

SPRINGFIELD PLANNING COMMISSION

Ethics, Public Meetings, and Public Records Training
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I. WHAT ARE ETHICS?

- A. "Ethics" are "rules of behavior based on ideas about what is morally good or bad; a belief that something is very important." Merriam-Webster Dictionary.
- B. Oregon Ethics Law (Oregon Government Standards and Practices Statutes) ORS Chapter 244: Legal ethics, not personal ethics - the bare minimum ethical behavior required to comply with the law.
- C. You are responsible for your own ethics. You are responsible for complying with standards required by State of Oregon.

II. OREGON ETHICS LAW

A. **Background.** Oregon Revised Statute (ORS) Chapter 244 applies to a very narrow set of activities. It addresses exclusively the concept of financial disclosure, use of office for personal financial gain, conflicts of interest, and other areas in which the employee, a relative, or business with which the employee is associated might be affected financially by the employee's public role.

There are other Oregon Statutes which regulate the behavior of public employees in a number of areas outside the jurisdiction of the Government Standards and Practices Commission. These include campaign finance and campaign activities which are regulated by the Secretary of State's office; alleged criminal activity which would fall under the jurisdiction of the Springfield Police or Lane County District Attorney; cases involving employment related sexual harassment or discrimination against a protected class are investigated by the Oregon Bureau of Labor and Industries.

B. **Use or Attempted Use of Official Position.** "...a public official may not use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment for the public official, a relative or member of the household of the public official, or any business with which the public official or a relative or member of the household of the public official is associated, if the financial gain or avoidance of financial detriment would not otherwise be available *but for* the public official's holding of the official position or office." ORS 244.040(1).

1. **Public Official.** A "public official" is any person serving the State of Oregon or any of its political subdivisions or any other public body of the state as an elected official, appointed official, employee or agent, irrespective of whether the person is compensated for the services. ORS 244.020(15).

2. **Relative.** A "relative" includes: The spouse, parent, stepparent, child, sibling, stepsibling, son-in-law or daughter-in-law of the public official *or* of the public official's spouse; 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; or any individual from whom the candidate receives benefits arising from that individual's employment. ORS 244.020(16).

3. Exceptions. ORS 244.040(2) provides a list of financial benefits that would not otherwise be available to public officials *but for* holding the position as a public official. The following financial benefits are not prohibited and may be accepted by a public official:

- a. Official compensation.
- b. Reimbursement of expenses.
- c. Honoraria valued at \$50 or less: "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." ORS 244.020(8), ORS 244.042(3)(a).
- d. Unsolicited awards for professional achievement.
- e. Exempt "gifts" (discussed below).

C. **Soliciting or Receiving Gifts.** No public official or candidate for office or a relative of the public official or candidate shall solicit or receive, whether directly or indirectly, during any calendar year, any gift or gifts with an aggregate value in excess of \$50 from any single source who could reasonably be known to have a legislative or administrative interest. (ORS 244.025). A "legislative or administrative interest" is an economic interest, distinct from the general public, in any matter subject to the decision of the public official, or of the candidate if elected, in their official capacity.

1. Gifts. Under the Oregon Government Ethics Law, a "gift" is something of economic value given to a public official or relative or member of the household of the public official, without valuable consideration of equivalent value (i.e. without paying for it) or given for less than required from others, and which is not extended to others who are not public officials or their relatives/household members. Waiving debt or giving a service are also gifts.

2. Exceptions. ORS 244.020(6)(b) provides the following definitions of items that are allowed as exclusions to the definition of a "gift," including:

(A) Campaign contributions as defined in ORS 260.005.

(B) Gifts from relatives or members of the household of the public official or candidate.

(C) An unsolicited token or award of appreciation in the form of a plaque, trophy, desk item, wall memento or similar item, with a resale value reasonably expected to be less than \$25.

(D) Informational or program material, publications or subscriptions related to the recipient's performance of official duties.

(E) Admission provided to or the cost of food or beverage consumed by a public official, a relative of the public official accompanying the public official, a member of the household of the public official accompanying the public official or a staff member of the public official accompanying the public official, at a reception, meal or meeting held by an organization when the public official represents... a local government as defined in ORS 174.116.

(F) Reasonable expenses paid by any unit of the federal government, a state or local government, a Native American tribe that is recognized by federal law or formally acknowledged by a state, a membership organization to which a public body as defined in ORS 174.109 pays membership dues, or a not-for-profit corporation... for attendance at a convention, fact-finding mission or trip, conference or other meeting if the public official is scheduled to deliver a speech, make a presentation, participate on a panel or represent... a local government as defined in ORS 174.116.

(G) Contributions made to a legal expense trust fund established under ORS 244.209 for the benefit of the public official.

(H) Reasonable food, travel or lodging expenses provided to a public official, a relative of the public official accompanying the public official, a member of the household of the public official accompanying the public official or a staff member of the public official accompanying the public official, when the public official is representing ... a local government as defined in ORS 174.116.

(i) On an officially sanctioned trade-promotion or fact-finding mission; or

(ii) In officially designated negotiations, or economic development activities, where receipt of the expenses is approved in advance.

(J) Waiver or discount of registration expenses or materials provided to a public official or candidate at a continuing education event that the public official or candidate may attend to satisfy a professional licensing requirement.

(K) Expenses provided by one public official to another public official for travel inside this state to or from an event that bears a relationship to the receiving public official's office and at which the official participates in an official capacity.

(L) Food or beverage consumed by a public official or candidate at a reception where the food or beverage is provided as an incidental part of the reception and no cost is placed on the food or beverage.

(M) Entertainment provided to a public official or candidate or a relative or member of the household of the public official or candidate that is incidental to the main purpose of another event.

(N) Entertainment provided to a public official or a relative or member of the household of the public official where the public official is acting in an official capacity while representing ... a local government as defined in ORS 174.116.

(O) Anything of economic value offered to or solicited or received by a public official or candidate, or a relative or member of the household of the public official or candidate:

(i) As part of the usual and customary practice of the person's private business, or the person's employment or position as a volunteer with a private business, corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, not-for-profit corporation or other legal entity operated for economic value; and

(ii) That bears no relationship to the public official's or candidate's holding of, or candidacy for, the official position or public office.

3. Public officials and their relatives may accept gifts of any amount from individuals with no administrative or legislative interest in the public body with which the official serves. (The millionaire on your doorstep; not your developer friend who has, or will have, several projects ongoing in the City development process requiring PC decisions.)

4. How is an official to know the value of a gift?

a. A public official should make every effort to determine the value of any gift provided by individuals with an administrative or legislative interest in the area of the official's public responsibility.

b. Because the giving, as well as receiving, of gifts is regulated, both donor and recipient should be aware of the statutes and should keep track of the value of any gifts. When in doubt, ask.

D. Future Employment. No public official shall solicit or receive, either directly or indirectly, and no person shall offer or give to any public official any pledge or promise of future employment, based on any understanding that such public official's vote, official action or judgment would be influenced thereby. ORS 244.040(3).

E. Use of Confidential Information. 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 of or by reason of the official position or activities of the public official in any way. ORS 244.040(4).

F. **Offering Gifts.** A person who has a legislative or administrative interest may not offer to the public official or a relative or member of the household of the public official any gift or gifts with an aggregate value in excess of \$50 during a calendar year. ORS 244.025(2).

G. **Representation Before Jurisdiction.** 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. This subsection does not apply to the person's employer, business partner, or other associate. ORS 244.040(6).

H. **Actual and Potential Conflicts.**

1. A potential conflict of interest exists when a public employee takes action that reasonably *could be* expected to have a financial impact on that public employee, a relative, or a business with which the public employee or public employee's relative is associated. ORS 244.020(13). The decision-maker must disclose the potential conflict, but then may participate in discussions and in the decision.

2. An actual conflict of interest occurs when the action is *reasonably certain* to result in a financial benefit or detriment. It will occur when an action is taken that directly and specifically affects land, a business, or any other financial interest of the office of the public employee or public employee's relative. ORS 244.020(1). The decision-maker must disclose the actual conflict and cannot participate in discussions or in the decision.

I. **Choices and Responsibility.** Although these distinctions may blur on occasion, it is important to be vigilant. In each situation there are three choices, the first two are almost always safe and the last one is likely to get you in trouble. The choices are: (1) err on the side of caution - i.e. don't accept a gift, don't participate in a vote on a matter that might present a conflict; (2) consult the Oregon Ethics Commission or City Attorney's office before taking/not taking action; or (3) (likely to get you in trouble) go ahead and do it without verifying compliance with ethics laws first.

Public officials are held *personally* responsible for complying with the provisions in Oregon Government Ethics law. If a public official fails to comply with the operative statutes, a violation cannot be dismissed by placing the blame on the public officials government employer of the governing body represented by the public official.

J. **Jurisdiction.** Jurisdiction over violations of the Ethics Code is vested in the Oregon Government Ethics Commission. See ORS Chapter 244.

III. PLANNING COMMISSION ETHICS

Planning commissioners have an ethical obligation to act as a fair and impartial decision-maker. An impartial decision-maker free of bias and undisclosed ex parte contacts is a fundamental requirement of all quasi-judicial land use proceedings. *Fasano v. Board of County Comm'rs*, 264 Or 574, 588, 507 P2d 23 (1973), *overruled on other grounds*, 288 Or 585 (1980). Note that the following requirements are the bare minimum legal standards to ensure an impartial tribunal; when in doubt, it is best for public officials to disclose potential biases, ex parte contacts, or conflicts of interest.

A. **Bias.** Bias occurs when there is prejudice, prejudgment of the facts, or personal interest to such a degree that an official is incapable of making an objective decision based on the merits of the case. The standard for bias is actual impartiality on the part of the decision-maker toward the particular subject-matter, not merely a lack of appearance of impartiality. Impartiality is required only towards the parties and issues in a particular (quasi-judicial) matter, not toward all individuals and all competing interests in the community. *1000 Friends of Oregon v. Wasco County Court*, 304 Or 76 (1987).

Actual bias disqualifies a decision-maker from participating in a quasi-judicial land use decision. Actual bias occurred when a decision-maker lived in or near a development and actively opposed the development and did not recuse himself from participating in a decision on the development. *Halvorson-Mason Corp. v. City of Depoe Bay*, LUBA No. 2000-118, 39 Or LUBA 702 (2001). Bias was also found when a decision-maker was a member of a church congregation, actively advocated or supported expansion of the church, and then failed to recuse him- or herself when the church applied to expand. *Friends of Jacksonville v. City of Jacksonville*, LUBA No. 2001-132, 42 Or LUBA 137, *aff'd*, 183 Or App 581 (2002).

B. **Ex-Parte Contact.** An ex parte communication is any communication with a decision-maker outside a public hearing regarding a matter that is relevant to the decision. The rules regarding ex parte communications apply only to quasi-judicial land use decisions; decision-makers are free to communicate regarding legislative actions (i.e. be "lobbied" by interested parties). Decision-makers' communications with City staff are not ex parte contacts that need to be disclosed.

Ex parte communications do not make a decision invalid as long as the decision-maker (1) makes a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication at the first hearing following the communication, and (2) places the substance of the communication on the record. When there has been an ex-parte contact, disclose it on the record and offer the parties the right for rebuttal. ORS 227.180(3).

Site visits are not considered ex parte contacts, but a decision-maker has an obligation to disclose site visits so that any information gained from a site visit can be included in the record. *See Carrigg v. City of Enterprise*, 48 Or LUBA 328 (2004). For that reason, planning commissioners should treat site visits in the same way as ex parte contacts, and announce the site visit during the public hearing just as though it was an ex parte communication.

C. **Conflicts of Interest.** A decision-maker with an actual conflict of interest

must recuse himself or herself from participating in both the deliberation and the decision. A decision-maker with a potential conflict of interest must disclose the potential conflict on the record, but then may participate in both the deliberation and the decision.

IV. TORT CLAIMS

A. **“Will I Be Sued?”** The simple answer is there is no guarantee you will not be sued and it is entirely possible that you could be sued. It does not take a meritorious claim in order to institute a suite. All it takes is a person who believes strongly that he or she has been harmed or shown disrespect, a filing fee and the hiring of an attorney (or suing pro se). The real issue is what is the likelihood of success of any lawsuit and what actions can be taken to minimize the success of that lawsuit.

B. **History of Governmental Immunity.** Historically the doctrine evolved that “the King can do no wrong.” Thus, when a person attempted to sue the State for a personal wrong, the State was held to be immune from tort liability. The initial concept was created because the King did not answer to people. Subsequently, the rule of law evolved into the premise that the people (through their elected officials as a whole) cannot be guilty of a tort.

C. **Oregon Tort Claims Act.**

1. Immunity Waived. Prior to 1967, governmental entities were absolutely immune from suit, except for breach of contract claims. With the passage of the Oregon Tort Claims Act of 1967, codified at ORS 30.260 to ORS 30.400, a “public body” became subject to suit for its torts and the torts of its officers, employees, and agents acting within the scope of their employment or duties. Why changed: horrible fact situations crying out for justice and insurance.

2. Actions Permitted. Pursuant to ORS 30.265(1), however, these actions are limited to those against the public body only, not against individuals. The liability of a public body is limited. See ORS 30.272.

3. Remaining Limitations on Suit.

- a. Notice within 6 months (“knew or should have known”).
- b. Suit filed within two years (“knew or should have known”).
- c. Cap on amount.
- d. Punitive damages may not be awarded against public bodies. ORS 30.269.

4. Immunities. Public bodies and the officers, employees and agents of public bodies, are immune from liability for: 1) workers’ compensation claims; 2) tax claims; 3) claims based upon the performance of discretionary

functions; 4) claims barred by statute; 5) riots; and, 6) injury or death claims when the public officer or employee is immune from liability; 7) acts or omissions done under apparent authority of law which is determined to be invalid or unconstitutional unless such act was done or omitted in bad faith or with malice. ORS 30.265(6).

5. Public Entity is Defendant. If an action or suit is filed against an officer, employee or agent of a public body, on appropriate motion, the public body is substituted as the **only** defendant. ORS 30.265(1).

6. Discretionary Functions. Discretionary functions are those in which the official utilizes some element of personal judgment in decision making. The official is granted immunity as long as he/she acts honestly and in good faith. In contrast, there is no tort immunity for "ministerial" functions, in which the official or employee is carrying out the orders of others or established duties of his or her office.

7. Defense Required. In addition to the specific immunities enumerated above, ORS 30.285(1) requires a municipality to defend, save harmless and indemnify its officials and tort actions arising out of performance of their duties. Public bodies may also procure insurance against liability or establish self-insurance funds to shield the entity and its employees from liability. ORS 30.282(1).

8. Defense not Required. A public body is not required to defend its employees for 1) actions outside the scope of official duty; 2) malfeasance; or 3) willful and wanton neglect of duty, as these are not within the scope of official duties. ORS 30.285(2).

9. What to Do If You are Sued.

a. Request Counsel. An official against whom a tort claim has been filed may submit a written request for counsel to the Planning Commission. The public body must then defend the official unless it decides that the alleged act or omission was outside the performance of duty or that there was malfeasance in office, or willful or wanton neglect of duty.

b. Defense/No Defense. If the City refuses defense and the official asserts and establishes entitlement to defense by the public, City must indemnify the official against liability and pay reasonable defense costs. If, alternatively, the City defends the official but the court establishes that the act or omission was outside performance of duty or involved malfeasance in office or willful or wanton neglect of duty, the judgment against the official must include payment to City of defense costs and reasonable attorney fees (ORS 30.287).

c. Cooperation Required. An official who is defended by City is required to cooperate with counsel on the defense. Failure to

cooperate is adequate grounds for City to reject defense of the claim.

10. Litigation Avoidance Checklist for Planning Commission Members.

ALLOW PEOPLE THEIR DIGNITY. Spending 20 extra minutes to show simple courtesy and fairness may save you hundreds of hours preparing for court and save City substantial dollars.

DON'T DENIGRATE THE LAW. Avoid pronouncements like "I don't care what the law says, this is the way we are going to do it." Example: "I know our attorney has informed us we can't do this - but we are going to do it anyway." LUBA reversed PC decision and quoted PC member remark.

DUTY TO ORGANIZATION. Remember that your primary duty is to the organization (i.e. the City of Springfield itself, not any particular person or political position).

THINK BEFORE ACTING. Do not make hasty decisions in moments of excitement or emotion. Make sure you have all the facts. Do not rely on only one side's version of a disputed issue. Demand sufficient information.

AVOID CONFLICTS. Avoid conflicts of interest by disclosing potential conflicts and refusing to make decisions on any matter in which you or your family have an interest.

ACT. After considering all the options, act in a responsible and reasonable manner. Remember failure to act is easier to prove than misjudgment.

COMPLY WITH OWN RULES. Do not cut corners. City must comply with their own ordinances and rules of procedure.

RECORD REVIEWS FOR NON-COMPLIANCE. In the event it is not possible to comply with an ordinance, make a record of the reasons.

V. DEFAMATION

A. **Defamation.** Liability for defamation is based on the unprivileged publication to a third person of a false and defamatory matter concerning a person that damages a person's reputation. A person is most commonly defamed through some form of verbal communication, however, an action for defamation may be based the publication of a political cartoon, the use of physical gestures, or other forms of non-verbal communication. A corporation, partnership, or other legal entity may be defamed.

B. **Reputation.** The suit in tort for defamation provides redress for injury to one's reputation. A defamatory communication is one that tends to subject the person to hatred, contempt, or ridicule, or tends to diminish the esteem, respect, good will or confidence in which the person is held by a substantial and respectable majority. It is the tendency for the words to have an adverse effect on a person's reputation that

makes them defamatory.

C. **Affirmative Defense.** There are affirmative defenses to a suit for defamation. These include Absolute Privilege and Conditional Privilege.

1. Privilege. Absolute Privilege is an occasion on which certain defamatory utterances are absolute and unqualifiedly privileged. Conditional Privilege is a qualified privileged.

2. Difference/Absolute/Conditional. The difference between absolute and qualified privilege lies in the effect of the motive and purpose of the defamer. The malice or malevolent purpose of the defamer is of no consequence if the occasion is absolutely privileged, but if the privilege is conditional only, proof of actual malice or ill-will makes the defendant liable.

3. Social Importance. The defenses of qualified and absolute privilege rest upon the same idea that conduct which otherwise would be actionable is to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation. If it is one of paramount importance, considerations of policy may require that the defendant's immunity for false statements be absolute, without regard to his/her purpose or motive, or the reasonableness of his conduct. If it has relatively less weight from a social point of view, the immunity may be qualified, and conditioned upon good motives and reasonable behavior. The defendant's belief in the truth of what he/she says, the purpose for which he/she says it, and the manner of publication, all of which are immaterial when no question of privilege is involved, may determine the issue when he enters the defense of such a conditional privilege.

4. Case Law. In Oregon we have two cases that provide illustration and guidance. Those cases are: *Norman L. Noble v. Wilbur E. Ternyik*, 273 Or. 39 (1975) and *Val Adamson v. Wallace Bonesteele Jr.*, 295 Or. 815 (1983).

a. In the *Noble v. Ternyik* case a defamation action was filed against Wilbur Ternyik as a Commissioner of the Port of Siuslaw. There was a Port Commission meeting to discuss using a registered brand to mark the port's logs. During the discussion Wilbur Ternyik remarked:

"The Port of Siuslaw should buy a log-branding device in order to stop that damn Norman Noble (plaintiff) from stealing any more logs."

The Oregon Supreme Court determined that Wilbur Ternyik's comment was absolutely privileged. The Oregon Supreme Court stated that 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. The Oregon Supreme Court stated that members of legislative bodies must either impart their

information for all to hear and endure a possible defamation action and ensuing judgment or remain mute and thereby not completely participate in the role to which they have been appointed or elected. The court, in finding that Mr. Ternyik had absolute privilege, opted for discussion and informed citizens.

b. In *Adamson v. Bonesteele*, Wallace Bonesteele was a member of the Salem City Council. During an interview with a reporter Bonesteele made the following statement about Val Adamson:

“If he wants to have a profitable business, he’ll follow the recommendations. But I don’t think he wants a profitable business. I don’t think he cares. His whole attitude absolutely defies good business judgment. I’ve tried to counsel him for two years on some business practices and it’s like talking to an eight year old.”

“He’s creating his own problems. I refuse to take any responsibility.”

“He’ll sit there and look you eyeball-to-eyeball and still not tell you the truth.”

Adamson sued Bonesteele alleging defamation. Bonesteele argued that he had an absolute privilege. The court found the absolute privilege extended only when made during a meeting when the Planning Commission was acting in its legislative capacity. Comments made to a reporter outside of the meeting are not afforded absolute privilege. The court found that absolute privilege does not protect a legislator or councilor during private or public discussion outside of his legislative function whether explaining his or her reasons for voting on past, pending or proposed legislation or who otherwise discusses legislation, or who engages in other activities incidentally related to legislative affairs but not a part of the legislative process itself.

VI. PUBLIC RECORDS & PUBLIC MEETINGS

A. **Overarching Policy.** Public Business Is Done in Public.

1. Public Records Law. “Every person has a right to inspect any record of a public body in this state” except as expressly provided in exceptions ORS 192.501 to 192.505. ORS 192.420.

2. Public Meetings Law. “All meetings of a governing body of a public body shall be open to the public, and all persons shall be permitted to attend any meeting except as provided by ORS 192.610 to 192.690. ORS 192.620.

B. **Public Records Law.** The definition of “public record” in ORS 192.410(4) and the policy statement in ORS 192.420 make it clear that the records law applies

broadly. A “public record” includes: “any writing that contains information relating to the conduct of the public’s business, including but not limited to court records, mortgages, and deed records, prepared, owned, used or retained by a public body regardless of physical form or characteristics.”

1. Emails. Public documents by definition include a Planning Commission member’s email to another Planning Commission member concerning Planning Commission business. It is very important for the Planning Commission to keep in mind that communications between yourselves, whether they be email or written communications, are most probably public documents.

2. Exemptions. Public records may not include staff reports or communications among staff, however, once a report comes to the Planning Commission it is a public record. There are some specific exemptions, that is documents that are public records that we do not need to disclose to the public, because of the confidentiality and our obligation to third parties to keep that information confidential. Examples: (1) personnel files, (2) information concerning litigation, (3) real estate negotiations.

C. **Public Meetings Law**. Public Meetings Law applies to all meetings of a governing body for which a quorum is required in order to make a decision or deliberate toward a decision on a matter. ORS 192.610(5), 192.630(1).

1. Requirements.

a. Notice. Public notice must be given of the time and place of meetings. This requirement applies to regular, special and emergency meetings. ORS 192.620. The public notice requirements apply to *any* “meeting” of a “governing body” subject to the law, including committees, subcommittees and advisory groups. The notice must be reasonably calculated to provide actual notice to the persons and the media that wish to be notified. Although the law does not require that every proposed item of business be described in the notice, the law requires a reasonable effort to inform the public and interested persons of the nature of the more important issues.

b. Minutes and Recordkeeping. The governing body must provide a sound, video, or digital recording or written minutes of its meeting. ORS 192.650(1).

2. Subject of Meetings and “Social Gatherings”. Even if a meeting is for the sole purpose of gathering information to serve as a basis for a subsequent decision or recommendation by the governing body, the meetings law will apply. Purely social gatherings of the members are not covered by Public Meetings Law as long as no deliberations or discussions of any matter of official decisions occur during the gathering. Members constituting a quorum must avoid any discussions of official business during such a gathering.

3. Public Meetings Via Email or Other Electronic Communication.

Public Meetings Law expressly recognizes that meetings may be conducted by telephonic conference calls or “other electronic communication.” ORS 192.670(1). Accordingly, notice and opportunity for public access must be provided when meetings are conducted by electronic means.

4. Serial Communications. Serial communications (i.e. like the game of “Telephone”) that involve a quorum of a public body have been found to violate the public meetings law. For that reason, it is best to avoid the “reply all” function when communicating by email with City staff, when all members of the PC have been copied on a particular email thread.

VII. LEGISLATIVE VERSUS QUASI-JUDICIAL PROCESSES

A. **Which process applies.** When the Planning Commission is considering a land use issue involving the adoption of City laws that regulate land uses, it uses the legislative process (creating laws). When the Planning Commission is considering applying existing land use regulations (approval criteria) to a specific set of facts, a zone change for example, it uses the quasi-judicial process (applying laws).

There is no State law defining the difference between legislative process and quasi-judicial process—the Land Use Board of Appeals (LUBA), the Court of Appeals and the Oregon Supreme Court have addressed the issue and provide the best available guidance to explain the difference between the legislative and quasi-judicial process. The quasi-judicial process is to be used if:

The process is bound to result in a decision. The decision is bound to apply to preexisting criteria to concrete facts, and the action is directed at a closely circumscribed factual situation or a relatively small number of persons. *Strawberry Hill 4-Wheelers v. Benton County Board of Commissioners*.

No one of the three factors is determinative. *ODOT v. Klamath County, LUBA*.

B. **Legislative Process.** The legislative process is less restrictive than the quasi-judicial process. The process of creating laws involves decision makers who do not sit as an impartial tribunal. The less restrictive nature of the legislative process allows ex-parte contacts to occur.

C. **Quasi-Judicial Process.** The quasi-judicial process is more prescribed because the decision makers sit as an impartial tribunal similar to a judge in a court.

1. Procedural Requirements. ORS 197.763 sets the requirements for noticing and conducting quasi-judicial public hearings. Springfield Development Code 5.2-100 complies with ORS 197.763 and codifies the requirements. ORS 197.763 and SDC 5.2-100 are attached for your reference. Key requirements include the following:

- a. An opportunity to be heard;
- b. An opportunity to present and rebut evidence;

- c. A right to an impartial tribunal;
- d. A right to findings of fact; and
- e. A right to a record of the proceedings.

2. Decision. The decision must apply the approval criteria to the facts. ORS 227.173(1). If the applicant demonstrates compliance with the criteria, the application must be approved even if the Planning Commission disagrees with the criteria, or believes that additional unadopted criteria should be applied. Conversely, if the applicant *fails* to demonstrate compliance with the applicable criteria, the Planning Commission must deny the application even if the Planning Commission believes the applicable criteria are unreasonable.

3. Findings. Findings explain why a decision is made. Findings ensure that applicable legal standards have been address to show that the decision complies with the applicable law. The findings must address all of the applicable criteria. Failure to make a required finding creates a void in the record and renders the order legally insufficient.

QUESTIONS?

Feel Free to Contact the City Attorney's Office. Questions or potential problems are better addressed proactively than retroactively.

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