

Oregon's Statewide Planning Program

Morrow County Planning Meeting



May 6, 2021

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Community Services Division Manager

A little Oregon background



- Planning Commissions came first! (and zoning authority, 1919)
- Oregon Land Use Act of 1973 (SB 100)
 - Concerns about farmland lost to urban development
 - Other concerns, “coastal condomania,” “sagebrush subdivisions,” “ravaging rampage of suburbia,” etc.





State and Local Responsibilities

Oregon Statewide Planning Program

State (LCDC, DLCD)

- Sets land use policy of statewide significance (goals and rules)
- Acknowledges city and county plans
- Helps enforce goals
- Reviews local government plan and zoning amendments
- Provides technical assistance




State and Local Responsibilities

Oregon Statewide
Planning Program

Cities and Counties

- Address local vision and needs
- Adopt and amend plans and codes in compliance with statewide goals
- Enforce codes and ordinances
- Make land use decisions



Statewide Planning Goals

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

“PROCESS” GOALS

➤ **Goal 1 – Citizen Involvement**

➤ **Goal 2 – Land Use Planning**



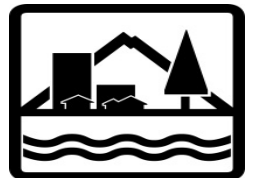
“RURAL” GOALS

- **GOAL 3 – AGRICULTURAL LANDS**
- **GOAL 4 – FOREST LANDS**



“URBAN” GOALS

- **GOAL 14 - URBANIZATION**
- **GOAL 10 – HOUSING**
- **GOAL 9 – ECONOMIC DEVELOPMENT**
- **GOAL 11 – PUBLIC FACILITIES**
- **GOAL 12 – TRANSPORTATION**
- **GOAL 8 - RECREATION**



“CONSTRAINTS” GOALS

- **GOAL 5 - Natural Resources, Scenic and Historic Areas, and Open Spaces**
- **GOAL 7 – Areas Subject to Natural Hazards**



Planning Commission Fundamentals

- Tools to be familiar with
- Roles
- Hearings – requirements, process
- Some best practices



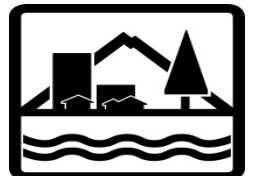
Planning Commission Tools

- **Planning Commission tools include:**
 - Comprehensive plan
 - Development code, ordinances and studies
 - Staff reports
 - Oregon Revised Statutes
 - Local rules of procedure, scripts
 - Training sessions, work sessions, and materials/resources
 - Teamwork – commission members, staff, attorney



Roles

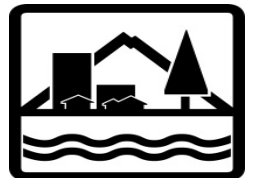
- **Planning Commission – quasi-judicial decision maker**
- **Planning staff – experts on plan and code**
 - Initial contact for applicant and public – provide information
 - Draft and present staff report and recommendations
 - Resource during public hearings (respond to questions, assist in process, prepare modified conditions, prepare findings)
- **Government Attorney – resource on legal issues, provide input on process, assist in developing conditions and findings**



What Commissioners Need and Expect

➤ From the Planning Staff:

- Well prepared and understandable staff reports that present the application, criteria, and options
- Ability to explain code language and how it is applied
- Deliver and understand input from departments and agencies
- Answer questions fully, accurately, objectively – or commit to get answers
- Provide guidance when needed and appropriate
- Always show respect to the Commission and public
- Identify any need for follow up – code changes, training, etc.



What Commissioners Need and Expect

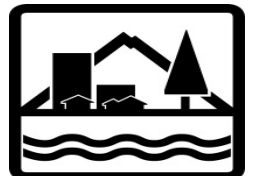
➤ From the City Attorney:

- Accurate legal advice
- Guidance on process – particularly conflicts, bias, continuances, etc.
- Resource to the chair to respond to issues as they arise
- Assistance maintaining order (and decorum)
- Identify and propose improvements through:
 - Training
 - Process/rule revisions
 - Language improvement in codes



What is Needed From Commissioners

- Know the plan, code, local rules of procedure
- Prepare fully for meetings – be present, read the packet, ask questions (in advance), suggest improvements
- Listen carefully to all – respect staff, applicant, audience, and fellow commissioners equally
- Preserve the public trust in the process
 - Declare fully conflicts, bias, site visits; make open decisions
- Understand the law that applies, including:
 - ORS 197.763 – Public Hearing Process
 - ORS 244.120 – Conflicts of Interest
 - ORS Chapter 192 – Oregon Public Meeting and Public Record Law



Hearing Procedures

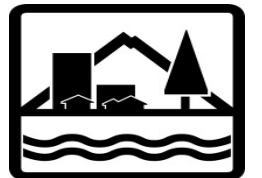
➤ Types:

- Legislative
- Quasi-Judicial

The differences:

Legislative involves the adoption of laws. Typically the Planning Commission recommends to the City Council. In a quasi-judicial process the Planning Commission applies existing law to a set of facts as an impartial tribunal.

Legislative is less restrictive and allows ex-parte contacts. The notice is prescribed in quasi-judicial and findings are required.



Legislative Process

- Less procedural restrictions apply
- Decision-makers sit as lawmakers
- Information used in making a decision may come from many sources (ex parte contact is allowed)
- Findings are less specific, but some are needed
- Adequate findings or accessible materials in the record must show applicable criteria were considered and applied



Quasi-Judicial Process

- Decision-makers sit as an impartial tribunal
- Articles 5 and 14 of the U.S. Constitution require due process
- Impartiality requires:
 - Treat all parties fairly
 - Allow all parties to know what the decision makers “know”
 - Ex parte contacts must be announced so all parties know what information was provided to the receiver, and



Quasi-Judicial Process

➤ Impartiality requires:

- Information considered by the decision maker should be factual
- The process allows information placed before the Planning Commission to be challenged
- To challenge information the parties need to know what has been submitted



Fasano Case in 1973 Established

- Parties to a quasi-judicial land use proceeding are entitled to:
 - An opportunity to be heard
 - Present and rebut evidence
 - An impartial tribunal
 - A decision based on the record
 - A decision supported by adequate findings



Elements of Due Process

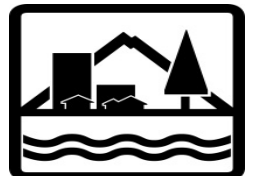
- Opportunity to present and rebut evidence
 - Every party to a quasi-judicial hearing has the right to:
 - Present evidence
 - Rebut evidence presented by other parties
 - The Planning Commission has the right to set time, place and manner on presentations
 - Create the order for presenters, set time limits, hold the record open
 - To rebut evidence a party must:
 - Know what evidence is in the record; review the evidence



The Record

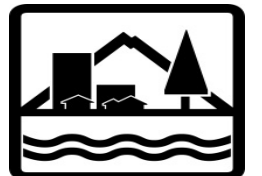
➤ The record includes:

- The written minutes of the hearing
- Tape or video of the hearing
- The decision including conditions of approval and findings
- Everything “placed before” the Planning Commission during the hearing
 - The application, studies, testimony of the applicant and its advisors, maps, photographs, drawings, etc.
 - The notice of hearing, staff report, comments from officials
 - Letters, emails, testimony, documents from public



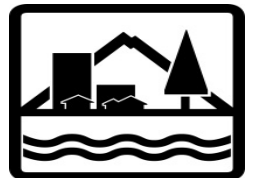
Procedural Items and Requirements

- Pay attention to ORS 197.763
 - Notice of Hearing – what is in it, when is it sent, who is it sent to
 - Staff report – what is in it, when is it available, who receives it
 - Documents submitted by the applicant in support of the application must be available to the public
 - Statement made at the commencement of the hearing providing direction on hearing conduct
 - Right to a continuance – automatic if requested before conclusion of the first evidentiary hearing on an application



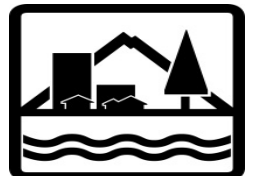
Scripts

- The script must be legally sufficient with all the required statutory language
- It should be easy for the chair to follow
- Chair might consider delegating responsibility for the “legal matters” if the attorney attends the hearing
- It must provide notice of the right to request a continuance or keep the record open before the conclusion of the first evidentiary hearing



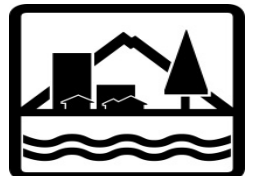
Elements of the Script

- Introduction and Opening Statement – identify application
- Hearing Procedure – including time limits if used
- Legal Matters – Burden of Proof, Criteria, Appeal Rights
- Testimony Order
- Staff Report and Presentation
- Presentation of the Applicant
- Public Testimony
- Rebuttal by the Applicant
- Address Request for Continuance – if any
- Questions of Staff
- Deliberations and Decision
- Final Comments Including Appeal Rights



Impartial Tribunal

- Parties to a quasi-judicial land use proceeding have a right to an “impartial tribunal” – the hearing body must be free of personal interest or bias.
- Members of the hearing body may have certain situations arise that challenge the ability of the hearing body to make an impartial decision.
- The situations arise when there are ex parte contact, site visits, conflicts of interest, and bias.
- Procedural requirements must be followed.



Ex Parte Contacts

➤ What are they?

- Contacts by a party on a fact in issue under circumstances which do not involve all parties to the proceedings
- All three underlined elements must be present for an ex parte contact to exist.
- Contacts may be oral or in writing.
- Ex parte communications should be discouraged in favor of the public hearing process.
- If ex parte contact occurs, action can be taken to address the issue: disclosure, make a record, continue without influence.



Ex Parte Contact – Planning Commission

- If an ex parte contact takes place, what should you do?
 - Disclose - put the matter on the record at the next hearing on the matter before any testimony is received and before any proceedings on the matter take place.
 - Describe the substance of the contact or communication.
 - Be sure the disclosure is noted in the record of the hearing.
 - The Commission should provide a right to comment on the statement of the communication.
 - Failure to make a disclosure of ex parte contact could result in a remand.



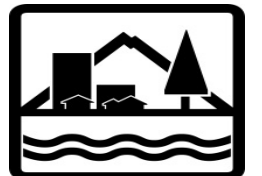
Site Visits

- During a site visit a commissioner may gain information outside the public hearing which may or may not otherwise be part of the record..
- Site visits are OK – if there is disclosure.
- What should a commissioner do if they make a site visit:
 - Make a disclosure as early as possible on the record to give other interested parties a chance to rebut the evidence, and
 - State on the record in detail what was observed, who was talked to, what was discussed, etc. during the site visit.



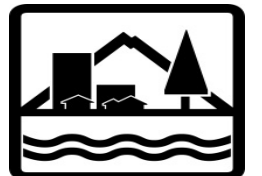
Conflict of Interest

- Potential Conflict of Interest – ORS 244.020(13)
- **Potential conflict**: You must declare but “may” participate in a decision, action or recommendation that “could” result in financial gain or detriment to
 - You
 - Your relative
 - Member of the household, or
 - Business with which you, your relative, or member of the household is associated



Conflict of Interest

- Actual Conflict of Interest – ORS 244.020(1)
- **Actual conflict**: You must declare and must not participate in a decision, action or recommendation that “would” result in financial gain or detriment to:
 - You
 - Your relative
 - Member of the household, or
 - Business with which you, your relative, or member of the household is associated.



Conflict of Interest - Potential

- What should you do if you have a potential conflict?
 - Publicly announce the potential conflict prior to participating in debate and voting on an issue – provide details
 - Announce the potential conflict when the chair calls for declarations before the hearing is opened, have it recorded
 - If the conflict is not apparent until the hearing has begun, ask to be recognized and make the disclosure as soon as possible
 - When there is a potential conflict, the commissioner can take part in the hearing. But, be concerned about appearance.
 - If there is more than one hearing on the matter – announce each time the matter is on the agenda.



Conflict of Interest - Actual

- What should you do if you have an actual conflict?
 - Publicly announce the conflict prior to participating in the hearing, and
 - Refrain from participating in a debate on the issue or from voting on the issue
 - Have the declaration go into the minutes of the hearing
 - Make the announcement at each meeting the matter is on the agenda
 - Best practice tip: leave the hearing room after making the declaration. You can return for the next agenda item.



Exception

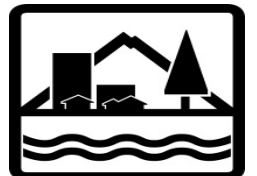
- ORS 244.120(B) provides an exception if an official's vote is necessary to meet a minimum number of votes to take official action.
- The exception is limited to “be eligible to vote, but not to participate as a public official in any discussion or debate on the issue out of which the actual conflict arises.”
- Be cautious.



Personal Bias

- Bias is when a commissioner cannot render fair judgment in a matter because of:
 - An acquaintance or relationship
 - With someone or something in the land use case.

Personal bias differs from conflict of interest because there is no potential for financial gain only the existence of a relationship.



Bias: What to Do

- **When bias exists a commissioner should:**
 - Disclose the nature of the bias
 - State whether or not in their opinion it requires disqualification

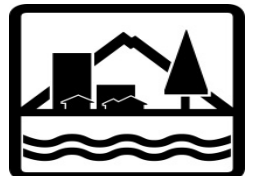
Simple bias does not require disqualification, but if you cannot be fair and impartial in the matter, you should step down.

Best practice: when there is a sufficient quorum to conduct business without participation of a commissioner who has been challenged for bias, they should consider recusal.



Burden of Proof

- The applicant (proponent) has the burden of proving that all elements necessary to grant the proposed application are met. All applicable criteria must be met.
- The greater the change proposed, the greater the burden.
- The burden is met by submitting a complete application with substantial evidence showing compliance with each applicable criterion.



Burden of Proof - continued

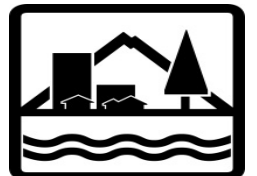
- The applicant should respond to all issues raised by opponents by pointing to evidence in the record or bringing forward more evidence.
- Applicants should not rely on staff presentations alone to meet the burden.
- If an applicant provides new information at a hearing, the public must be given a chance to rebut it.



Continuance and Keeping the Record Open

A continuance is mandatory if requested by any participant prior to the closure of the first evidentiary hearing. Or, someone can request the record be left open to present additional information.

If there is a request: continue the hearing by scheduling a date to finish the hearing (a continuance) or leave the record open for at least seven days for additional written evidence, argument or testimony. Consider the 120 Day Rule. Unless requested by the applicant, the clock rolls.



Some Issues With Continuances, etc.

- **A continuance might raise issues of:**
 - **At what point in the hearing will you pick up the hearing? Who will be able to speak at the next hearing? Be clear when you grant the continuance.**
 - **If the record is left open to accept additional information, how will it be handled? A possible scenario:**
 - **Seven days to submit additional written information (including applicant)**
 - **Seven days for rebuttal opportunity to address new information submitted into the record – by any party**
 - **The applicant has the right to the final word, limited to addressing issues raised by opponents.**



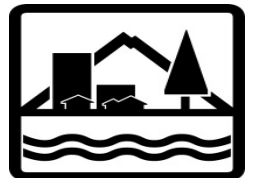
Evidence in Land Use Cases

- Evidence in the record must be the basis of the Planning Commission decision.
- Evidence is defined in ORS 197.763(9)(b) as “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.”
- Evidence rules are not as strict in land use settings.



Evidence in Land Use Cases

- **Administrative law standards apply in land use cases:**
 - Is the evidence the kind a reasonable person would rely on in the conduct of their own affairs?
 - The Planning Commission has some discretion to determine whether evidence should be accepted.
 - During deliberation, the Planning Commission can consider which evidence is relevant, reliable, trustworthy, strongest.
 - Substantial evidence – a decision must be based on reliable evidence in the record and the quantity must be substantial.



Substantial Evidence

- Evidence may be disputed. It does not have to be “uncontroverted”.
- Evidence may not be “voluminous”.
- There may be inconsistencies in evidence presented.
- The Planning Commission should determine whether the evidence in support of the decision, when viewed in light of contrary evidence in the record, was sufficient that a reasonable person could rely on it.



Substantial Evidence on Appeal

- On appeal, the standard is that a reviewing body will not disturb a decision based on substantial evidence even if there is conflicting evidence in the record.
- The findings must be sufficient to show why certain evidence was believed over other evidence in the record.



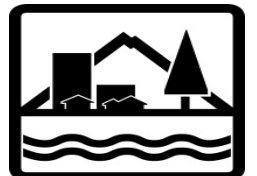
Admitting Evidence

- There may be doubt whether evidence is reliable or relevant. Examples – hearsay, signed petitions
- Best practice: accept the evidence conditionally and allow rebuttal. If there is objection to evidence, the Planning Commission can accept the evidence and decide later in the hearing (before making a decision on the application) whether to admit the evidence into the record. Ask the city attorney for assistance.



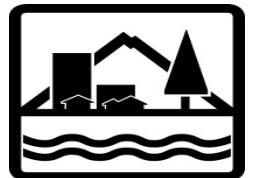
Raise It Or Waive It

- The burden is on the local government to properly issue notice as required by ORS 197.763.
- By complying with the requirement, a local government benefits because participants must raise issues during local proceedings. Any issues not raised are waived if the matter is appealed to LUBA.
- The benefit to a local government is less appeals are remanded by the Land Use Board of Appeals (LUBA) to address new issues raised for the first time at LUBA.



Findings

- A land use decision must be supported by findings that are based on the record.
- Essential requirements for findings:
 - Based on information found in the record
 - They are facts not conclusions
 - They are relevant to and address all relevant criteria for the decision
- Findings are significant to explain why the Commission decided a matter and are often the means by which an appeal is avoided or won.



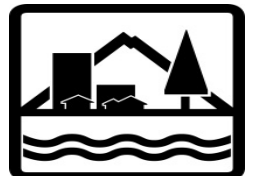
Findings

- **When an application is approved:**
 - The applicant typically introduced the majority of evidence
 - The staff interpreted the evidence against the criteria and states whether it believes the evidence shows criteria is met
 - Opponent testimony has been responded to with evidence
 - Every relevant approval criterion is addressed
- **When an application is denied:**
 - The staff provides code interpretation, data and suggested findings recommending denial, or
 - The staff recommended approval, but the Commission determines that the application has not met all approval criteria and votes to deny. The Commission must state on the record the reason for denial, supported by evidence in the record. Staff can assist.



The Final Order

- The final order must be legally sufficient once a decision is made.
- For approval of a land use application – all criteria must be addressed in the decision.
- For a denial of an application – findings are required but a failure to meet any relevant approval criteria is enough to support denial. Findings only need to address the criterion that is not met.



The 120 Day Rule

- **ORS 227.178 Final action on certain applications required within 120 days; procedure; exceptions; refund of fees.**
- **Extensions can be granted by the applicant through a written request.**
- **What happens if a city does not act in 120 days?**
 - City loses jurisdiction to make a decision
 - A court may order approval without detailed conditions
 - A partial refund may be ordered





QUIZ TIME

QUESTION # 1

TRUE OR FALSE: A PUBLIC SEWER SYSTEM CAN BE EXTENDED OUTSIDE OF AN URBAN GROWTH BOUNDARY



QUIZ TIME

QUESTION # 2

WHAT IS THE MINIMUM PARCEL SIZE FOR A NEWLY CREATED LOT IN EFU ZONED AREA? (with limited exceptions)

- a. 80 acres**
- b. 80 acres, 160 acres for rangeland east of Cascades**
- c. 40 acres, 80 acres for rangeland east of Cascades**
- d. 10 acres**

QUIZ TIME

QUESTION # 3

A PLANNING COMMISSION IS CONSIDERING A PROPOSAL TO AMEND THE ZONING CODE TO REDUCE PROPERTY LINE SETBACKS FOR NEW RURAL RESIDENTIAL DWELLINGS THROUGHOUT THE COUNTY. A COMMISSIONER MAY:

- a. Not talk to anyone in the city about this issue before the public hearing.**
- b. Not talk to any owner of a residential lot in the city about the issue before the public hearing**
- c. Talk to any owner of a residential lot in the city about the issue before the hearing, but disclose the discussion at the beginning of the public hearing.**
- d. Talk to anyone in the city about the issue before the public hearing, no disclosure necessary.**



QUIZ TIME

QUESTION # 4

TRUE OR FALSE: A Planning Commission has seven members. Four of them can meet before the meeting to look over the site of a proposed conditional use permit if they disclose the meeting at the hearing, state their observations, and allow hearing participants to quiz them on their observations.



QUIZ TIME

QUESTION # 5

The Planning Commission is holding an initial hearing on a conditional use permit on the 116th day of the 120 day clock. An opponent of the project requests a minimum 7-day continuance. The Commission should:

- a. Ask the applicant if they are willing to grant a waiver of the 120-day timeline and only grant the continuance if the applicant says “yes.”**
- b. Grant the continuance regardless of the applicant’s desires.**
- c. Chastise staff for scheduling the hearing when they did.**



QUIZ TIME

QUESTION # 6

**A LOCAL GOVERNMENT
MUST SUBMIT TO DLCD,
AT LEAST 35 DAYS
BEFORE THE FIRST
HEARING:**

- a. Conditional use permit applications received**
- b. Proposed comprehensive plan and land use regulation amendments**
- c. Subdivision applications received**
- d. All of the above**

Planning in Hyderabad, India



ONE LAST TIP: WHEN YOU ARE TRAVELING, THINK ABOUT PLANNING ISSUES WHERE YOU ARE VISITING – LOOK AROUND!

QUESTIONS?

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