisions as defined by ORS 197.015, and therefore are not subject to appeal to LUBA.



Type II decision (Administrative Review with Notice) – MMC 17-4.1.030

Type II decisions are made by the Planning Official with public notice and an opportunity for appeal to the Planning Commission, or the Planning Official may refer a Type II application to the Planning Commission for its review and decision in a public meeting. Type II decisions include adjustments, preliminary plat partitions, and some site design reviews.

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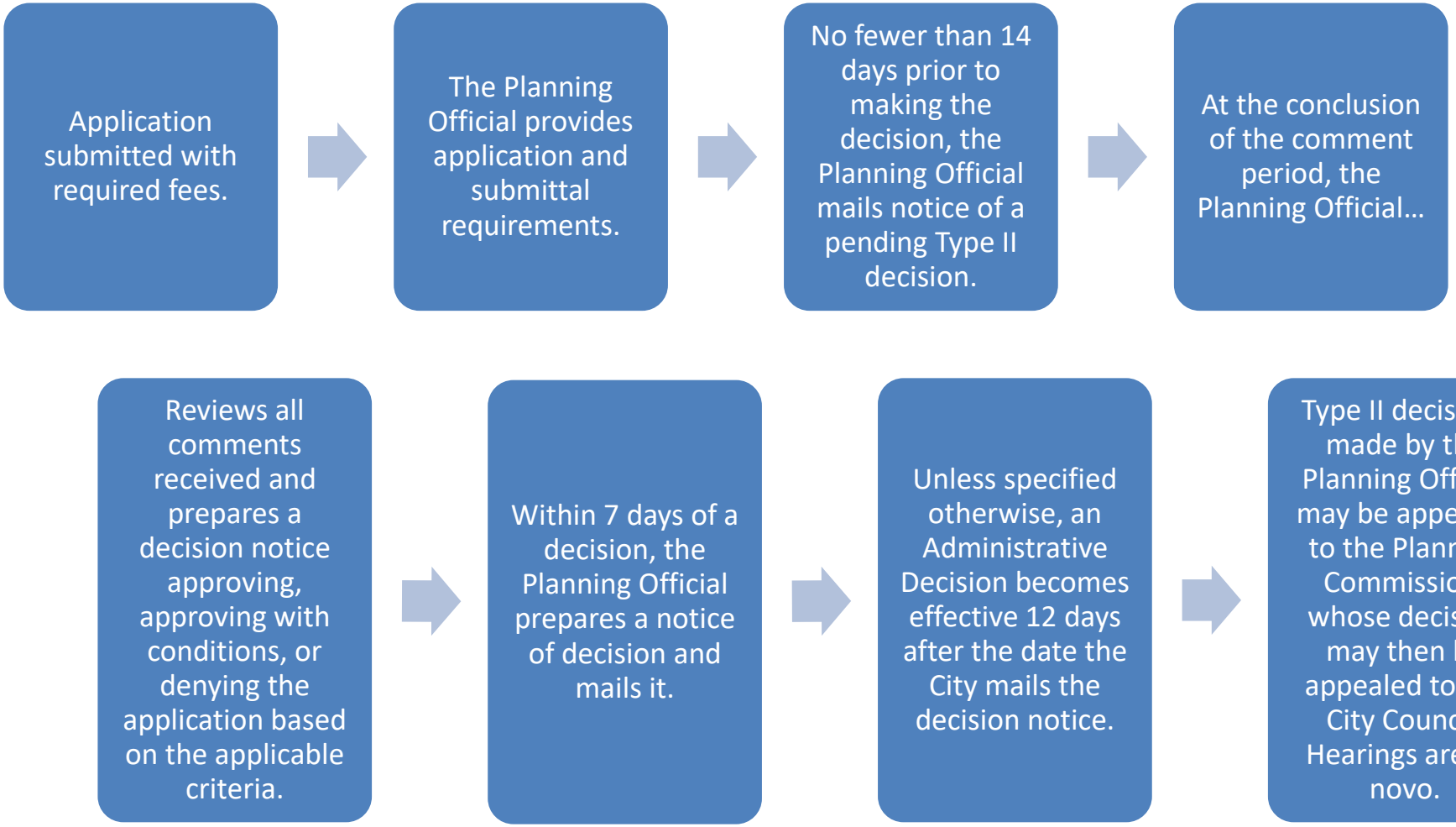

Type II decision (Administrative Review with Notice) – MMC 17-4.1.030
Planning Commission Decision

Type II decisions are made by the Planning Official with public notice and an opportunity for appeal to the Planning Commission, or the Planning Official may refer a Type II application to the Planning Commission for its review and decision in a public meeting. Type II decisions include adjustments, preliminary plat partitions, and some site design reviews.

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Application submitted with required fees.

The Planning Official provides application and submittal requirements.

No fewer than 14 days prior to making the decision, the Planning Official mails notice of a pending Type II decision.

At the conclusion of the comment period, the Planning Official…

Transmits all written comments, along with a copy of the application, to the Planning Commission for review and decision at its next regularly scheduled meeting.

Within 7 days of a decision, the Planning Official prepares a notice of decision and mails it.

Unless specified otherwise, an Administrative Decision becomes effective 12 days after the date the City mails the decision notice.

Type II decisions made by the Planning Commission may be appealed to the City Council for a de novo hearing.

Type III decisions (Quasi-Judicial Review – Public Hearing) MMC 17-4.1.040

Type III decisions are made by the Planning Commission after a public hearing, with an opportunity for appeal to the City Council.

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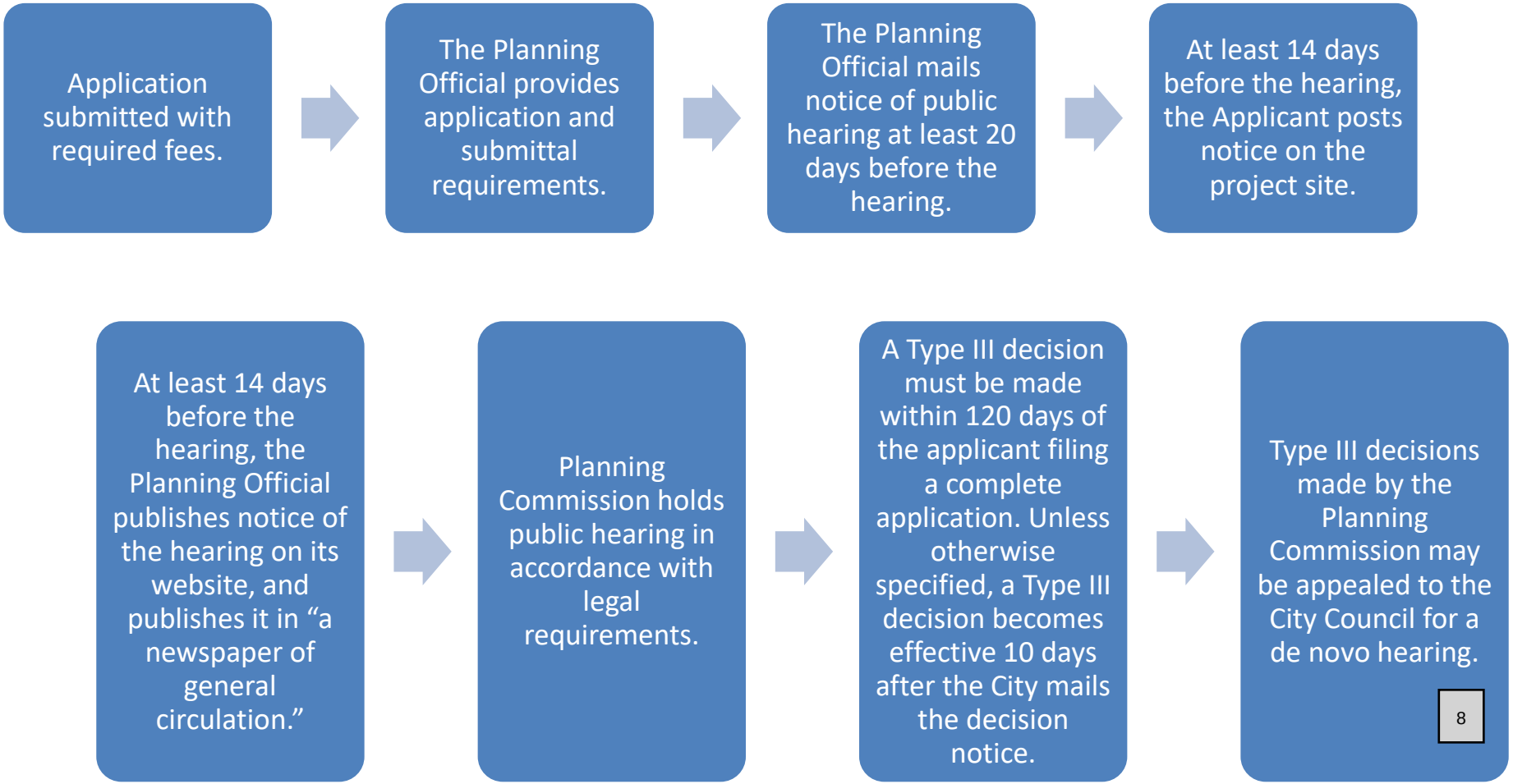

Type IV (Legislative Decisions) – MMC 17-4.1.050

The City Council may establish a schedule for when it will accept legislative code amendment or plan amendment requests, or the City Council may initiate its own legislative proposals at any time. Legislative requests are not subject to the 120-day review period under ORS 227.178.3

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Application is filed; must contain specific and detailed information and documents.

At least 35 days before the hearing, the Planning Official notifies DLCD in writing about the hearing.

At least 20 days (but not more than 40) before the hearing, the Planning Official sends notice to required individuals, property owners and government partners.

At least 10 days before the scheduled public hearing, the Planning Official must publish notice in a newspaper of general circulation in the city and on the City's Website.

Hearings on Legislative Land Use requests are conducted similar to City Council hearings on other legislative proposals.

A Legislative Land Use decision, if approved, takes effect and becomes final as specified in the enacting ordinance or, if not approved, upon mailing of the notice of decision to the applicant.

Notice of a Legislative Land Use decision must be mailed to the applicant, all participants of record, and DLCD within 20 business days after the City Council decision is filed with the Planning Official.

Land Use Board of Appeals

Land use decisions made by the City Council may be appealed to the Land Use Board of Appeals (LUBA).

Appeals of City Council decisions may be filed with the state Land Use Board of Appeals pursuant to ORS 197.805 to 197.860.

Anyone who participated in a local land use decision may appeal the decision to LUBA within 21 days of the date the decision becomes final.

Once notice of appeal is served, the local government must compile and submit the record of the decision to LUBA within 21 days.

LUBA's review is limited to the record. Therefore, it is important that the Council ensure that all applicable criteria, goals, arguments, staff reports, studies, etc. are included in the record.

LUBA is required to issue a decision on the appeal within 77 days after the record is transmitted, though there are some exceptions to this deadline.

LUBA's decision may be appealed to the Oregon Court of Appeals.

Beery Elsner & Hammond LLP

CITY OF MOLALLA

LEGAL REQUIREMENTS PERTAINING TO LAND USE DECISION MAKING, EX-PARTE COMMUNICATIONS, AND PUBLIC MEETINGS

November 2021

I. WHAT IS A LAND USE DECISION?

A. "Land Use Decision" is Defined by Statute and Case Law

A simple definition of the term "land use decision" is a discretionary decision by a governmental body that applies the government's land use regulations, unless exempt under one or more of the statutory exceptions (discussed below). The statute that sets forth the definition and the exceptions is lengthy and is found at ORS 197.015(10)(a).

In simplified and non-exhaustive terms, a "land use decision" involves:

a) a final decision or determination;
b) made by a local government or special district (or state agency in limited circumstances);
c) that concerns the adoption, amendment or application of Statewide Planning Goals, a comprehensive plan provision, the local land use regulations.

B. "Limited Land Use Decision" as Defined by Statute

Oregon law distinguishes a "land use decision" from a "limited land use decision" in ORS 197.015(12). The key distinctions are: (1) a "limited land use decision" involves land within an urban growth boundary, and (2) procedural requirements are less cumbersome for a "limited land use decision."

Specifically, a "limited land use decision" involves:

a) a final decision or determination;
b) made by a local government regarding a site within an urban growth boundary;
c) that concerns the approval or denial of a tentative subdivision or partition plat, or the approval or denial of an application based on discretionary standards that regulate physical characteristics of an outright permitted use (e.g. site or design review).

Examples of limited land use decisions include tentative subdivision plats for land within an UGB,[1] plan review decisions and review of uses permitted outright based on discretionary standards, such as approval of residential use in a residential zone.

The review process for a limited land use decision is less formal and shorter than that of a land use decision. ORS 197.195 requires written notice to property owners within 100 feet of the site for which the application is made, a 14-day comment period, a written list of the applicable criteria upon which the decision will be made and notice of the final decision. A local government may, but is not required, to provide a hearing before the local government on appeal of the final decision. However, if a local hearing is provided, it must comply with procedural requirements in ORS 197.763. The final decision is not required to have complete or exhaustive findings and may take the form of a "brief statement" that explains the relevant standards and criteria, states the facts relied upon in reaching the decision and explains the justification for the decision based on the criteria, standards and facts. However, as a practical matter, the findings for a limited land use decision will look much the same as the findings for a standard land use decision.

Note, however, that a decision to approve a preliminary plat may not qualify as a limited land use decision when it involves other discretionary standards. For example, in *Wasserburg v. City of Dunes City*, LUBA determined that an application for City subdivision approval including a request for planned unit development approval (to allow the property to be divided in ways that the property could not be divided without planned unit development approval) meant the decision granting preliminary planned unit development subdivision approval was a land use decision, *not* a limited land use decision. 52 Or. LUBA 70, 78 (2006) (emphasis added).

In either case, approval of the *final* plat is not a land use decision. ORS 197.015(10)(b)(G), (12)(b).[2]

C. "Land Use Decision" Does Not Include…

One reason for the complexity of defining a "land use decision" in Oregon is that the statute provides an extensive list of what a "land use decision" does *not* include. The list below is not comprehensive but describes the actions you are most likely to encounter that are *not* land use decisions per ORS 197.015(10)(b). A local government decision is *not* a "land use decision" if it:

a) involves land use standards that do not require interpretation, or the exercise of policy or legal judgment (i.e. "ministerial" decisions);
b) approves or denies a building permit under clear and objective land use standards;
c) is a limited land use decision;

[1] *See Barrick v. City of Salem*, 27 Or. LUBA 417, 419 (1994), holding that a tentative subdivision plat within an UGB is a limited land use decision.
[2] This statutory provision was adopted in 2007 in response to Oregon Court of Appeals decision in *Homer v. City of Eugene*, 202 Or. App. 189 (2005).

d) involves a transportation facility that is otherwise authorized by and consistent with the comprehensive plan and land use regulations;
e) is an expedited land division as described in ORS 197.360; or
f) approves or denies approval of a final subdivision or partition plat, or determines whether a final subdivision or partition plan substantially conforms to the tentative plan (as noted above).

II. LAND USE BASICS

A. Local Government Authority

In Oregon, there are several levels of government that simultaneously regulate land use — the state, city, county and special districts. A local government, such as a city or county, adopts its own land use plan as well as regulations to implement the plan. However, the local government's plan and regulations must be consistent with and implement state policies that are set forth in the Statewide Planning Goals and Oregon Administrative Rules (OARs). Additionally, those cities and counties located within Metro must meet regional requirements established by Metro.

Oregon law requires coordination between cities and counties. Except for cities and counties within Metro, counties are responsible for coordinating all planning activities within the county, including planning activities of cities, special districts and state agencies.[3] Within Metro's boundary, Metro is designated by statute to coordinate planning activities.

State law imposes substantial procedural requirements for local land use decisions, depending on the type of land use decision that is being made. Due to the complexity involved in determining what type of decision is being made, the Planning Department staff and City Attorney will generally evaluate the nature of the particular decision in any given case.

B. State's Role in Local Land Use

(1) Land Conservation and Development Commission (LCDC).

The Oregon Land Conservation and Development Commission (LCDC) adopts the statewide land use goals and administrative rules, assures local plan compliance with applicable land use laws, coordinates state and local planning, and manages the coastal zone program. LCDC is comprised of seven appointed volunteer members and meets about every six weeks to direct the work of the Department of Land Conservation and Development (DLCD).

DLCD is the state agency that administers the state's land use planning program. DLCD works under and provides staff support for LCDC. DLCD is organized into five divisions: Community

[3] *See* ORS 195.025 regarding regional coordination of planning activities, ORS 197.175 pertaining to cities' and counties' planning responsibilities, and ORS Chapter 197 on comprehensive land use planning coordination requirements.

Services, Planning Services, Ocean and Coastal Services, Measure 49 Development Services and Operations Services.

Under ORS 197.090(2), DLCD is authorized to participate in local land use decisions that involve statewide planning goals or local acknowledged plans or regulations. With LCDC approval, DLCD may initiate or intervene in the appeal of a local decision when the appeal involves certain pre-established factors laid out in ORS 197.090(2) to (4). DLCD is also involved in reviewing and acknowledging local comprehensive plans.

When "good cause" exists,[4] LCDC may order a local government to bring its plan, regulations, or decisions into compliance with statewide planning goals or acknowledged plans and regulations. This is known as an "enforcement order" and can be initiated by LCDC or a citizen but is infrequently used. LCDC may also become involved in a local government action if a petitioner requests an enforcement order and LCDC finds there is good cause for the petition. If LCDC determines there is good cause, LCDC will commence proceedings for a contested-case hearing under ORS 197.328. Failure to comply with an enforcement order under ORS 197.328 may result in the loss of certain public revenue, including state shared revenue.

(2) Land Use Board of Appeals (LUBA).

Most appeals of a local land use decision go to the Land Use Board of Appeals (LUBA). LUBA is comprised of three board members who are appointed by the governor and confirmed by the state senate. Anyone who participated in a local land use decision may appeal the decision to LUBA within 21 days of the date the decision becomes final. It is important to note that the date the decision becomes "final" is when it is put in writing and signed by the decision-maker (e.g. Planning Commission Chair, Mayor, or Hearings Officer). Alternatively, a city may specify in its code when the decision becomes final, such as the date the decision is mailed. In any case, it is not the same as the date the decision becomes *effective*, which may be much later.

Once notice of appeal is served, the local government must compile and submit the record of the decision to LUBA within 21 days. LUBA is required to issue a decision on the appeal within 77 days after the record is transmitted, though there are some exceptions to this deadline. Finally, LUBA's decision may be appealed to the Oregon Court of Appeals.

An important aspect of an appeal is that LUBA's review is limited to the contents in the record. Therefore, it is important that the City Council ensure that all applicable criteria, goals, arguments, staff reports, studies, etc. are included in the record in the event of an appeal. Such care can impact the outcome of any appeal.

For example, the Oregon Court of Appeals found that the interpretation of a local code provisions was not a "new" issue and prohibited the appellant from raising the issue on appeal

[4] See ORS 197.320, which lists indicators of "good cause" such as: (1) a local government comprehensive plan or land use regulation that is not in compliance with goals by the date set in statute; (2) a local government does not make satisfactory progress toward coordination; or the local government has engaged in a pattern or practice that violated the comprehensive plan or a land use regulation.

because, even though the provision was not specifically referenced in the City's notice of hearing the record showed that a member of the City Council raised the provision at the hearing, thus, placing the provision in the record. *Stewart v. City of Salem*, 231 Or. App. 356 (2009).

Because of the specific procedural requirements for an appeal to LUBA, the City Council and Planning Department staff work closely with the City Attorney on any appeals. It is important to notify the City Attorney immediately upon receipt of an appeal.

C. Statewide Planning Goals[5]

The purpose of the Statewide Planning Goals is to implement and consistently apply state land use policies throughout Oregon. The Statewide Planning Goals emphasize citizen involvement, a public planning process, management of growth within UGBs, housing and preservation of natural resources and specific types of lands called resource lands.

Most of the goals are accompanied by "guidelines," which suggest how to apply a goal but are not mandatory. The goals have been adopted as administrative rules and are located in OAR Chapter 660, Division 015. As noted, the City's comprehensive plan and development code must be consistent with the goals and are periodically reviewed by LCDC for compliance.

[5] Oregon's 19 Statewide Planning Goals are:

Goal 1: Citizen Involvement
Goal 2: Land Use Planning
Goal 3: Agricultural Lands
Goal 4: Forest Lands
Goal 5: Natural Resources, Scenic and Historic Areas, and Open Spaces
Goal 6: Air, Water and Land Resources Quality
Goal 7: Areas Subject to Natural Hazards
Goal 8: Recreational Needs
Goal 9: Economic Development
Goal 10: Housing
Goal 11: Public Facilities and Services
Goal 12: Transportation
Goal 13: Energy Conservation
Goal 14: Urbanization
Goal 15: Willamette River Greenway
Goal 16: Estuarine Resources
Goal 17: Coastal Shorelands
Goal 18: Beaches and Dunes
Goal 19: Ocean Resource

III. TYPES OF LAND USE DECISIONS

A. Quasi-Judicial Process and Appeals

(1) Overview.

A quasi-judicial decision typically applies pre-existing criteria to an individual person or piece of land. Determining whether a proceeding is "quasi-judicial" turns on whether the decision displays the characteristics of such decisions identified by the Oregon Supreme Court in *Strawberry Hill 4 Wheelers v. Benton County Bd. of Commissioners*, 287 Or. 591, 601 P.2d 769 (1979). First, the proceeding must be "bound to result in a decision." *Id*. at 775. Second, the local government must be "bound to apply preexisting criteria to concrete facts." *Id*. Third, the decision must be "directed at a closely circumscribed factual situation or a relatively small number of persons." *Id*. While the court held that no single factor is determinative, the more closely a local decision comes to meeting these criteria, the more likely the decision is quasi-judicial. Typical examples of a quasi-judicial decision include design review, partition and subdivision, a zone change for a small number of lots or parcels, development permits and variances.

In Oregon, a quasi-judicial decision must comply with general standards of due process. This requirement arises from Oregon Supreme Court's decision in *Fasano v. Washington County Commission*, 264 Or. 574 (1973). Due process standards typically include an opportunity to be heard, an opportunity to present and rebut evidence, an impartial decision-maker and a record and written findings adequate to permit judicial review. *Id*. The mechanics of meeting the due process requirement are deeply embedded in state law and in some local codes.

(2) State law procedural requirements.

The procedures that apply to the City's review of a quasi-judicial application are largely determined by ORS 197.763. A copy of that statute is attached to these materials. For example, at the "initial evidentiary hearing," the City must read a statement that lists the applicable criteria in the City development code; ask that testimony and evidence be directed at the applicable criteria (or other criteria in the plan or development code the person believes apply to the decision); and stating that the failure to raise an issue with sufficient specificity to allow the City and other parties an opportunity to respond prohibits an appeal to LUBA based on that issue. The applicant must also be advised of the requirement to raise any constitutional claims at the beginning of the hearing under ORS 197.796. Typically, these statements are included in a script for the presiding officer but also may be presented by staff or legal counsel.

The City must provide a description of the applicable standards that is "clear enough for an applicant to know what he must show during [the] application process." *State ex. Rel. West Main Townhomes, LLC. V. City of Medford*, 234 Or. App. 343, 346 (2010). Generally referencing local code provisions is not enough to satisfy ORS 197.763(3)(b) and (5)(a), (governing the content of mailed notices and statements at the commencement of the hearing,

respectively).

At the close of the "initial evidentiary hearing," *any* participant may request that the record be held open in order to allow additional evidence regarding the application. The City can either hold the record open for a specific period to allow additional written evidence, or continue the hearing to a specific date, time and place at least seven days in the future. It is the City's choice whether to continue the hearing or leave the record open, which may depend on the nature of the evidence to be submitted and the time available in which to render a final decision.

If new written evidence is submitted at the continued hearing, a person may request that the record be left open for at least seven days to submit additional written testimony/evidence. Then, after all of the written evidence has been submitted and the record is closed to all other parties, the applicant is allowed at least seven days to submit a final written argument in support of the application.

Approval or denial of a quasi-judicial land use application must be based on standards and criteria that are set forth in the City's development code. ORS 227.173. The City's interpretation of its own code must be consistent with the express language of the code. *Siporen v. City of Medford*, 231 Or. App. 585 (2009). The courts will defer to a City's interpretation of its own code, provided the interpretation is made by the City Council. Conversely, the courts do not defer to an interpretation made by a lower body such as the Planning Commission or a hearings officer.

The City's final decision must include a brief description of the criteria, a description of the evidence that addresses each criterion, and the reasoning for approving or denying the application. ORS 227.173 (3). This part of the decision is generally referred to as the "findings." The legal requirements that apply to the City's findings are addressed in separate training materials but suffice it to say that they may not be cursory or conclusory.

(3) Local code requirements.

Under ORS 227.170(1), a city may establish its own hearing procedures provided they are consistent with ORS 197.763.

B. Final decision (Quasi-Judicial)

ORS 227.173(4) requires the final decision on a "permit" application be made in writing and sent to "all parties to the proceeding." A "permit" is defined at ORS 227.160(2) as a discretionary approval of development, excluding limited land use decisions (which have their own statutory process). Code Section 12.70.050 details the City procedures for issuing a final decision for quasi-judicial decisions. Section 12.70.130 addresses the effective date of land use decisions, including quasi-judicial decisions. ORS 227.175(12) requires that the final order include notice of appeal procedures.

Finally, under ORS 227.178(1), a final decision must be made within **120 days** of the date the application was "deemed complete," including "resolution of all [local] appeals." While ORS 227.178(5) allows *the applicant* to extend the deadline in writing, the total of all extensions may not exceed 245 days. Accordingly, the City must reach a final decision on an application for a "permit, limited land use decision or zone change" within one year from the date the application is deemed complete.

C. Legislative Process

The procedural requirements for a legislative land use decision differ from the procedural requirements for a quasi-judicial decision. Legislative decisions typically involve the adoption of more generally applicable policies, standards, etc., that apply to a variety of factual situations, and a broad class of people. Examples include amending the comprehensive plan, a zone change that applies broadly to large areas, or changes to the text of the development code to include or delete specific uses in a zoning classification. Because a legislative decision is the expression of City policy, the City is not required to reach a decision on a legislative proposal and may table the issue or decline to review it altogether.

IV. EX PARTE CONTACTS, CONFLICTS OF INTEREST AND BIAS

A. Right to an Impartial Decision

The purpose of declaring ex parte contacts, bias and conflicts of interest is to ensure that *quasi-judicial* land use applications are decided by an impartial hearing body. Declaring ex parte contacts, bias or conflict of interest is required prior to conducting a hearing on any quasi-judicial land use decision.[6] It is important to note that, as a resident of the community, Planning Commissioners and City Councilors frequently have personal beliefs, business associations, membership with organizations, and relatives living and working within the community who may be affected directly or indirectly by issues presented by a land use application. Disclosing these beliefs or associations is required only where such beliefs or associations will affect the ability of the hearing body member to render an impartial decision. The exception to this general

[6] Because the rights of the applicants in a quasi-judicial proceeding require additional protection relative to a legislative decision, in general ex parte contacts and bias are less important in the legislative context. As a result, open discussions with members of the community and expressions of opinion on proposed amendments to the code that affect the community as a whole rather than a narrow class or limited number of property owners generally do not require disclosure. *Casey Jones Well Drilling, Inc. v. City of Lowell*, 34 Or. LUBA 263 (1998). Where there is an actual conflict of interest that will result in a financial benefit to a public official, the statutory provisions *prohibit* participation in that decision. See discussion provided herein. In addition to the conflict of interest provisions that protect the community from special interests, ORS 244.040(1) prohibits a public official from using his or her office as a means of financial gain. To that extent disclosure protects both the individual commissioner and the community.

rule is ex parte contacts. In a quasi-judicial setting, regardless of whether the ex parte contact affects the impartiality of a decision maker, it must be disclosed.[7]

Once a hearing body member discloses an ex parte contact, bias or conflict of interest and announces publicly his or her ability to render an impartial decision, the burden shifts to the public to prove that the person is not capable of making an impartial decision. However, a mere possibility that an improper ex parte contact occurred is not sufficient for the public to meet its burden. *Dahlen v. City of Bend*, 57 Or. LUBA 757, 765 (2008).

With respect to bias or a conflict of interest, a Planning Commission or City Council member may step down and not participate in a decision if the person believes that bias or a conflict of interest will prevent the person from being impartial. The decision to step down is up to the person based on whether he or she believes the particular contact or conflict gives an appearance of impropriety rather than a direct financial benefit. Where a hearing body member (including relatives and business associates) will financially benefit from the decision, ORS 244 prohibits the person from participating in the decision unless a class exception exists. Bias and conflict of interests are discussed in more detail below.

Although not required, a person who recuses himself from the decision may step down from the dais and join the general public seating during the discussion and decision. There is no legal requirement that prevents a person who steps down from participating as an interested citizen, although, when there is an actual financial benefit, a decision maker is discouraged from participating as a citizen to preserve the integrity of the process.

B. Ex Parte Contacts

An ex parte contact is commonly understood as a meeting, written communication (including email), or telephone conversation between a member of the hearing body and an interested party, outside of the public hearing process. While this is true, the scope of ex parte contacts is actually much broader—encompassing any evidence relating to a pending application relied on by a hearing body member in making a final decision that is not fully disclosed. The purpose of disclosure is to provide interested parties an opportunity to consider and rebut evidence.

It is important to note that ex parte contacts are not unlawful. While contact with interested parties to broker a behind-the-scenes deal on a particular decision is often a political disaster, legally such contact is a problem only where the substance of the meeting is not disclosed during a public hearing and recorded as a part of the public record. In most cases, the better approach is to rely on City staff to work directly with interested parties and avoid the risk of engaging in ex parte discussions.

[7] However, where the disclosure reveals either that the public official did not rely on that information in making a final decision or that the information is not relevant to the applicable criteria, the public official may participate in the decision without undermining the validity of the final decision

(1) Statutory Provisions.

ORS 227.180(3) provides the legal framework governing ex parte contacts and is discussed in greater detail below.

(a) Full Disclosure

Ex parte contact does not render a decision unlawful so long as there is full disclosure. ORS 227.180(3). Disclosure must occur at the earliest possible time in the decision-making process. *Horizon Construction v. City of Newberg*, 114 Or. App. 249, 834 P.2d 523 (1992) (Declaration of ex parte contact after the hearing at a meeting before making the final decision was ephemeral and required remand). There are two components to full disclosure: (1) placing the substance of the written or oral ex parte contact on the record and (2) a public announcement of the ex parte contact. ORS 227.180(3)(a) & (b). Both requirements are satisfied by disclosure at the initial public hearing (public announcement that is included as a part of the record). In addition, the presiding officer of the hearing body is required to provide the general public with an opportunity to rebut the substance of the ex parte contact.[8]

(b) Communications with Staff

Under ORS 227.180(4) communications with City staff are not considered an ex parte contact. However, City staff may not serve as a conduit for obtaining information outside of the public process unless that information is disclosed. In practice, decision makers may freely discuss issues and evidence with staff. Where an interested party requests staff to communicate with a decision maker or other evidence is obtained through staff that the decision maker relies on without disclosure (or is not otherwise included as a part of the public record such as the staff report), an ex parte contact problem occurs. Because an ex parte contact is a procedural error, the party appealing a decision must show that the ex parte contact was prejudicial. In general, evidence that a relevant ex parte contact was not disclosed should be regarded as enough to require remand of a decision.

(2) Common Sense.

Common sense judgment can go a long way in deciding what should be disclosed. Generally, a decision maker's instincts about whether information is relevant to the decision and should be included as a part of the record through disclosure are correct. The ex parte contact rules should not be viewed as an impediment to the hearing body's ability to conduct business. The majority of information used to form general opinions that existed prior to but which may impact a decision are not subject to disclosure. Specific information obtained in anticipation of or subsequent to an application being filed that is directly relevant to the decision and unavailable to the rest of the interested parties should always be included in the public record through disclosure

[8] Often the opportunity to rebut or object to the decision maker's participation occurs prior to opening the public hearing. Depending on the extent of the rebuttal, the body may allow rebuttal during the public hearing or during the open record period following the initial hearing if requested by the objector.

(3) Scope of Ex Parte Contacts.

As indicated, ex parte contacts are not limited to conversations with interested parties or other members of the community. The concept of ex parte contacts is much broader. For example, consider:

- A site visit is not in itself an *ex parte* contact unless it involves communication between a decision maker and a party or other interested person. *Carrigg v. City of Enterprise*, 48 Or. LUBA 328 (2004). However, site visits do invoke procedural requirements of disclosure and opportunity to rebut. *Id.* If a site visit is conducted and conversations take place between decision makers and applicants and/or opposition that are then used in making the final decision, or give the appearance of so, the content of those conversations must be disclosed or the decision will be remanded. *Gordon v. Polk County*, 50 Or. LUBA 502 (2005).

- Communications with staff where the staff member is acting as a conduit for the transfer of information from persons for or against the proposal, or where the contact occurs after the record closes. See *Nez Perce Tribe and City of Joseph v. Wallowa County*, 47 Or. LUBA 419 (2004) (staff submittal of evidence after the record closes could prejudice parties' substantial right to rebut evidence and requires remand).

- Allegations that the planning staff, who were not the final decision makers, were biased in favor of an application are insufficient, even if true, to demonstrate that the final decision makers were biased. *Hoskinson v. City of Corvallis*, 60 Or. LUBA 93 (2009).

- Newspaper articles, television or radio broadcasts.

- All other outside discussions of a pending application.

(4) Example – another potential for ex parte communications.

Addressing Ex Parte Contacts on Remand. The Land Use Board of Appeals remanded a decision of the City of Portland where a commissioner spoke with an interested party during a recess and failed to disclose the conversation. On remand, the commissioner entered a statement on the record that he could not recall the nature of the conversation, and the decision was again appealed and remanded by LUBA. On appeal, the Court of Appeals agreed with LUBA that the City is required to adopt a decision based on fully disclosed information subject to the opportunity for rebuttal. Although a full hearing on remand is not generally required, the court found in this case that "[t]he remedy should be tailored to rectify the evil at which it is directed, in light of the particular circumstances of the case." *Opp v. City of Portland*, 171 Or. App. 417, 423 (2000).

C. Conflict of Interest

The Government Ethics Commission oversees the implementation of the conflict of interest statutes under ORS Chapter 244.

(1) Actual vs. Potential Conflict of Interest.

An actual conflict of interest is defined under ORS 244.020 as any decision or act by a public official that would result in a "private pecuniary benefit or detriment." An actual conflict extends not only to financial gain or loss to the individual public official but also to any relatives, household member or any business with which the official or relative is associated.

A potential conflict of interest is distinguished from an actual conflict of interest in that the benefit or detriment could occur while in an actual conflict of interest situation, the benefit or detriment "will" occur. ORS 244.020(1), 244.020(12).

In the case of an actual conflict of interest, the official must both:

- Announce the actual conflict of interest; and
- Refrain from taking official action.

For example, in *Catholic Diocese of Baker v. Crook County*, LUBA determined that a county commissioner's wife's testimony and the county commissioner's attendance at a planning commission hearing had no bearing on whether the commissioner's participation in the matter would result in a private pecuniary benefit or detriment to the commissioner. Neither did the fact that the commissioner owned property within 700 feet of the subject property; instead, ownership was indicative of a potential conflict of interest only, which the commissioner announced at the public meeting. 60 Or. LUBA 157, 164 (2009)

In the case of a potential conflict of interest, the official must announce the conflict, but may take action on the issue. The disclosure requirements for both potential and actual conflicts do not apply to class exceptions.

(2) Class Exceptions.

Often a land use decision has at least some indirect financial impact on an individual hearing body member and other members of the community. For example, legislative rezoning and code amendments often entail changes to the development rights of property owners throughout the City. To address this issue, a class exception to a conflict of interest is created under ORS 244.020(12)(b). Where a hearing body member is part of a class that consists of a larger group of people affected by a decision, no conflict exists. There is no hard and fast rule on the size or type of class to which the conflict exemption applies. In general, legislative rezoning decisions that affect the community as a whole are exempt. The class exemption depends on the facts of each case. Several examples are provided below.

(3) Examples.

Disclosure of Proximity to Property Being Developed. Councilors living within proximity of an application for the continuance of a nonconforming mining operation failed to disclose the location of their residences during the local process. LUBA remanded requiring disclosure. *ODOT v. City of Mosier*, 36 Or. LUBA 666 (1999).

GSPC Staff Opinion No. 00S-008. Councilor Rod Park is a member of the Metro Council. Metro was developing an ordinance that would require local governments to adopt limitations on development in proximity of streams and other water bodies. Councilor Park is owner of property that includes an intermittent stream that will be impacted by the ordinance. Because Councilor Park is one of approximately 10,000 landowners affected by the ordinance, he clearly falls within the class exception.

GSPC Staff Opinion No. 01S-018. Sherwood City Councilor Cathy Figley owns commercial property in the City of Sherwood. The City was considering establishing an urban renewal area that includes 260 acres of land. Councilor Figley owns two tax lots of approximately 122 acres of commercial area within the proposed urban renewal area. Here the state pointed out the class exemption applies so long as the benefits from the urban renewal area apply equally to all owners.

GSPC Staff Opinion No. 98S-005. Creswell City Councilor Sharlene Neff requested an opinion as to whether she could actively oppose an application for a 19.5 acre development of a manufactured home park. Councilor Neff owns property that will be directly impacted by traffic from the proposed development. In this case, the state found that the number of property owners impacted by the development was of a sufficient size to trigger the class exception. NOTE: This staff opinion does not address the issue of bias at all. Although the GSPC found that there was no class exception, there is a very real chance that the councilor's participation with an opposition group is evidence of actual bias that would preclude her participation in the final decision.

D. Bias

A biased decision maker substantially impairs a party's ability to receive a full and fair hearing. *1000 Friends of Oregon v. Wasco Co. Court*, 304 Or. 76, 742 P.2d 39 (1987). Bias can be in favor of or against the party or the application. Generalized expressions of opinions are not bias. *Space Age Fuels v. City of Sherwood*, LUBA No. 2001-064 (2001).

Local quasi-judicial decision makers are not expected to be free of bias but they are expected to (1) put whatever bias they may have aside when deciding individual permit applications and (2) engage in the necessary fact finding and attempt to interpret and apply the law to the facts as they find them so that the ultimate decision is a reflection of their view of the facts and law rather than a product of any positive or negative bias the decision maker may bring to the process. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or. LUBA 697 (2005).

(1) Actual Bias.

Actual bias means prejudice or prejudgment of the parties or the case to such a degree that the decision maker is incapable of being persuaded by the facts to vote another way.
This can include:

- Personal bias;
- Personal prejudice; or
- An interest in the outcome.

The standard for determining actual bias is whether the decision maker "prejudged the application and did not reach a decision by applying relevant standards based on the evidence and argument presented [during quasi-judicial proceedings]." *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or. LUBA 440, 445 (2000), *aff'd* 172 Or. App. 361, 19 P.3d 918 (2001). Actual bias strong enough to disqualify a decision maker must be demonstrated in a clear and unmistakable manner. *Reed v. Jackson County*, 2010 WL 2655117, LUBA No. 2009-136 (June 2, 2010).

The burden of proof that a party must satisfy to demonstrate prejudgment by a local decision maker is substantial. *Roberts et. al. v. Clatsop County*, 44 Or. LUBA 178 (2003), *see also Becklin v. Board of Examiners for Engineering and Land Surveying*, 195 Or. App. 186 (2004). The objecting party need not demonstrate that a majority of the decision makers were influenced by the bias of one decision maker to warrant a remand; the bias of one City Councilor is enough. *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or. LUBA 702 (2001).

(2) Appearance of Bias.

Appearance of bias will not necessarily invalidate a decision. *1000 Friends of Oregon v. Wasco County Court*, 304 Or. 76, 742 P.2d 39 (1987). However, the appearance of bias may call into question a decision maker's ultimate decision. *Gooley v. City of Mt. Angel*, 56 Or. LUBA 319, FN6 (2008) (LUBA did not opine on whether City Councilors were biased, but noted that "even the most fair-minded decision maker is likely to have some difficulty deciding…a matter based solely on the applicable criteria, when a very close relative is party to the matter"). The main objective is to maintain public confidence in public processes.

(3) Examples.

General Expressions of Opinion Do Not Invalidate Decisions. "While on a personal basis, I think the Council and I * * * don't want these businesses in the community, the fact is our personal [feeling] versus our obligation as elected officials to uphold the law is very different, and so we can't base any decisions tonight based on content." Mayor Drake commenting on a proposed adult video store in Beaverton. *Oregon Entertainment Corporation v. City of Beaverton*, 38 Or.

LUBA 440 (2000). Statements by City officials that they would prefer a privately funded convention center, rather than a publicly financed one, do not demonstrate that the City decision makers are biased and incapable of making a decision on the merits. *O'Shea v. City of Bend*, 49 Or. LUBA 498 (2005).

Mere Association with Membership Organization Not Enough. For instance, an applicant for a dog raising farm alleged that a chairperson was biased by association with Clatsop County Friends of the Animals. Applicant speculated that the chairperson gave money to this organization and that opponents to the application were also members of the association. LUBA found that there was no evidence provided of any communications and that adequate disclosure was provided by the chairperson. *Tri-River Investment Company v. Clatsop County*, 37 Or. LUBA 195 (1999).

Also, where a land use decision maker is a member of a church congregation and the church has applied for a land use permit, and the decision maker has expressed concern regarding the impact proposed conditions of approval would have on church operations but nevertheless declares that she is able to render a decision regarding the church's application based on the facts and law before her, that decision maker has not impermissibly prejudged the application. *Friends of Jacksonville v. City of Jacksonville*, 42 Or. LUBA 137 (2002).

City May Adopt Applicant's Findings In Support of Decision. A hearings officer accepting, reviewing and adopting findings from the applicant is not evidence of prejudgment or bias. *Heiller v. Josephine County*, 23 Or. LUBA 551 (1992).

Prior Recusal Does Not Prohibit Participation In Subsequent Hearing. LUBA found no error where a County Commissioner failed to excuse himself from a decision even though the commissioner voluntarily withdrew from a prior hearing involving the same matter because of his friendship with an opponent of the proposed change. *Schneider v. Umatilla County*, 13 Or. LUBA 281 (1985).

Councilor Prejudged Application. In the City of Depoe Bay, a councilor's prior actions and written statements amounted to prejudgment of an application for a business license to operate a real estate office within a residential planned unit development. In this case, the councilor wrote a letter to the mayor stating that there was no legal basis for permitting the office. Subsequent correspondence also revealed the antagonistic relationship between the councilor and the applicant. The Land Use Board of Appeals found that "[i]n view of his history of actively opposing the siting of a real estate sales office within the Little Whale Cove PUD, it is clear that he had prejudged the application and was incapable of rendering an impartial decision based on the application, evidence and argument submitted during the City's proceedings on the application." *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or. LUBA 702 (2001).

Councilor May Not Seek Additional Evidence. In the City of Cottage Grove, two councilors sought and obtained additional evidence not in the record and relied on that evidence to make a decision on a permit application. The Land Use Board of Appeals noted, "The role of the local government decision maker is not to *develop* evidence to be considered in deciding a quasi-

judicial application, but to impartially consider the evidence that the participants and City planning staff submit to the decision maker in the course of the public proceedings." *Woodard v. Cottage Grove*, 54 Or. LUBA 176 (2007) (emphasis in original).

City's prior interest in purchasing subject property does not create bias. In the City of Oregon City, the fact that the City had inquired about purchasing property which became the subject of an application for a new Wal-Mart store was held to be insufficient to demonstrate bias. LUBA was unwilling to open the record for an evidentiary hearing. The Wal-Mart applicant did not allege that any member of the City Council had a personal financial interest in the property; rather, the applicant's allegation of bias "is based solely on its belief that the City as a municipal entity was interested in purchasing the subject property for future development of City buildings…" Such general allegations do not counter the City's argument that its City Commission was still capable of making an impartial decision. *Wal-Mart Stores, Inc. v. City of Oregon City*, Order on Motion to Take Evidence, LUBA No. 2004-124 (2005).

Postscript: The Oregon City Wal-Mart case went to the Court of Appeals on unrelated procedural matters. The Court of Appeals upheld the City's decision denying the application; the Oregon Supreme Court denied Wal-Mart's petition for review.[9]

V. IMPLICATIONS OF THE PUBLIC MEETINGS LAW

A. Overview

The Oregon policy of open decision-making is established by ORS 192.620:

> 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 are arrived at openly.

The Public Meetings Law applies to not only the state, but also the cities, counties and special districts despite any conflict with a local charter, ordinance or other rules. Cities, counties and other public bodies may impose greater requirements than required by state law through the local charter, ordinances, administrative rules or bylaws.

The Public Meetings Law applies to meetings of the "governing body of a public body." ORS 192.630(1). A "public body" is the state, any regional council, county, city or district, or any municipal or public corporation or any board, department, commission, council, bureau, committee, subcommittee or advisory group or any other agency thereof. ORS 192.610(4). If two or more members of any public body have "the authority to make decisions for or recommendations to a public body on policy or administration," they are a "governing body" for purposes of the meetings law. ORS 192.610(3).

[9] 204 Or App 359, review denied, 341 Or 80 (2006).

B. Meetings Subject to the Law

The Public Meetings Law defines a meeting as the convening of any of the "governing bodies" described above "for which a quorum is required in order to make a decision or to deliberate toward a decision *on any matter*." ORS 192.610(5) (emphasis added).

Although the state law does not define a "quorum," it is defined locally as a majority of the decisionmaking body. A gathering of less than a quorum is not a meeting under the meetings law.

Staff meetings are not subject to the meetings law because staff is not the "governing body" and a quorum is not required. ORS 192.610(3). However, if staff meets with a quorum of the commission to discuss matters of "policy or administration," or to clarify a decision or direction for staff, the meeting is within the scope of the law. ORS 192.610(5).

The Public Meetings Law applies to all commission meetings for which a quorum is required to make a decision or deliberate toward a decision on any matter. Even meetings for the sole purpose of gathering information upon which to base a future decision or recommendation are covered. Hence, information gathering and investigative activities of a city body, such as a work session, are subject to the law.

The law does not cover purely social meetings of commission members. In *Harris v. Nordquist*, 96 Or 19 (1989), the court concluded that social gatherings at which school board members sometimes discussed "what's going on at the school" did not violate the meetings law. The *purpose* of the meeting determines whether the law applies. However, a purpose to deliberate on any matter of policy may arise *during* a social gathering and lead to a violation. When a quorum is present, members should avoid any discussions of official business during social gatherings. Some citizens may see social gatherings as a subterfuge for avoiding the law.

C. Serial Communications

Members of a governing body may violate the Oregon Public Meeting Law's prohibition on meeting in private even if a quorum never meets contemporaneously.

ORS 192.630(2) provides that a "quorum of a governing body may not meet in private for the purpose of deciding on or deliberating towards a decision on any matter." A decision is "any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required, at any meeting at which quorum is present. ORS 192.610(1). In other words, members of a governing body may violate the prohibition against private meetings by (1) communicating in private, (2) for the purpose of deciding or deliberating on (3) any topic that may require a vote.

As two recent Oregon cases, *Dumbi* and *Handy*, make clear, the prohibition against meeting in private includes both when a quorum meets contemporaneously *and* when a series of non-contemporaneous communications between members of the governing body, in the aggregate,

include a quorum and the purpose of the communications is to decide or deliberate on a matter that may come before the governing body.

To illustrate this point, the following communications between members of a five person governing body may violate ORS 192.630(2):

- A member forwards an email discussion she had with a member regarding a matter that may come before the governing body to another member. Because the email exchange, in the aggregate, includes a quorum of the body and its purpose is to discuss a matter that will require a vote, the email exchange violates ORS 192.630(2).

- A staff person individually calls members of a governing body to discuss a matter that will require a vote. When the staff person talks to each member, she shares with the member the opinions and comments of the other members. Although the members never speak directly, the staff person is acting as a conduit. These conversations, in the aggregate, violate ORS 192.630(2).

- A citizen posts a comment on the city's Facebook page about an upcoming land use decision and the comment generates a discussion. Two members of the governing body make comments and share opinion on the Facebook "thread." A third member reads the comments and also comments. Because three members have communicated opinions on the social media site on a matter that will require a vote, the members have violated ORS 192.630(2).

The prohibition against meeting in private does not include communications that are purely "information gathering." Members of a governing body should be aware, however, that the parameters of "information gathering" are not clear.

C. Electronic Communication

The Public Meetings Law expressly applies to telephonic conference calls and "other electronic communication" meetings of governing bodies. ORS 192.670(1). Notice and an opportunity for public access must be provided when meetings are conducted by electronic means. For non-executive session meetings, the public must be provided at least one place to listen to the meeting by speakers or other devices. ORS 192.670(2). Special accommodations may be necessary to provide accessibility for persons with disabilities. The media must be provided such access for electronic executive sessions, unless the executive session is held under a statutory provision permitting its exclusion. Communications between and among commissioners on electronically linked personal computers may be subject to the meetings law.

D. Control of Meetings

The presiding officer of any meeting has inherent authority to keep order and to impose any reasonable restrictions necessary for the efficient and orderly conduct of a meeting. If public participation is part of the meeting, the presiding officer may regulate the order and length of appearances and limit appearances to presentations of relevant points. Any person who fails to

comply with reasonable rules of conduct or who causes a disturbance may be asked or required to leave and upon failure to do so becomes a trespasser. *State v. Marbet,* 32 Or App 67 (1978).

This authority extends to control over equipment such as cameras, tape recorders and microphones, but only to the extent of reasonable regulation. Members of the public may not be prohibited from unobtrusively recording the proceedings of a public meeting. The criminal law prohibition against electronically recording conversations without the consent of a participant does not apply to recording "public or semipublic meetings such as hearing before government or quasi-government bodies." ORS 165.540(6)(a).

APPENDIX A

197.763 Conduct of local quasi-judicial land use hearings; notice requirements; hearing procedures. The following procedures shall govern the conduct of quasi-judicial land use hearings conducted before a local governing body, planning commission, hearings body or hearings officer on application for a land use decision and shall be incorporated into the comprehensive plan and land use regulations:

(1) An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.

(2)(a) Notice of the hearings governed by this section shall be provided to the applicant and to owners of record of property on the most recent property tax assessment roll where such property is located:

(A) Within 100 feet of the property which is the subject of the notice where the subject property is wholly or in part within an urban growth boundary;

(B) Within 250 feet of the property which is the subject of the notice where the subject property is outside an urban growth boundary and not within a farm or forest zone; or

(C) Within 500 feet of the property which is the subject of the notice where the subject property is within a farm or forest zone.

(b) Notice shall also be provided to any neighborhood or community organization recognized by the governing body and whose boundaries include the site.

(c) At the discretion of the applicant, the local government also shall provide notice to the Department of Land Conservation and Development.

(3) The notice provided by the jurisdiction shall:

(a) Explain the nature of the application and the proposed use or uses which could be authorized;

(b) List the applicable criteria from the ordinance and the plan that apply to the application at issue;

(c) Set forth the street address or other easily understood geographical reference to the subject property;

(d) State the date, time and location of the hearing;

(e) 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 based on that issue;

(f) Be mailed at least:

(A) Twenty days before the evidentiary hearing; or

(B) If two or more evidentiary hearings are allowed, 10 days before the first evidentiary hearing;

(g) Include the name of a local government representative to contact and the telephone number where additional information may be obtained;

(h) State that a copy of the application, all documents and evidence submitted by or on behalf of the applicant and applicable criteria are available for inspection at no cost and will be provided at reasonable cost;

(i) 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; and

(j) Include a general explanation of the requirements for submission of testimony and the procedure for conduct of hearings.

(4)(a) All documents or evidence relied upon by the applicant shall be submitted to the local government and be made available to the public.

(b) Any staff report used at the hearing shall be available at least seven days prior to the hearing. If additional documents or evidence are provided by any party, the local government may allow a continuance or leave the record open to allow the parties a reasonable opportunity to respond. Any continuance or extension of the record requested by an applicant shall result in a corresponding extension of the time limitations of ORS 215.427 or 227.178 and ORS 215.429 or 227.179.

(5) At the commencement of a hearing under a comprehensive plan or land use regulation, a statement shall be made to those in attendance that:

(a) Lists the applicable substantive criteria;

(b) States that testimony, arguments and evidence must be directed toward the criteria described in paragraph (a) of this subsection or other criteria in the plan or land use regulation which the person believes to apply to the decision; and

(c) States 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 issue precludes appeal to the board based on that issue.

(6)(a) Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to paragraph (b) of this subsection or leaving the record open for additional written evidence, arguments or testimony pursuant to paragraph (c) of this subsection.

(b) If the hearings authority grants a continuance, the hearing shall be continued to a date, time and place certain at least seven days from the date of the initial evidentiary hearing. An opportunity shall be provided at the continued hearing for persons to present and rebut new evidence, arguments or testimony. If new written evidence is submitted at the continued hearing, any person may request, prior to the conclusion of the continued hearing, that the record be left open for at least seven days to submit additional written evidence, arguments or testimony for the purpose of responding to the new written evidence.

(c) If the hearings authority leaves the record open for additional written evidence, arguments or testimony, the record shall be left open for at least seven days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the hearings authority shall reopen the record pursuant to subsection (7) of this section.

(d) A continuance or extension granted pursuant to this section shall be subject to the limitations of ORS 215.427 or 227.178 and ORS 215.429 or 227.179, unless the continuance or extension is requested or agreed to by the applicant.

(e) Unless waived by the applicant, the local government shall allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. The applicant’s final submittal shall be considered part of the record, but shall not include any new evidence. This seven-day period shall not be subject to the limitations of ORS 215.427 or 227.178 and ORS 215.429 or 227.179.

(7) When a local governing body, planning commission, hearings body or hearings officer reopens a record to admit new evidence, arguments or testimony, any person may raise new issues which relate to the new evidence, arguments, testimony or criteria for decision-making which apply to the matter at issue.

(8) The failure of the property owner to receive notice as provided in this section shall not invalidate such proceedings if the local government can demonstrate by affidavit that such notice

was given. The notice provisions of this section shall not restrict the giving of notice by other means, including posting, newspaper publication, radio and television.

(9) For purposes of this section:

(a) "Argument" means assertions and analysis regarding the satisfaction or violation of legal standards or policy believed relevant by the proponent to a decision. "Argument" does not include facts.

(b) "Evidence" means facts, documents, data or other information offered to demonstrate compliance or noncompliance with the standards believed by the proponent to be relevant to the decision. [1989 c.761 §10a (enacted in lieu of 197.762); 1991 c.817 §31; 1995 c.595 §2; 1997 c.763 §6; 1997 c.844 §2; 1999 c.533 §12]