



# SCAPPOOSE *Oregon*

MONDAY, MARCH 13, 2023  
6:00PM TO 8:00PM  
COUNCIL CHAMBERS  
33568 EAST COLUMBIA AVENUE  
SCAPPOOSE, OREGON 97056

## CITY COUNCIL & PLANNING COMMISSION LAND USE TRAINING

Mayor Backus called the City Council & Planning Commission Land Use Training to order.

**Present:** Mayor Joe Backus; Councilor Pete McHugh; Councilor Jeannet Santiago; Councilor Kim Holmes; City Manager Alexandra Rains; Community Development Director Laurie Oliver Joseph; City Engineer Chris Negelspach; Associate City Planner NJ Johnson; City Recorder Susan M. Reeves; Planning Commissioner Harlow Vernwald; and Josh Sopher with Beery Elsner & Hammond, LLP.

**Remote:** Planning Commission Chair Scott Jensen; Planning Commissioner Bill Blank; David Molinari (left at 7:30pm); and Joshua Walter (left at 6:18pm).

Josh Sopher went over his presentation.

### Agenda

- ★ History and Purpose of Oregon Land Use Law
- ★ Role of State and Cities
- ★ Types of Land Use Decisions
- ★ Bias, Ex Parte Contacts, and Conflicts of Interest
- ★ Hearing Requirements and Issues
- ★ Criteria and Findings
- ★ Appeals
- ★ 120-Day and Fixed Goalpost Rules
- ★ Clear and Objective Requirements
- ★ Constitutional Issues
- ★ Questions and resources

### Land Use Training

March 2023  
Presented by Josh Sopher  
BEERY ELSNER & HAMMOND, LLP

### History and Purpose of Oregon Land Use

- ★ 50<sup>th</sup> anniversary this year
  - Originated with Senate Bill 100, adopted in 1973
  - Concerned at that time primarily with protecting farm and forest lands, preventing sprawl
- ★ Purpose is to manage land uses to achieve a variety of competing and complimentary goals
  - Livability
  - Economic development
  - Protecting resources
  - Efficient and orderly uses of land

### Role of State and Cities

- ★ State:
  - 19 Statewide Planning Goals
  - State statutes and administrative rules
  - DLCD, governed by LCDC
  - LUBA
- ★ Cities:
  - Comprehensive Plans – maps, policy, vision
  - Ordinances - implementing comp plan
  - Review development applications for compliance

## Types of Land Use Decisions

There are two types of land use decisions:

- Legislative
- Quasi-Judicial

### Quasi-Judicial Decisions

Definition:

- The application involves only a single property or small group of properties.
- A decision on the application is based on pre-existing criteria.
- The city is required to make a decision.

Most of your decisions will be quasi-judicial. The focus is on "judicial" – you will be effectively acting as the judge to determine an application's compliance with applicable requirements. Because of that, additional requirements apply.

#### Bias – Example

*Halvorson Mason Corp v City of Depot Bay*, 39 Or LUBA 702 (2001).

- Facts: Prior to decision, city councilor sent letter to mayor and other councilors concluding that applicant did not have the right to use the structure for the proposed use.
- LUBA: The city councilor formed an opinion regarding the legality of the real estate sales office prior to receiving evidence during the course of the city council proceedings . . . It is clear [the councilor] 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

#### Bias - Example

*Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137 (2002).

- Facts: City councilor was member of church that applied for conditional use permit. Voted to approve permit.
- LUBA: Where the decision maker has expressed concern about the proposed conditions of approval but nevertheless declares that she is able to render a decision based on the facts and law before her, that decision maker has not impermissibly prejudged the application.

## Legislative 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.
  - Examples include amending the comprehensive plan, a zone change that applies broadly to large areas, or changes to the text of the development code to include or delete specific uses in a zoning classification
  - Because a legislative decision is the expression of City policy, the City is not required to reach a decision on a legislative proposal and may table the issue or decline to review it altogether.
- Bias and ex parte requirements do not apply.

### Bias

Bias exists if the decision was the product of positive or negative bias rather than an independent review of the facts and law.

*Rosenzweig v City of McMinnville*, 64 Or LUBA 402 (2011).

The standard is whether the decision-maker prejudged the application and did not reach a decision based on the evidence in the record and the applicable criteria. *Halvorson Mason Corp v City of Depot Bay*, 39 Or LUBA 702 (2001).

#### Bias - Example

*Woodard v. Cottage Grove*, 54 Or LUBA 176 (2007)

- Facts: City councilor signed letter to the editor encouraging project opponent to leave town. Also requested police logs regarding projects opponents and included them in the record.
- LUBA: "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 . . . in the course of the public proceedings

#### Bias - Example

*Nicita v. Oregon City*, 74 Or LUBA 176 (2016).

- Facts: Petitioner challenged city decision to approve plan amendment, zone change and master plan.
- LUBA: A city councilor's reference to "banana" as an acronym for "build absolutely nothing anywhere near anything" does not demonstrate that the city commissioner was biased against opponents.

## Ex Parte Contacts

**Definition:** Communication or information received outside of the record on a matter that is pending before the city. Can include site visits.

**ORS 227.180(3):** A decision is not invalid if the decision-maker receiving the contact discloses the substance of the communication on the record and allows an opportunity for parties to respond. Tip: Err on the side of over-disclosure.

### Exceptions:

- Communication with staff.
- Communication before application is submitted or after final decision (more on this later).

## Hearing Requirements

### Quasi-Judicial Hearings:

- Notice requirements
- Staff typically provides a script to open the hearing which meets other requirements ("raise-it-or-waive-it," identifying criteria)
- At the "initial evidentiary hearing," anyone can ask for time to present additional argument or evidence. Record must be held open or continuance granted.
- Applicant gets seven days after record closes to submit final written argument. Applicant can waive seven-day period.

## Criteria and Findings

- Criteria: Approval or denial must be based on standards and criteria adopted by ordinance.
- Findings: Decision must be accompanied by a statement explaining the relevant criteria, facts relied upon, and justification for the decision based on the criteria.
  - ... Decision must be based on substantial evidence in the record
  - ... Resolve conflicts in the evidence

## 120-Day Rule

- Final decision (including all local appeals) must be made within 120 days after the application is deemed complete.
- Failure to meet this deadline:
  - ... Requires the City to refund at least 50% of fees/deposits (or unexpended portion)
  - ... Allows the applicant to file a writ of mandamus in Circuit Court, where the application will be approved unless City can show approval would violate code.
- Can be extended in writing up to 245 days.
  - ... Tip: Have blank extension forms at hearings.

## Conflicts of Interest

### Actual vs. Potential:

- ... Actual: The decision will result in a "private pecuniary benefit or detriment"
- ... Potential: The decision may result in a "private pecuniary benefit or detriment."
- Includes relatives, household, businesses.
- Must disclose both. For actual, must recuse oneself. Recommendation: Leave the room.
- Can overlap with bias.
- In addition to appeal issues, can result in personal liability for the official (fines, plus up to 2x financial gain)
- Call OGEC

## Hearing Issues

- Presiding Officer has inherent authority to maintain order and decorum
  - ... Reasonable rules for conduct of meeting
  - ... Order and length of public testimony (may be specified by ordinance or other rules)
- Disturbances
  - ... Provide a warning
  - ... If behavior continues, ask to leave the meeting
  - ... If they do not leave, they can be treated as a trespasser
  - ... Tip: Call a recess

## Appeals

- Local Appeals
  - ... Applications are generally divided into categories in the code (Type I, Type II, etc.) which will define the initial decision maker and the appeal body
  - ... Appeals can be "de novo" (a completely new hearing process) or "on the record" (no new evidence; decision based on record from initial decision maker)
- Further appeals
  - ... IUBA
  - ... Oregon Court of Appeals, etc.
- Remand
  - ... Be mindful that appeals may result in remand, so you may be making a new decision on the same application again in the future. Consider implications for bias and ex parte contacts with conduct after making a decision

## Fixed Goalpost Rule

- Decision must be based on the standards and criteria applicable at the time the application was first submitted.

### Clear and Objective Requirements

- All "standards, conditions and procedures regulating the development of housing" must be clear and objective.
- If they aren't clear and objective, they cannot be applied.
- An alternative, discretionary path can be provided as long as a clear and objective path is available.
- Simple in concept; very challenging to accomplish in reality.

### Constitutional Issues

- A "taking" is a governmental appropriation of private property. Under the state and federal constitutions, the government must provide "just compensation."
- Can be the result of regulations that limit the use of property.
- More commonly, can be the result of exactions, meaning conditions of approval that require transfer of private property (e.g. road dedications, construction of improvements). These must meet two requirements:
  - Nexus: The relationship between the exaction and the underlying regulation of the property.
  - Rough proportionality: The exaction is related in nature and extent to the impact of the proposed development.

### Questions?


- Additional resources:
  - [OregonLandUseTraining.info](http://OregonLandUseTraining.info)
  - An Introductory Guide to Land Use Planning for Small Cities and Counties in Oregon (a bit dated, but still valuable)
  - OREC Guide for Public Officials (for conflicts of interest and other ethics issues)

Training adjourned at 8:01pm.



Mayor Joseph A. Backus

Attest:

  
City Recorder Susan M. Reeves, MMC