City of Sherwood
PLANNING COMMISSION
Sherwood City Hall
22560 SW Pine Street
Sherwood, OR 97140
March 13, 2012 – 7PM

Business meeting – 7:00 PM

1. **Call to Order/Roll Call**
2. **Agenda Review**
3. **Consent Agenda:**
4. **Council Liaison Announcements**
5. **Staff Announcements**
6. **Community Comments**
7. **Old Business**

a. Continued Public Hearing PA11-07- Temporary and Portable Signs(Code Clean Up) – The Planning Commission will consider proposed revisions to the Sherwood Zoning and Community Development Code. The proposed changes will update the "Signs" Chapter (16.102). Specifically, the proposed changes include housekeeping edits to ensure that the SZCDC is content neutral, a provision that would allow projecting signs beneath awnings and porches that are oriented to pedestrians, and a variety of amendments that will speak to the size, height, and placement of temporary and portable signs within the City of Sherwood. The Planning Commission will make a recommendation to the City Council who will make the ultimate decision.

8. **New Business**

9. **Adjourn**

Work Session – following business meeting

1. **Planning Commissioner training on legal issues and obstacles**

Next Meeting: March 27, 2012

Meeting documents may be found on the City of Sherwood website or by contacting the planning staff at 503-925-2308.

City of Sherwood
Oregon

Home of the Tualatin River National Wildlife Refuge

MEMORANDUM

City of Sherwood
22560 SW Pine St.
Sherwood, OR 97140
Tel 503-625-5522
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www.sherwoodoregon.gov

2009 Top Ten Selection

2007 18th Best Place to Live

Sherwood
2·0·0·6
All-America City Finalist

DATE: March 5, 2012

TO: Sherwood City Planning Commission

FROM: Planning Department

SUBJECT: Chapters 16.100 and 16.102 Signs

The purpose of this memorandum is to outline the revisions that have been made to the proposed language for the regulation of signs that were discussed in your hearing on February 28, 2012. The revised language is attached to this memorandum for your consideration.

In the public hearing of PA 11-07, the commission identified eight items that they wanted staff to consider and revise based on the verbal and written testimony that was presented to the Planning Commission. Each of those items is identified below along with a brief explanation of what revisions staff made to address the concerns. The order of the item discussed is based upon where it falls within the document.

Testimony from RJ Claus suggested that the "nameplate" language, and language related to "Memorial or tablets, names of buildings, and date of erection…" found in section 16.100.010.C.1.(b and e), along with other provisions of the code were not time, place, manner, and content neutral.

Staff consulted the City Attorney, amended section 16.100.010.C.1. to remove the referenced language, and replace it with a purely dimensional standard that does not force staff to rely on the content of the sign in order to regulate it. The proposed size of the signage is four (4) square feet. The City attorney suggested other amendments throughout the code, including removing all language related to off-premise signage, and other minor language changes to ensure that the code is time, place, manner, and content neutral.

The City Attorney proposed amendments to the sign code language that removes any mention or regulation of Off-premise signage.

Staff fully supports the proposed amendments and has incorporated them into the revised language where suggested.

Written and verbal testimony from Matt Grady, Planner and Project Manager for Gramor Development requested that staff consider clarifying the difference between the projecting sign and signs that could be potentially placed beneath either a porch or awning, remove language that requires projecting signs to be spaced at least twenty (20) feet from one another, and to increase the allowed size to six (6) square feet as opposed to four (4).

Staff supports the proposed amendments from Mr. Grady and has incorporated them into the revised language consistent with the Planning Commission's direction on February 28, 2012.

Gary Surgeon and Cindy Sturm, both of whom are commercial brokers, along with Jeffery Zimmel of Mercury Development raised concerns about the proposed size limitations on Temporary signs. Their specific concern was directed at the proposed limitation of six (6) feet by (4) feet for temporary signs in all zones except the VLDR, LDR, and MDRL designations. They proposed that the limitation be increased to eight (8) feet by four (4) feet and a total sign face limitation of thirty two (32) square feet as opposed to the twenty four (24) square feet that staff initially recommended.

After discussing the matter further with Mr. Surgeon, it came to light that the majority of commercial brokers buy their signs from a select group of companies and would be comfortable with a limitation of eight (8) feet by four (4) feet, but that the sign would need some clearance from the ground to ensure that the sign was not sitting directly on the ground. Since the signs are typically mounted onto posts, the height limitation would need to be increased by ½ a foot to keep the sign off of the ground, making the effective height of the sign eight and one half (8 ½) feet. Staff has incorporated the proposed amendments to the language for the overall size, but maintains the limitation of the sign face to thirty two (32) square feet.

Daryl Winand, Government Affairs Specialist for the Portland Metro Association of Realtors (PMAR) provided written testimony that opposed removal of the weekday and weekend sign exemptions for portable signs that currently exists in the code, and in turn, the requirement for permits for any signs placed in the right-of-way. Mr. Winand also suggested revised language to the requirement that adjacent homeowners be notified when temporary or portable signs are placed in the front of their home on the abutting right of way.

Consistent with the Planning Commission's discussion, the only change that was made with regard to these three items was the amended language for notification. It was determined that discussion of the permitting process related to signs within the right-of-way could be further discussed with the Council once the language was agreed upon. Most commissioners agreed that retaining the existing language exempting signs in the right-of-way on Tuesdays, and Thursday afternoons through Sunday was confusing to the public, and made enforcement of the sign code ineffective.

Charles Jagow, Trustee for St. Paul Lutheran Church provided written testimony seeking relief from the requirements that banner signs be attached to a building, fence, or, wall, and would not be allowed within the right-of-way. Mr. Jagows' concerns are based on the fact that the church relies on banner signs to advertise its services to the community, and relies on the current location of its existing banner signs because of the realignment of Roy Rogers Road, and the public landscaping within the right-of-way. Mr. Jagow also objects to the limitation of three (3) banner signs in any one calendar year.

Since the existing banner signs have not been permitted by either the County or the City, and neither entity allows banner signs within the public right-of-way, the church would need to petition the County to amend their rules for signs within the public right-of-way, and/or allow the City to permit them within the right-of-way. The City would then need to amend its language to allow banner signs within the right-of-way. Staff cannot think of any other solution to this situation short of favoring one property owner over others. Staff has, at the Planning Commissions' direction, proposed an increase in the allowed occurrences of banner signs from three (3) to six (6) consistent with Mr. Jagows' written testimony.

Finally, it should be noted that the spacing limitation for portable signs placed on private property were previously removed, so it would not be a problem for a property owner to have four signs on their property regardless of the amount of frontage they own.

Chapter 16.100

PERMANENT SIGNS*

Sections:

* Editor's Note: Some sections may not contain a history.

16.100.010 Common Regulations

A. Sign Permits

1. Except as otherwise provided in this Section and in Chapter 16.102, a person may not construct, install, structurally alter or relocate any sign without first obtaining an administrative sign permit from the City as required by Chapter 16.72, including payment of the fee required by Section 16.74.010. In addition, all permitted illuminated signs are subject to the provisions of the State Electrical Code and any applicable permit fees. (Ord. 2009-002, § 2, 4-21-2009; Ord. 2005-002 § 5; 2002-1132)

B. Sign Application.

1. Application for a sign permit shall be made upon forms provided by the City and shall include the following information:

    a. Name, address and telephone number of the applicant. Name, address, telephone number and signature of the property owner.

    b. Location of the building structure, lot or parcel to which or upon which the sign is to be attached or erected.

    c. A scaled drawing showing sign design including colors, dimensions, sign size, height above ground, method of attachment, construction and materials, type, source and intensity of illumination and the relationship to any building to which the sign will be attached.

    d. A plot plan drawn to scale indicating the location of all buildings, property lines, existing signs, street lights, easements, and overhead power lines on the same premises.

    e. Name, address and telephone number of the person or firm who will erect, construct and maintain the sign. (Ord. 2009-002, § 2, 4-21-2009; Ord. 2004-006 § 3; Ord. 86-851)

C. Exceptions

1. The following signs do not require a permanent sign permit but shall conform to all other applicable provisions of this Chapter:

   a. Traffic signs installed per the Manual of Uniform Traffic Control Devices and other federal, state and local traffic sign regulations.

   ~~b. Nameplates not exceeding one (1) square foot in area.~~

   ~~c.~~b. Changes to the copy of a legally erected, painted or printed advertising sign, theater marquee or similar sign specifically designed for the use of replaceable copy that does not alter the dimensions of the sign.

   ~~d.~~c. On-site painting, repainting, cleaning and normal maintenance and repair of a sign.

   ~~e.~~d. ~~Memorial~~ A sign~~s or tablets, names of buildings and date of erection~~ not exceeding four (4) square feet in size when cut into any masonry surface or when constructed of bronze or other noncombustible materials.

   ~~f.~~e. A sign that is accessory to a construction site and construction activities that does not exceed thirty-two (32) square feet in area, provided that such sign is removed within thirty (30) days from date of issuance of the final occupancy permit or within two (2) years, whichever is less.

   ~~g.~~f. Portable/temporary signs allowed per Chapter 16.102.

   ~~h.~~g. Public utility signs and other signs required by law.

   ~~i.~~h. Signs on private property three (3) square feet or less per sign face and under three (3) feet tall when freestanding and installed to be readable on private property. (Ord. 2009-002, § 2, 4-21-2009; Ord. 2002-1132 §3; Ord. 86-851)

D. Violations

1. The City may order the removal of any sign erected or maintained in violation of the provisions of this Chapter. If the City orders the removal of a sign under this Section, the City shall give ninety (90) days written notice to the owner of the sign or, if the owner of the sign cannot be notified, to the owner of the building, structure or premises on which such sign is located, to remove the sign or to bring it into compliance. After ninety (90) days the City may remove the sign at cost to the owner of the building, structure or premises. All costs incurred by the City will be a lien against the land or premises on which the sign is located and may be collected or foreclosed in the same manner as ~~similar liens~~an assessment lien. (Ord. 2009-002, § 2, 4-21-2009; Ord. 86-851 §3)

E. Nonconforming Signs

1. Signs that do not conform to the provisions of this Chapter are regarded as non-

conforming signs and shall be brought into compliance with this Code's standards.

2. Except as exempted in subsection four (4) below, a nonconforming sign in existence on the effective date of Ordinance 2005-002, shall be brought into compliance within five (5) years of the effective date of Ordinance 2005-002. A nonconforming sign erected after the effective date of Ordinance 2005-002 or made non-conforming by subsequent sign ordinance amendments, shall be brought into compliance within five (5) years of the issuance of a building permit to construct the sign or adoption of the ordinance creating the non-conformity. A nonconforming sign that is not brought into compliance within five (5) years shall be removed at the expense of the sign owner or, at the City's discretion, the owner of the property upon which it is located.

3. Except as exempted in subsection 4 below, a nonconforming sign that is structurally altered, relocated or replaced shall immediately be brought into compliance.

4. A sign that is forty five (45) feet tall or less and that is three hundred (300) square feet or less in size is exempt from the requirement to come into compliance within five (5) years and may remain until: a.) structurally altered, relocated or replaced, or b.) until such time as the property on which it is located goes through a major re-development as determined by the Commission as part of a Type IV land use application. (Ord. 2009-002, § 2, 4-21-2009; Ord. 2005-002 § 5; 2004-006)

F. Abandoned Signs

A person who owns or leases a sign shall remove the sign when the business advertised is discontinued or moves. The City shall give the owner of the building, structure or premises upon which an abandoned sign is located ninety (90) days written notice to remove the sign. After ninety (90) days the City may remove the sign at cost to the owner of the building, structure or premises. All costs incurred by the City may be a lien against the land or premises on which such sign is located and may be collected or foreclosed in the same manner as similar liens. (Ord. 2009-002, § 2, 4-21-2009; Ord. 86-851, § 3)

G. Reserved (Ord. 2009-002, § 2, 4-21-2009; Ord. 86-851, § 3)

H. Construction and Maintenance

Except as otherwise provided in this Code, the construction of all signs or sign structures shall conform to applicable provisions of the Uniform Building Code. All signs, supports, braces, guys and anchors and sign sites shall be kept in good repair and maintained in a clean, safe condition. (Ord. 86-851, § 3)

I. Definitions

1. Animated Signs: Signs that are animated by a person or animal using, carrying, or wearing a sign.

2. Area, Sign Face: The area of the sign shall be measured as follows if the sign is composed of one or more individual cabinets or sides:

    a. The area around and enclosing the perimeter of each cabinet, sign face or module shall be summed and then totaled to determine total area. The perimeter of measurable area shall include all written advertising copy, symbols or logos.

    b. If the sign is composed of more than two (2) sign cabinets, sign faces, or modules, the area enclosing the entire perimeter of all cabinets and/or modules within a single, continuous geometric figure shall be the area of the sign.

3. Awning or Canopy Sign: A sign attached ~~or applied to a~~below a building awning, porch, canopy, or other roof-like structure and limited to six (6) square feet.

4. Banner Sign: Signs made of lightweight fabric or other non-rigid material characteristically supported by two (2) or more points, and hung only on a permanent structure such as a building, fence, or wall.

5. Commercial Center: Any lot, or combination of lots legally bound together by a deed restriction, restrictive covenant or other recorded document, having at least two (2) but no more than three (3) legally permitted businesses on the site.

6. Commercial Plaza: Any lot, or combination of lots legally bound together by a deed restriction, restrictive covenant or other recorded document, having four (4) or more legally permitted businesses on the site. ~~Any legally permitted off-premise sign on the site must comply with the provisions of this Chapter.~~

7. Electronic Message Signs: Consistent with 16.100.020.E.and F., electronic message signs may not change more than once every thirty (30) seconds. In addition, the change may not involve movement or flashing. Electronic message signs are limited to no more than thirty-five (35) percent of the total allowable sign area per sign face. (Ord. 2004-006 § 3) (Ord. No. 2009-003, § 2, 2-17-2009)

8. Flag sign: A sign constructed of lightweight material designed to wave or move in the wind to attract attention to a particular location. For the purposes of this code an example would be a vertical banner. Flag signs are sometimes referred to as teardrop or feather banners.

9. Free-Standing Signs:

    a. Monument Sign: A sign constructed so that it is erected on grade or set into a hillside. If the monument sign is supported by poles, the sign shall extend to cover the support poles to within four (4) inches of the grade. Each free-standing monument sign shall have no more than two (2) faces.

    b. Column Sign: A sign supported by two square columns covered by wood, brick,

metal or stone with a minimum width of twenty-four (24) inches or a single square column with a minimum width of thirty-six (36) inches.

c. Pole Sign: A free-standing sign mounted on one (1) vertical support less than thirty-six (36) inches wide.

10. Mural – An image located on the side of a wall that is~~, deemed to have artistic merit as~~ commissioned and/or approved by the City Council via resolution.

~~11. Off-Premise Sign: A sign placed at a location other than on the lot or property where the business or event being advertised or otherwise promoted is located.~~

~~12.~~11. Over-Right-of-Way Banner Sign: A banner sign, usually associated with a community-wide event, placed over a public right of way for a limited period of time.

~~13.~~12. Permanent Residential Development Sign: Any sign erected in association with a single-family attached, single-family detached, duplex or townhome subdivision or Planned Unit Development (PUD). (Ord. 2005-002 § 5; 2004-006)

~~14.~~13. Portable A-Frame Sign: A double-faced portable sign with an A-shaped frame, composed of two (2) sign boards attached at the top and separated at the bottom, and not supported by a structure in the ground.

~~15.~~14. Portable Sign: Small movable signs used for a temporary period of time. Portable signs include stand-alone signs, not attached to a building or any other permanent structure. Examples include A-frame signs, political signs, real estate open house signs, and other similar signage.

~~16.~~15. Projecting Sign: A projecting sign is a sign which projects from and is supported by a wall or parapet of a building with the display surface of the sign in a plane that is generally perpendicular to the wall.

~~17.~~16. Roof Signs: Signs erected in or directly above a roof or parapet of a building or structure.

~~18.~~17. Rotating or Revolving Signs: Signs that rotate or turn in motion by electrical or mechanical means in a circular pattern

~~19.~~18. Single Business Site: Any lot, or combination of lots legally bound together by a deed restriction, restrictive covenant or any other recorded document, having a single legally permitted business on the site.

~~20.~~19. Snipe Sign: Any sign of any size, made of any material, including paper, cardboard, wood and metal, when such sign is tacked, nailed, posted, pasted, glued, or otherwise attached to trees, poles, fences or other objects.~~, and the advertising matter appearing thereon is not applicable to the premises upon which said sign is located.~~

~~21.~~20. Temporary Sign: Signs that are firmly affixed to a temporary structure that is placed into the ground and designed to be temporary. Characteristics of a temporary sign include signs constructed of a rigid material attached to wood or metal posts which do not require permanent footings. Examples of temporary signs include, but are not limited to residential and commercial real estate signs.

~~22.~~21. Vehicle Sign: A sign that is attached to a vehicle, on or above the vehicle that is parked in a location for the primary purpose of advertising.

~~23.~~22. Wall Sign: A sign attached to, erected against or painted on a wall of a building.

16.100.020 Prohibited Signs

A. Unsafe or Unmaintained Signs

All signs and sign structures must be constructed, erected and maintained to withstand the wind, seismic and other loads as specified in the Uniform Building Code. No sign shall be constructed, erected or maintained in violation of the maintenance provisions of this Chapter. (Ord. 86-851, § 3)

B. Signs on Streets

No sign shall substantially obstruct free and clear vision along streets or by reason of the position, shape or color, may interfere with, obstruct the view of, or be confused with any authorized traffic signal or device. No sign shall use the words "stop", "look", "danger", or any other similar word, phrase, symbol or character that interferes with or misleads motorists, pedestrians or bicyclists. (Ord. 86-851, § 3)

C. Obstructing Signs

No sign or sign structure shall be located or constructed so that it obstructs access to any fire escape, exit doorway or other means of egress from a building. No sign or supporting structure shall cover, wholly or partially, any window or doorway in any manner that will substantially limit access to the building in case of fire. (Ord. 86-851, § 3)

D. Rotating or Revolving Signs

Rotating or revolving signs are prohibited. (Ord. 86-851, § 3)

E. Illuminated Signs

Flashing signs, exposed reflective type bulbs, strobe lights, rotary beacons, par spots, zip lights and similar devices are prohibited. No exposed incandescent lamp which exceeds twenty-five (25) watts shall be used on the exterior surface of any sign so as to expose the face of such bulb or lamp to a public street. All permitted signs shall bear an approved

Underwriters Laboratory label or equivalent third party product safety testing and certification organization. (Ord. 86851 § 3)

F. Changing Image Signs

Any sign that, through the use of moving structural elements, flashing or sequential lights, lighting elements, or other automated method, results~~ing~~ in movement, the appearance of movement or change of sign image or message ~~are~~ is prohibited. Changing image signs do not include otherwise static signs where illumination is turned off and back on at a maximum of once every thirty (30) seconds and such change does not involve movement or flashing. (Ord. 2003-1153, § 1)

G. Pole Signs, over six (6) feet in height (Ord. 2004-006 § 3)

H. Signs on Vacant Land

Any sign on unimproved property, unless allowed as a portable or temporary sign under Chapter 16.102 ~~shall be~~is prohibited. (Ord. 2004-006 § 3)

I. Permanent Residential Development Signs (Ord. 2005-002 § 5; 2004-006)

J. Roof Signs (Ord. 2004-006 § 3) (Ord. No. 2009-003, § 2, 2-17-2009)

16.100.030 Sign Regulations By Zone

A. Residential Zones

No permanent sign requiring a permit shall be allowed in residential zones except for the following:

1. Public/Semi-Public Uses

For churches, schools and other public uses located within a residential or institutional public zone:

a. One (1) wall sign not exceeding thirty-six (36) square feet shall be permitted on a maximum of two (2) building elevations. Wall signs must be attached flat against the building face.

b. One (1) free-standing sign per street frontage not exceeding thirty-six (36) square feet per sign face shall be permitted. A minimum setback of fifteen (15) feet from property lines adjacent to public streets is required. The maximum height of any portion of a free-standing sign shall be limited to six (6) feet from ground level at its base.

2. Multi-Family Development Signs

a. One (1) non-illuminated free-standing sign per street frontage not exceeding thirty-six (36) square feet per sign face shall be permitted, the maximum height of any portion of a free-standing sign shall be limited to six (6) feet from ground level at its base. (Ord. 2005-002 § 5; 2004-006)

3. Non-Residential Signs

a. One (1) monument sign not more than sixteen (16) square feet in area identifying a permitted use in a residential zone shall be allowed. (Ord. 2005-002 § 5; 2004-006; 2002-1132)

B. Commercial Zones

~~No~~ A permanent sign ~~requiring~~ that requires a sign permit ~~shall be~~is not allowed in a commercial zone~~s~~ except for the following:

1. Free-Standing Signs

a. Number Permitted: Except as otherwise provided in (1-3) below, one (1) multi-faced, free-standing sign. ~~designating the principal goods or services available on the premises shall be permitted per lot. Any off-premise free-standing sign legally located on a site shall be considered the sole free-standing sign allowed on the site and shall comply with the provisions of this Chapter.~~

(1) Where the total street frontage exceeds three-hundred (300) feet in length, one (1) additional free-standing sign is permitted. Except as otherwise permitted in (2) or (3) below, no more than one (1) free-standing sign per street frontage shall be permitted. Where two (2) or more signs are allowed due to multiple frontages, each sign shall be oriented to face a different direction or street frontage.

(2) One (1) additional free-standing monument sign may be provided for fueling stations. ~~to provide required pricing information.~~

(3) A Commercial Center or Commercial Plaza with at least two (2) stand-alone businesses may have one (1) additional free-standing sign provided the site has more than three hundred (300) feet of frontage

b. Height Limit: The maximum sign height shall not exceed six (6) feet in all commercial zones except that in the locations identified in (1-5) below, the height, for no more than one (1) sign per single business site, commercial center or plaza, may be increased to no more than twenty (20) feet to allow for the construction of a column sign only. The exception locations are identified as:

(1) On or within one hundred (100) feet of Pacific Highway,

(2) Tualatin-Sherwood Road between 99W and SW Olds Place,

(3) Roy Rogers Road between 99W and Borchers

(4) Sherwood Boulevard between 99W and Century Boulevard, and

(5) Edy Road between 99W and Borchers.

The height of the sign shall be measured from the average grade of the building footprint located on site to the highest point of the sign. For sites with more than one (1) building, the average grade of the building closest to the location of the sign shall be used.

c. Clearance: Signs are prohibited over a driveway or parking area.

d. Area: The maximum sign area for all commercial zones shall not exceed thirty-six (36) square feet per sign face with a maximum of two (2) sign faces permitted except that in those areas identified in 16.100.030.B.1.b.1-5, the sign area for one (1) sign may be increased up to one hundred (100) square feet for a commercial center or up to one hundred fifty (150) square feet for a commercial plaza.

e. Location: No free-standing sign or any portion of any free-standing sign shall be located within a public right-of-way. Free-standing signs must comply with the Clear Vision Area requirements of Section 16.58.010.

~~f. Off-Premise Signs: Sign area will be calculated as part of the permitting business's total square footage requirements as described in subsection (1)(d) above. Any off-premise free-standing sign legally located on a single business site shall be considered the sole free-standing sign allowed on the site and shall comply with the provisions of this Chapter.~~

~~(1) All off-premise signs oriented to be viewed from State Highway 99W shall be subject to the standards and requirements of the Oregon Administrative Rules and Oregon Revised Statutes administered and enforced by the Oregon Department of Transportation (ODOT). Where there is a conflict between the standards or requirements of the City and the State, the more restrictive standards or requirements shall apply.~~

2. Wall Signs

a. Wall signs in combination with projecting signs shall not exceed twenty percent (20%) of the gross area face of the building to which the sign is attached. Signs placed on or within one (1) foot of display windows and designed to be viewed from the exterior of the building shall be included in determining the amount of signage. A minimum of thirty (30) square feet is guaranteed and the maximum

shall be two-hundred fifty (250) square feet. Wall signs may not project more than one and one-half (1 1/2) feet from the wall to which they are attached.

3. Projecting Signs

a. Projecting signs supported by a wall of a building or structure shall be permitted under the following conditions:

(1) Only one (1) projecting sign will be permitted per store front. ~~with wall signs~~. Projecting signs are attached so that they hang perpendicular to the façade of the building, and are limited in size by the provisions of 16.100.030.B.2.a above.

(a)In addition, businesses within commercial districts with a porch or awning, will be permitted to have one (1) additional awning sign that is perpendicular to the building and oriented to pedestrians provided that they are:

(i) Hung from the roof of the porch or awning;

(ii) Less than ~~four~~ six (~~4~~6) square feet in area; and

(iii)The bottom of the sign is at least eight (8) feet above the grade of the sidewalk.

(2) No projecting sign shall be permitted on the same premises where there is a free-standing sign.

(3) No projecting sign shall extend more than three (3) feet above the roof line at the wall or the top of a parapet wall, whichever is higher.

~~(4) No projecting sign shall be located within twenty (20) feet of another projecting sign in the same horizontal plane.~~

(~~5~~4) When a projecting sign is used no angle irons guy wires or braces shall be visible except those that are an integral part of the overall design such as decorative metals or woods or unless they are required for safety.

(~~6~~5) No sign shall project to within two (2) feet of the curb of a public street or beyond five (5) feet from the building face, whichever is less.

4. Directional Signs

a. The requirements of ~~subsection C~~chapter 16.102 shall apply. (Ord. 2004-006 § 3; 2002-1132)

C. Industrial Zones

No permanent sign requiring a permit shall be allowed in industrial zones except for the

following:

1. Free Standing Signs

    a. Industrial zoned properties that have an approved PUD and approval for permitted commercial uses, shall apply requirements in Section 16.102.030.B.1-5.

    b. Other than allowed under (1) above, a property in an industrial zones ~~shall be permitted to~~may have have one (1) multi-faced free-standing sign ~~designating the principal uses of the premise~~ per street frontage provided the height does not exceed six (6) feet and the sign face does not exceed thirty-six (36) square feet per sign face for a maximum of seventy-two (72) square feet.

2. Directional Signs

    a. The requirements of ~~subsection 3 below~~Chapter 16.102 shall apply. ~~(2004-006 § 3; 2002-1132)~~

3. Wall Signs

    a. The requirements of Section 16.100.030.B.2, Commercial Signs shall apply. (Ord. No. 2009-003, § 2, 2-17-2009)

Chapter 16.102

TEMPORARY, PORTABLE AND BANNER SIGNS*

Sections

* Editor's Note: Some sections may not contain a history.

16.102.010 Temporary and Portable Signs - Purpose

Temporary, portable, and banner signs regulated by this code are intended to allow the City of Sherwood citizens to exercise their right to free speech while ensuring that the City's streets remain clear of visual clutter and safe for travel. Signs that are not clearly regulated by the provisions of this chapter are subject to the standards for permanent signs in Chapter 16.100. Definitions for permanent, temporary, and portable signs can be found in Section 16.100.010.I. All temporary, portable, and banner signs are subject to the time, place, and manner regulations of this chapter

16.102.020 Temporary and Portable Signs General Regulations

A. Temporary and portable signs are prohibited in the following locations:

1. Within any ODOT right-of-way, including but not limited to Highway 99.
2. Within any Washington County right-of-way, including but not limited to Roy Rogers Road, Edy Road, and Tualatin-Sherwood Road.
3. Within any clear vision area as defined in Section 16.58.010

B. The following temporary, portable, and banner signs are exempt from the provisions of this chapter.

1. Public notice signs as required by Section 16.72.020, or by any federal, state or local law.
2. Federal, state, and other flags not exceeding twenty-four (24) square feet in all residential zones, and forty (40) square feet in all other zones.
3. Signs that have been approved in association with a City of Sherwood Special Event Permit.
4. A ~~P~~public ~~-~~-necessity sign~~s~~ such as safety~~/~~ and instructional signs, for public facilities and public parks, City sponsored community events~~, warnings, information kiosks at~~

~~trail heads, bus stops, no parking, and street name signs~~ installed by or with permission of the City of Sherwood.~~ are exempt from permit requirements.~~

C. Temporary and portable signs on private property do not require a permit, but are subject to all of the applicable standards within this section.
D. Signs shall not be placed on private property without the express permission of the property owner.
E. Signs shall not be illuminated and may not include pennant strings, balloons, streamers, spinners, propellers, search lights, or other items that involve motion to attract attention.
F. Signs shall not obstruct vehicular or pedestrian traffic.
G. It is the responsibility of the person posting a temporary or portable sign to remove it.
H. In the event that a sign is requested by a business whose regular access is blocked due to road construction and/or road closures, signs may be permitted to remain in the public right-of-way, at an approved location, until construction is completed. Such signs do not require a permit. Such signs may be located in ODOT, City of Sherwood or Washington County right-of-ways if approved by the~~se agencies~~agency.

16.102.030 Temporary Sign Regulations

A. The following regulations apply to all temporary signs as defined in Section 16.100.I.21.
1. Temporary signs on properties zoned VLDR, LDR, and MDRL, may be double sided, but are limited to a maximum height of six (6) feet, and a maximum sign width of three (3) feet. The actual sign face of each side of the sign shall not exceed six (6) square feet.
2. Temporary signs in all other zones may be double sided, and are limited to a maximum height of ~~six~~ eight and one half (~~6~~8 1/2) feet, and a maximum width of four (4) feet. The actual sign face of each side of the sign shall not exceed ~~twenty-four~~thirty-two (~~24~~32) square feet.
3. No more than one (1) temporary sign is permitted on any one (1) lot unless the property fronts more than one (1) street or has more than three hundred (300) feet of frontage along a street. In these limited cases up to two (2) temporary signs may be allowed.
4. Where multiple temporary signs are placed on the same property, as authorized above, the signs shall be spaced at least fifty (50) feet apart.
5. Temporary signs are not permitted in the public right-of-way.

16.102.040 Portable sign Regulations

A. The following regulations apply to all portable signs as defined in Section 16.100.I.15 in all zones.
1. Portable signs, in all zones are limited to four (4) feet in height with a sign face no larger than six (6) square feet.
2. No more than four (4) portable signs are allowed on any residentially zoned lot.
3. No more than (1) portable sign per business is allowed in all other zones.
4. No portable sign shall be placed in any publicly owned right-of-way without a permit unless exempt per B, below or 16.102.020.B above.

5. Permits for portable signs placed within the public right-of-way are valid for thirty (30) days and must meet the following criteria:
   Signs placed in public rights-of-way must meet the following standards in order to obtain and maintain a valid permit:
   a. Because maintenance of the right-of-way in front of a single-family home is the responsibility of the homeowner, a person wishing to place a sign in the right-of-way, in front of someone's home must make a good faith effort to contact the homeowner, and if not home, must leave something in writing that includes the persons contact information and a description of the effort made to contact the homeowner. ~~signs may only be placed within the right-of-way adjacent to attached and detached single-family and two-family homes after the property owner has been notified and provided with the sign owner's contact information.~~
   b. Signs shall not create a traffic safety or maintenance problem, and the City may remove and dispose of any signs that constitute a problem.
   c. Signs shall be freestanding and shall not be attached to any structure or vegetation such as utility poles, traffic signs, street signs, trees, or similar items.
   d. Signs within the public right-of-way shall be either an A-frame design or shall be attached to a wood or wire h-frame stake driven into the ground well clear of tree roots, irrigation lines, and any other underground utility that could be damaged by such stakes.

B. The following regulations apply to all portable signs located within the Old Town Overlay District
   1. A ~~B~~business~~es~~ who has~~ve~~ a valid City of Sherwood business license and ~~are~~ is physically located within the Old Town Overlay District~~,~~ may display two (2) portable signs, without a permit, on private property or within the public right-of-way in the Old Town Overlay District.
   2. Each portable sign shall be a maximum of six (6) square feet per sign face. ~~If a~~A business that wishes to place a portable sign on the sidewalk in front of someone else's property ~~that business~~ must receive written permission from the property owner ~~whose~~ of the property ~~is adjacent to~~ where the sign is placed. Signs shall be sited per Section 16.102.040.

16.102.050 Banner Sign Regulations

A. The following banner signs are exempt from these regulations:
   1. Banner signs not intended to be viewed from a public street. (Ord. 2002-1132 § 3)
   2. Signs that meet any of the provisions of section 16.102.020(B)

B. The following regulations apply to all banner signs as defined in Section 16.100.I.4 and over the right-of-way banner signs in 16.100.I.12 in all zones.
   1. Except for banner signs approved as over the right-of-way banner signs, banner signs shall be firmly attached to the side of a building, fence, or wall only. No banner sign shall be attached to building roofs, vehicles, trailers, or anything else.
   2. Banner signs shall not cover building windows.
   3. Banner signs shall be maintained in good condition. They shall not droop, have frayed ends, and shall be graphically clear and readable. Sun-faded, weather-damaged

banner signs are prohibited.

4. Banner signs shall be made of all-weather material. (Ord. 2002-1132 § 3)

C. Permitted Locations

1. Commercial, Industrial, and Institutional Public Zoning Districts.
   a. Each business having a valid City of Sherwood business license and who's business is physically located in the Neighborhood Commercial (NC), Office Commercial (OC), Retail Commercial (RC), General Commercial (GC). General Industrial (GI), Light Industrial (LI) or Institutional Public (IP) zoning district may display one (1) banner sign on private property.
   b. Banner signs shall be no larger than thirty-two (32) square feet in size.
2. Residential Zoning Districts.
   a. One (1) banner sign not exceeding thirty-two (32) square feet per tax lot. (Ord. 2002-1132 § 3)
3. Signs proposed to be located over a public right-of-way are subject to the following provisions:
   a. An applicant may be approved for one (1) temporary over-the-right-of-way banner sign to be attached to power poles. Over-the-right-of-way banner signs shall be installed only after receiving a permit from Portland General Electric (PGE) or its successor. Once a PGE permit is obtained, the applicant is required to receive a right-of-way permit from the City Engineer.
   b. Over-the-right-of-way banner signs are allowed at the following locations:
      (1) Over North Sherwood Boulevard, north of the south property line of Sherwood Middle School and south of the north property line of Hopkins Elementary School.

D. Review Process

1. No banner sign, except signs exempt by the provisions of sections 16.102.020.B, and 16.102.050.A shall be placed anywhere within the City without a permit.
2. Requests for permits shall be processed through a Type I administrative review and are subject to the standards listed above.
3. Permits for banner signs within the City shall be valid for a period of thirty (30) days.
4. Permits may be reissued on the same property a maximum of ~~three~~ six (~~3~~6) times in any calendar year.
5. ~~If an owner wishes to have a~~For a banner sign that will be permanently affixed to a wall, the process and dimensional limitations for a permanent wall sign ~~will~~ apply.

16.102.070 Violations to temporary, portable and banner sign standards

1. Fines shall be set by City Council resolution. (Ord. 2002-1132 § 3)

A. First Violation –Written warning stating corrective action required to bring the portable sign into conformance is provided to the property owner.

B. Second Violation -- Fine.

C. Third Violation -- Sign removed and held for thirty (30) calendar days. During this period the sign will be returned to the owner subject to payment equal to

twice the original fine.

D. Fourth Violation -- The business loses temporary and portable sign privileges for one (1) year. City can remove signs and fine for each offense during this one (1) year probation period. (Ord. 2006-021; 2005-002 § 5; 2002-1132)

E. The City is not responsible for any signs not collected by the owner after the thirty (30) day hold period expressed in C above. Such signs shall be properly disposed of by the City in the event that the signs are not collected by the owner within five (5) days after the hold period expires.

Sherwood Planning Commission Meeting

Date: 03-13-12

☑ Meeting Packet

☑ Approved Minutes Date Approved: _____

☐ Request to Speak Forms N/A

Documents submitted at meeting:

- Handout from Berry Elsner & Hammond re: Legal Requirements for Land Use Decision Making
- Handout from Berry Elsner & Hammond re: Findings and Conditions of Approval

CITY OF SHERWOOD
Planning Commission Legal Training Work Session

LEGAL REQUIREMENTS FOR LAND USE DECISIONMAKING
March 13, 2012

I. WHAT IS A LAND USE DECISION?

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

A simple definition of the term "land use decision" is a decision by a governmental body which discretionarily applies the local government's land use regulations unless one or more statutory limitations apply (discussed below). The statutory definition setting forth 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) concerns the adoption, amendment or application of Statewide Planning Goals, a comprehensive plan provision, or a new or existing land use regulation.

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

Oregon law distinguishes a "limited land use decision" from a "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 pertaining to a site within an urban growth boundary;
c) 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 provide, 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.

Final plat approvals are not limited land use decisions. ORS 197.015(10)(b)(G), (12)(b).[2] Note, however, that a decision may not qualify as a limited land use decision, even if it is a preliminary plat approval, where other discretionary standards apply. For instance, 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).

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, rather it includes actions you are most likely to encounter that are *not* land use decisions per ORS 197.015(10)(b). A local government decision that includes the following is *not* a "land use decision":

a) involves land use standards that do not require interpretation, or the exercise of policy or legal judgment;
b) approves or denies a building permit under clear and objective land use standards;
c) is a limited land use decision;
d) involves a transportation facility that is otherwise authorized by and consistent with the comprehensive plan and land use regulations;

[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 the Oregon Court of Appeals decision in *Hammer v. City of Eugene*, 202 Or. App. 189 (2005).

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 concurrently regulate land use within their own jurisdictions—state, city, county and special districts. Local governments, such as cities and counties, adopt their own land use plans as well as regulations to implement those plans. However, local government plans and regulations must be consistent with and implement state policies that are set forth in the Statewide Planning Goals and Oregon Administrative Rules (OAR). Additionally, cities and counties within Metro's jurisdiction must meet regional requirements established by Metro.

Oregon land use law requires coordination between cities and counties. Counties are responsible for coordinating all planning activities affecting land uses within the county, including planning activities of cities, special districts and state agencies.[3] Also, for cities located within Multnomah, Clackamas and Washington Counties, Metro is statutorily designated as the county review, advisory and coordinative body.

State law imposes procedural requirements for land use decisions and also imposes limits on local government decisions. Procedures and limits are dictated by 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), supported by the Department of Land Conservation and Development (DLCD), adopts statewide land-use goals and implements rules, assures local plan compliance with the goals, coordinates state and local planning and manages the coastal zone program. The Commission, which is comprised of seven appointed volunteer members, meets about every six weeks to direct the work of the Department of Land Conservation and Development (DLCD).

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[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.

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 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 appeals of local decisions when the appeal involves certain pre-established factors laid out in ORS 197.090(2)-(4). DLCD is also involved in reviewing and acknowledging local comprehensive plans.

If LCDC believes that certain circumstances exist,[4] see ORS 197.320, LCDC has the authority to 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.

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

Unique to Oregon land use law is the Land Use Board of Appeals (LUBA), which is comprised of three board members who are appointed by the governor and confirmed by the state senate. LUBA hears and rules on appeals of local government land use decisions and is the only forum that can hear such appeals (circuit courts no longer have jurisdiction, except as to enforcement). Specifically, LUBA has exclusive jurisdiction to review *final* "land use decisions" and "limited land use decisions."[5] Generally, a decision is considered final when it is reduced to writing and signed. Also, LUBA has jurisdiction over land use actions that have a "significant impact" on land uses.[6]

Any party to a land use decision may file an appeal to LUBA, so long as the filing is made within 21 days after the challenged land use decision becomes final. The timeline for LUBA appeal is short. Once the notice of appeal is served, the local government whose decision has been appealed must submit the record of the decision to LUBA within 21 days. LUBA must issue a final opinion and order within 77 days after the

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[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.

[5] ORS 197.015(10), 197.015(12), 197.825(1), and ORS 197.805-845 (LUBA procedural requirements).

[6] *See Oregonians in Action v. Land Conservation and Dev. Com.,* 103 Or. App. 35, 38 (1990); *Wagner v. Marion County*, 79 Or. App. 233 (1986). For example, construction of a major street through a quiet residential area was held to be a 'land use decision' because it would have a "significant impact" on existing land uses. *City of Pendleton v. Kerns*, 294 Or. 126 (1982).

record is transmitted, though there are some exceptions to this deadline. Finally, LUBA's decisions are reviewable by the Oregon Court of Appeals.

An important aspect of a LUBA appeal is that LUBA's review is limited to the contents in the record. Therefore, it is very important that the Planning Commission do its best to assure that all applicable criteria, goals, arguments, staff reports, studies, etc. are noted so that they 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 an issue was not a "new" issue precluding petitioner from raising a provision in his petition for review before LUBA, even though the provision was not specifically referenced in the City's notice of hearing because 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).

Due to the specific and strict procedural requirements for an appeal to LUBA, the Planning Commission 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

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 stated above, local comprehensive plans must be consistent with statewide planning goals, which are reviewed for consistency by the state's Land Conservation and Development Commission (LCDC), discussed above.

Statewide Planning Goals apply not only to cities and counties, but also to special districts and state agencies. Oregon's planning laws strongly emphasize coordination and consistency with the goals and acknowledged local plans.

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

For a summary of Statewide Planning Goals, go to:

http://www.oregon.gov/LCDC/docs/goals/goalssummary.PDF (accessed March 13, 2012)

D. Urban Growth Boundary Distinction

An important piece of Oregon land use planning is the existence of urban growth boundaries (UGB). A UGB is a regional or local boundary (outside Metro) encompassing urban and urbanizable lands and can contain additional land to meet long-range urban needs. In the case of the Portland metropolitan UGB, it encompasses 25 cities and three counties.

Goal 14 implements state policies that attempt to manage urban growth. Specifically, Goal 14 requires a UGB to accommodate long range urban population (consistent with a 20-year population forecast) and "must provide for needed housing, employment and other urban uses such as public facilities, streets and roads, schools, parks and open space..." OAR 660-024-0040(1). The UGB is a critical factor in many decisions facing Sherwood and the region. A detailed discussion is beyond the scope of this overview.

III. TYPES OF LAND USE DECISIONS

A. Quasi-Judicial Process and Appeals

(1) Overview.

Quasi-judicial decisions apply pre-existing criteria to individual persons or parcels of land. Whether a proceeding can be characterized as "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, quasi-judicial proceedings are "bound to result in a

decision." *Id.* at 775. Second, they are "bound to apply preexisting criteria to concrete facts." *Id.* Third, they are "directed at a closely circumscribed factual situation or a relatively small number of persons." *Id.* This test leads to a legislative/quasi-judicial determination by reviewing the character of the decision as a whole and not by its constituent parts. Fairly typical quasi-judicial examples include limited plan map amendments, single tract zone change applications, subdivisions, development permits and variances.

In Oregon, the hallmark of a quasi-judicial decision is that it must be made following due process requirements. The genesis of this requirement is the Oregon Supreme Court's landmark decision in *Fasano v. Washington County Commission*, 264 Or. 574 (1973). The elements of due process 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 most local codes.

(2) State law procedural requirements.

Under state law, the quasi-judicial application process is largely directed by ORS 197.763. A copy of that statute is attached to these materials. Under ORS 197.763(5), a statement must be made at the initial evidentiary hearing listing the applicable substantive criteria; stating that all testimony/evidence must be directed toward the applicable criteria or other criteria in the plan or land use regulation believed to apply to the decision; and stating that the failure to raise an issue accompanied by statements or evidence sufficient to afford the decision maker/parties an opportunity to respond to the issue precludes 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. These statements should be included in a hearing script for the presiding officer, or may be presented at the hearing by staff or legal counsel.

Specifically, the City must provide a description of the applicable "standards that are 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).

Under ORS 197.763(6), *any* participant may request an opportunity to present additional testimony/evidence regarding the application at a later hearing. A continuance must then be granted to a date, time and place certain at least seven days in the future, or the record must be kept open for additional written evidence, arguments or testimony. It is the hearing body's choice as to whether to continue the hearing or leave the record open. The decision 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, any person may request that the record be left open for at least seven days to submit additional written testimony/evidence. Unless waived by the applicant, the applicant then has at least seven days after the record is closed to all other parties to submit final written arguments in support of the application.

This last set of requirements is derived from the element of due process requiring that the applicant and parties be given a right of rebuttal of evidence submitted by others during the hearing process. LUBA's decision in the case of *Gunzel v. City of Silverton*, 53 Or. LUBA 174 (2006) illustrates the point. While the application for the subdivision in this case was pending, the City Council received a report from a scientist with the state of Oregon Department of Geology and Mineral Industries (DOGAMI) concerning a landslide hazard area on the property that was subject to the application in the *Gunzel* case. Later during the same meeting, the City Council voted to incorporate the DOGAMI information into the record of the applicant's development, though the hearing had already been closed. Clearly under these facts the applicant had an inadequate opportunity for rebuttal, and LUBA so held and sent the case back to the city.

Application of these principles must still be made on a case-by-case basis, with assistance from the City staff and legal counsel. But generally speaking, most questions will be answered correctly by the City if it relies on the principles of due process in making the determination.

Under ORS 227.173 (1), 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. The City's interpretation of its own code must be consistent with the express language of the code or it is vulnerable to challenge on appeal. *Siporen v. City of Medford,* 231 Or. App. 585 (2009).

The decision must include a brief description of the criteria, a description of the evidence in the record that addresses the criteria, 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)**, cities have the authority to establish their own hearing procedures consistent with ORS 197.763. Sherwood's code addresses hearings and appeal procedures in the Zoning and Community Development Code, Title 16, of the Sherwood Municipal Code (ZCDC).

Under **ORS 227.178(1)**, a final decision on an application is required "including resolution of all appeals . . . within 120 days after the application is deemed complete."

Subsection (5) authorizes the applicant to grant the City extensions for a specified period of time at the written request of the applicant. However, the total of all extensions may not exceed 245 days. The 120-day limit includes all local appeals.

B. Legislative Process

The procedural requirements applicable to legislative land use decisions differ from procedural requirements applicable to quasi-judicial decisions. 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 (i.e. a plan amendment that applies to 150 acres owned by several different people).

Plan map revisions and plan text amendments are processed as Type V legislative procedures in the City of Sherwood; requirements for the Type V process are included in Chapter 16.72 of the ZCDC. Planned Unit Developments also fall into the Type V legislative action category in Sherwood.

C. Final decision

Statutory provisions (ORS 227.173(4)) and case law require that 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). The process for adoption of the final decision can be established by local code, but state law requires that the final order include notice of appeal procedures; ORS 227.175(12).

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 assure that *quasi-judicial* land use applications are decided by an impartial hearing body that represents the interests of the community as a whole.

Declaration of any ex parte contact, bias or conflict of interest is required prior to conducting a hearing on any quasi-judicial land use decision.[7] As residents of the

[7] 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,

community, hearing body members frequently have personal beliefs, business associations, membership with organizations, and relatives living and working within the community that may be affected directly or indirectly by issues presented and decided by the hearing body. Disclosure of these beliefs or associations is required only where such beliefs or associations may or will affect the ability of the hearing body member to render an impartial decision. The exception to this general 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.[8]

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 individual decision maker is incapable of rendering 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). In general, the decision to step down is up to each individual decision maker if 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, the statutory provisions prohibit a decision maker from participating in the decision unless a class exception exists. See discussion below.

Although not required, often the individual decision maker physically joins the general public seating during that particular decision. There is no legal provision that prevents a person who steps down from participating as an interested citizen. Where there is an actual financial benefit, decision makers are generally 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.

Ex parte contacts are not in and of themselves 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

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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.

[8] 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.

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.

(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.[9]

(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.

[9] 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.

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.

(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. Conflicts 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 was 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 was owner of property that includes an intermittent stream that will be impacted by the ordinance. Because Councilor Park was 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 owned commercial property in the City of Sherwood. The City was considering establishing an urban renewal area that includes 260 acres of land. Councilor Figley owned 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 owned 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.[10]

V. IMPLICATIONS OF THE PUBLIC MEETINGS LAW

A. Overview

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

[10] 204 Or App 359, review denied, 341 Or 80 (2006).

> 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 conflicts with their charters, ordinances or other rules. Cities, counties and other public bodies may impose greater requirements than those of the law by their charters, 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). Thus, the Planning Commission is subject to the law.

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).

The meetings law does not define "quorum." Quorum is locally defined 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 they are not "governing bodies" and quorums are 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 are subject to the law.

The law does not cover purely social meetings of commission members. In *Harris v. Nordquist*, 96 Or.App. 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. 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).

E. Example of a recent court decision: public meetings law

In a recent Circuit Court decision, *Dumdi v. Handy, et. al.(2011)*, the Lane County Circuit Court found the Lane County Board of Commissioners ("Board") violated the Public Meetings Law and held two county commissioners personally liable for willfully violating the law. The Court held that the Board and two of its commissioners violated the law when they continued to deliberate, jockey for votes, and discuss approval of staff positions outside of public view after it was clear the issue would come before the Board for a decision. The court emphasized that once notice was given that the matter was pending Board approval at an upcoming meeting, all deliberations should have ceased

and the Board and its individual members should have heeded County Counsel's advice and warnings to stop the discussions.

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]

CITY OF SHERWOOD
Planning Commission Legal Training Work Session

FINDINGS AND CONDITIONS OF APPROVAL
March 13, 2012

I. FINDINGS

In its simplest form, each finding in a decision should include the following elements:

1. State the approval criterion;
2. Explain how the decision maker interprets that criterion;
3. Explain the facts of the proposal, and how those facts lead to the conclusion that the criterion is or is not satisfied; and
4. Respond to any issues raised regarding compliance with the criterion.

While this sounds simple enough, the reality is that all too often, when findings are challenged before LUBA, they are found deficient for failure to address one or more of these elements.

A. Why Do We Need Findings?

The requirement of findings to support local land use decisions is central to our current land use system. Even before LUBA was created in 1979 to review local land use decisions, the courts were admonishing local governments that they had to have, in writing, a basis for their decisions. While assuring that findings require no "magic words," the courts insisted that applicants have a right to know the criteria by which they will be judged, and an explanation of what the local decision maker "found" (i.e. a finding) when the criteria were applied to the facts.[1]

Those charged with drafting local findings to support decisions may not be able to stop this trend, and in some cases it may not be possible to draft fully "defensible" findings to counter such challenges. Nonetheless, knowing and following some basic findings "rules" will reduce the opportunities for challenges.

Other Reasons Findings Can be Important:

While the focus on findings is primarily on their role in legal challenges, findings serve significant functions beyond their role in appeals:

1. Findings give credibility to the process. Good findings themselves garner support for the land use system and respect for the integrity of the law. By having

[1] *See e.g., Sunnyside Neighborhood Assoc. v. Clackamas Co. Comm.*, 280 Or. 3, 569 P.2d 10 (1978); *Commonwealth Properties v. Washington County*, 35 Or. App. 387, 582 P.2d 1384 (1978).

Tip #2: Conditions must be mandatory. Avoid "should" or "to the extent feasible." An applicant who "should" satisfy a condition, or must do so only if it is feasible, is not necessarily under any obligation to satisfy the condition.

Tip #3: Conditions must be clear and non-discretionary. Conditional language such as "if the planning director determines necessary" essentially defers a potentially discretionary decision. Likewise, avoid language such as "This modification must comply with all conditions of the previous approval to the extent they are not inconsistent with this decision." Such language gives rise to potential disputes as to whether previous conditions are consistent.

Tip #4: Include a deadline for completion of the condition, and if possible tie it to an event the local government has control over (in other words, give the condition a "hammer"). For example, "before final plat approval" is an ideal deadline for conditions related to preliminary subdivision approval.

Tip #6: Do not rely on an applicant's promises as a substitute for conditions of approval requiring performance. There are cases holding that it is not necessary to incorporate elements of an application submittal as conditions of approval in order to make them binding on the applicant.[32] BUT, there are also cases holding that "non-binding promises by the applicant are not a substitute for conditions of approval."[33]

7. Conditions of Approval: Exactions, and Conditions requiring construction of improvements.[34]

Conditions requiring the dedication of an interest in real property (exactions) must be based on "*Dolan* findings." By definition, an exaction is always a physical taking of property through by the government, a factor not present when the government is merely regulating an activity. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Therefore, the *Dolan* requirements do not apply to mere regulations of land use. *Clark v. City of Albany*, 137 Or. App. 293, 301-02 (1995).

Significantly, these requirements also do not apply to the payment of fees such as systems development charges or traffic impact fees. *Homebuilders Association of Metro. Portland v. Tualatin Hills Parks and Recreation Dist.*, 185 Or. App. 729, 737 (2003); *Rogers Machinery v. Washington County*, 181 Or. App. 369 (2003).

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[32] *Wilson Park Neighborhood Assoc. v. City of Portland*, 27 Or LUBA 106, *rev'd on other grounds*, 129 Or App 33 (1994); *Perry v. Yamhill County*, 26 Or LUBA 73, *aff'd*, 125 Or App 588 (1993).

[33] *Central Oregon Landwatch v. Deschutes County*, 53 Or LUBA 290 (2007); *Neste Resins Corp. v. City of Eugene*, 23 Or LUBA 55 (1992).

[34] *Dolan v. City of Tigard*, 512 US 374 (1994). A detailed description of the U.S. Supreme Court's holding in *Dolan* is beyond the scope of this presentation. Nevertheless, a basic understanding is useful to provide guidance about what constitutes a defensible land use decision.

In *West Linn Corporate Park L.L.C. v. City of West Linn*, 534 F.3d 1091(2008), the Ninth Circuit Court of Appeals certified three questions to the Oregon Supreme Court in aid of its disposition of the case. The Court indicated that the answers to these questions "plainly implicate the development of local land use law. *Id.* at 1099.

The three questions resulted from a lawsuit initiated by West Linn Corporate Park, LLC ("WLCP") in Clackamas County Circuit Court. The suit was subsequently removed to the United States District Court by West Linn, which asserted a counterclaim. The two claims revolve around the development of a corporate park and the conditions imposed upon its approval. The conditions required WLCP to construct various off-site improvements. WLCP's complaint alleged that the conditions imposed by the City amounted to an unlawful taking under the "rough proportionality" test established in *Dolan*, *supra*.

The second of the three questions certified to the Supreme Court is of particular interest here: whether conditions requiring off-site improvements to property in which the landowner has no property interest are subject to *Dolan's* rough proportionality test under the Oregon Constitution. For example, must a City demonstrate that a condition requiring a developer to improve *existing* public right of way is "roughly proportional" to the development's impacts in order to lawfully compel the developer to make those improvements? Precisely, the question was posed as follows:

> [W]hether a condition of development that requires a plaintiff to construct off-site public improvements, as opposed to dedicating an interest in real property such as granting an easement to a municipal entity, can constitute an exaction or physical taking.

U.S. Supreme Court decisions subsequent to *Dolan* have clarified that the rough proportionality test under the Fifth Amendment is only applicable to "exactions" which the Court defines as "land use decisions conditioning approval of development on the dedication of property to public use." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999). Thus, the question for the Oregon Supreme Court was whether under Article I, Section 18 of the Oregon Constitution (the analog to the Fifth Amendment) the rough proportionality test applied to an off-site improvement condition when no dedication of real property is required.

Ultimately, the Oregon Supreme Court held that the rough proportionality test did *not* apply to an off-site improvement condition when no dedication of real property was required; in other words, government requirement of off-site improvement is not an "unconstitutional condition" or a taking. The Court equated the off-site improvement condition to a regulation that requires a property owner to pay a sum of money for a particular purpose (e.g. a system development charge, impact fee, etc.), which is not a taking under federal or state constitutional law, even if the obligation exceeds the impact

of the development (unless, of course, "the obligation is so high that it imposes a tantamount burden").[35]

Consequently, the *West Linn* decision makes it easier for Oregon's local governments to require infrastructure improvements when property develops or redevelops. While such requirements still need to reasonably relate to the development, the connection between the development's impacts and such required infrastructure improvements need not be as strong as required under the rough proportionality test.[36]

8. The burden of proof required to support conditions of approval requiring exactions.

Though not getting as much attention right now, the question of who has the burden of proof in these cases remains an important one. Some thoughts on this issue, with some cases and considerations for practical application of the requirement, follow.

As to the government's burden of proof, in *Piculell*, *supra*, the Court of Appeals noted that "[it] is unclear where on the continuum the Court intended to locate the line between precise mathematical calculation and quantification" but that *Dolan* requires "considerable particularity in local government findings that are aimed at showing the relationship between a developmental condition and the impacts of the development."[37] Another useful statement from the Court of Appeals seems to indicate that the government could offset benefits from the improvement against any impact in its calculations: "[T]he Dolan analysis allows consideration and appropriate weighing of whether and to what extent a condition serves needs of the development upon which it is imposed, as distinct from serving only general public needs in response to the public impacts of the development." *Piculell*, 142 Or. App. at 337, n. 4.

More recently, in *McClure v. Springfield*, 175 Or. App. 425 (2001), LUBA and the Court of Appeals appeared not to leave much room for anything less than a mathematical quantification to justify even relatively minor exactions.[38] The City of Springfield sought review of LUBA's decision remanding, for the second time, its approval of a land partition. The applicants cross-petitioned asserting that LUBA erred in upholding the proposed street right-of-way exaction. The Court of Appeals affirmed LUBA's decision in *McClure 2*. In doing so, it affirmed, for the first time, a local government's *Dolan* findings for a street right-of-way dedication. The opinion is worth reading for the precise mathematical analysis that was ultimately upheld on review.

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[35] *Penn Central Transp. Co v. New York City*, 438 US 104 (1978).
[36] Following the Oregon Supreme Court's decision on the certified questions, the Ninth Circuit Court of Appeals accepted the Oregon Court's analysis on April 18, 2011, affirming dismissal of a taking claim against West Linn.
[37] 142 Or. App. 327, 331 (1996), *citing J.C. Reeves Corp v. Clackamas County*, 131 Or. App. 615 (1994).
[38] *Review denied,* 334 Or. 327, 52 P.3d 435 (2002).

Finally, the case of *Hallmark v. City of Lake Oswego*, 193 Or. App. 24 (2004) is worth reviewing as a case in which a City's requirement for a walkway was upheld, but not after one heck of a battle.[39]

The case involved the appeal of a City of Lake Oswego requirement that Hallmark dedicate a 5-foot-wide, 160-foot-long walkway in front of the main entrance to its new headquarters building. The walkway is not adjacent to any street, but instead provides a connection across the front of the building between two streets. The case arose when Hallmark applied to modify a 1993 condition of approval to eliminate the pedestrian pathway across its property. The history of the offending walkway is interesting. Although its original commercial approval required Hallmark to "provide easements for all public walkways/sidewalks…to the satisfaction of the City Engineer," Hallmark never granted an easement for this particular walkway. Nonetheless, it was open to the public for a couple of years until Hallmark built a fence across the property, blocking the pathway. The City responded with a citation for failing to comply with the original condition of approval requiring the easement; Hallmark then filed an application for elimination of the condition. Hallmark claimed the easement requirement amounted to a taking of its property without just compensation under the theory announced in *Dolan.* And they were off to the races (or rather, for five years of litigation).

The City's findings are worth reading. The Court ultimately held that the City had demonstrated that the requirement for the pathway advanced a "legitimate governmental interest" based on its ordinance requirements for pedestrian and bicycle access routes and connectivity. The City won a challenge based on a lack of essential nexus (*Nollan*) by showing that employees and visitors to the property (based on the number of parking spaces on site) would walk to and through the buildings and neighboring businesses, which it also identified in its findings.

The third challenge was based on the *Dolan* rough proportionality standard. The City detailed the shape and size of the development, the number of parking places, the permitted uses on the site, the neighboring large residential development, the assemblage of six blocks of property in one development, and the number of lineal feet of pedestrian walkways as compared to the disputed walkway.

The Court engaged further in a discussion of the *Schultz* and *JC Reeves* cases noted above. The Court determined that the *Hallmark* case was more analogous to *JC Reeves*, and thus that the development was creating impact as actually approved, and not as a matter of conjecture, resulting in the requirement for the walkway being upheld.

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[39] The tortured procedural history of this case involved two appeals to LUBA and two appeals to the Court of Appeals. These cases included *Hallmark v. City of Lake Oswego*, 43 Or LUBA 62 (September 26, 2002) ("Hallmark LUBA 1"); *Hallmark v. City of Lake Oswego*, 186 Or. App. 710 (March 13, 2003) ("Hallmark CA 1"); *Hallmark v. City of Lake Oswego*, 44 Or LUBA 605 (June 4, 2003) ("Hallmark LUBA 2") and, finally, *Hallmark v. City of Lake Oswego*, 193 Or. App. 24 (April 14, 2004) ("Hallmark CA 2"). The first LUBA appeal (*Hallmark LUBA 1*) and the most recent Court of Appeals decision (*Hallmark CA 2*) are the two cases that deal directly with the *Dolan* findings.

9. Who needs to supply the documentation to support the findings?

Although the burden of adopting findings which comply with *Dolan* rests with the local government, in *Lincoln City Chamber of Commerce v. Lincoln City*, 164 Or. App. 272, 991 P.2d 1080 (1999), the Oregon Court of Appeals clarified that *Dolan* does not necessarily require the local government to generate the evidence upon which *Dolan* findings are based. While this ruling may allow local governments to share the actual expense of establishing the evidence upon which *Dolan* findings must be made, it does not offset the costs of extensive findings requirements (or the public costs for exactions that can't meet the difficult standards).

The Court of Appeals upheld the City's approach, whereby an applicant can either accept a "cookie cutter" requirement for "basic" improvements, or provide the evidence necessary for the City to make the findings. However, the Court did not find that the "cookie cutter" approach would exempt the City from making "individualized determination" findings, and strongly indicated that those findings continue to be required.[40]

10. Additional Drafting Tips: Conditions of Approval Requiring Exactions

Based on the case law just discussed, here are three basic tips about how to craft conditions of approval requiring exactions; details will evolve from each particular fact pattern:

Tip #1: Do not acknowledge a public benefit for the required improvement. The fact that the improvement will benefit the public is not only irrelevant, it may do irreparable harm by suggesting that the "real" purpose for the exaction is not the impact of the development but rather the public desire or benefit to be derived from it.

Tip #2: Do not rely solely on traditional code provisions that require standard exactions. Even if the impact can be individually quantified to require the standard exaction, it doesn't look "individualized." In any case, don't rely on the fact that the "code requires it" to support a particular condition of development approval.

Tip #3: Be sure to document the cause and effect relationship between the impact of the development and the exaction or improvement required as a condition of approval.

[40] The Oregon Supreme Court denied review of this case, letting the opinion stand. 330 Or. 331 (2000).

11. Administration of Conditions of Approval

a. Enforcement

(i) Failure to comply with conditions of approval may result in revocation or expiration of the local land use decision, if authorized by the City code.

(ii) Failure to comply with conditions of approval also may be enforced as a land use violation through civil proceedings that result in monetary penalties. The Circuit Court, not LUBA, has jurisdiction over enforcement (unless a local municipal court has jurisdiction based on the City code).

BUT a City cannot enforce a condition that it wanted to or meant to impose in the final order, but failed to do so expressly. This is true even if the applicant proposed the condition in the first place or agreed during the hearing to abide by it.[41]

AND a City cannot interpret a non-ambiguous condition to mean something that it does not clearly say.[42]

b. Amendment

Amendment to conditions of approval must be undertaken with the same level of process followed to impose the original conditions, unless the local code specifically states otherwise.

[41] *Brydon v. Portland*, 1 Or. LUBA 110 (1980), holding City was unable to rely on oral promise from applicant as binding. See also cases cited above in footnotes 28 and 29 re written promises, or proposals contained in an application.

[42] *Barbie v. Josephine County*, 16 Or. LUBA 695 (1988), *Rhyne v. Multnomah County*, 23 Or. LUBA 442 (1992).

APPROVED MINUTES

City of Sherwood Oregon

Home of the Tualatin River National Wildlife Refuge

SHERWOOD PLANNING COMMISSION MINUTES
March 13, 2012 - WORK SESSION

WORK SESSION

1. **CALL TO ORDER:** Chair Allen opened the meeting at 8:00 p. m.

2. **COMMISSION MEMBERS PRESENT:** Commissioner Walker, Commissioner Carey, Commissioner Copfer

3. **STAFF AND LEGAL COUNSEL PRESENT:** Julia Hajduk, Brad Kilby, Gene Stewart, Councilor Clark

4. **TOPICS DISCUSSED: Land Use Review (2 handouts provided)**

    A. **Land use decisions**

    B. **LCDC & LUBA**

    C. **Quasi-judicial**

    D. **Bias, conflict of interest & ex parte'**

5. **ADJOURNED:** Chair Allen adjourned the Work Session at 9:00 p. m.