



# Land Use Hearing Fundamentals for Historic Review Board Members

## **West Linn Historic Review Board Training – August 15, 2023**

- Observations from the City Attorney's Chair – Bill Monahan
  - Tools to be familiar with
  - Roles
  - Hearings – requirements, process
  - Transparency
  - Some best practices



# Historic Review Board (HRB) Land Use Tools

- Typical HRB land use tools include:
  - City Comprehensive Plan
  - City Development Code, ordinances and studies
  - Staff reports
  - Oregon Revised Statutes
  - Local rules of procedure (in West Linn - Council Rules apply), scripts
  - Training sessions, work sessions, and materials/resources
  - Teamwork – HRB members, staff, attorney



# Roles

HRB – quasi-judicial approval authority (decision maker) in certain land use actions (listed in WLCDC 99.060.D.1.) and make recommendations to the approval authority (listed in WLCDC 99.060.D.2.).

Chair – presides over meeting, maintains order, leads and follows the City's established process toward decision-making.

Members – prepare for meetings, make full disclosures at the appropriate times, provide full attention at hearings, and participate fully in the decision making process.



# Roles - continued

Planning Staff – experts on plan and code

- Initial contact for applicant and public – provide information
- Draft and present staff report and recommendations
- Prepare HRB decision or recommendation with findings
- Process appeals of Planning Commission decisions to City Council (WLCDC 99.240.A.)
- Resource during public hearings (respond to questions, assist in process, prepare modified conditions, prepare findings)

City Attorney – resource on legal issues, provide input on process, assist in developing conditions and findings

# What HRB Members Need and Expect

- From the Planning Staff:
  - Well prepared and understandable staff reports that present the application, criteria, and options
  - Ability to explain code language and how it is applied
  - Deliver and understand input from departments and agencies
  - Answer questions fully and accurately – or commit to get answers
  - Provide complete and objective answers
  - Provide guidance when needed and appropriate
  - Always show respect to the HRB, applicant and public
  - Identify any need for follow up – additional information for a specific hearing, and future code changes, training, meetings, etc.

# What HRB Members Need and Expect

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

# What is Needed From HRB Members

- Know the plan, code, local rules of procedure
- Prepare fully for meetings – be present, read the packet, ask questions (in advance when possible), suggest improvements
- Listen carefully to all – respect staff, applicant, audience, and fellow board members equally
- Preserve the public trust in the process
  - Fully and accurately declare conflicts, bias, ex parte contacts, and site visits
  - make open and impartial decisions
- Understand the laws that apply, including:
  - ORS 197.797 – Public Hearing Process (renumbered from 197.763 in 2021)
  - ORS 244.120 – Conflicts of Interest
  - ORS Chapter 192 – Oregon Public Meetings and Public Records Law

# What is Needed By the Citizens

- Citizens involved in land use at the local level need:
  - An open process – access to plans, code, reports
  - Easily understood procedures
  - Staff that is accessible and provides clear direction on land use proposals, applicable criteria, schedule, and process
  - Access to comprehensive plan, code, reports, application materials, staff report
  - An unbiased decision maker
  - Due process



# Hearing Procedures

- Types:
  - Legislative
  - Quasi-Judicial

## The differences:

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

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



# Legislative Process

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



# Quasi-Judicial Process

- Decision makers sit as an impartial tribunal
- The 5th and 14<sup>th</sup> Amendments to the U.S. Constitution require due process
- Impartiality requires:
  - Treat all parties fairly
  - Allow all parties to know what the decision makers “know” and consider as a decision is made
  - Ex parte contacts must be announced so all parties know what information was provided to the receiver, and



# Quasi-Judicial Process

- Impartiality requires:
  - Information considered by the decision maker should be factual
  - The process allows information placed before the HRB to be challenged by participants in the process
  - In order for any participant to challenge information, the participant (or party) needs to know what has been submitted



# Quasi-Judicial Process – Local Rule

- WLMC 2.045(2) requires the HRB to conduct its meetings in accordance with the Council Rules, WLMC, City Charter, and State law.
- West Linn’s Council Rules state procedural requirements that are in addition to requirements of State law that apply to land use hearings.
- The requirements that must be kept in mind are those that apply to quasi-judicial land use matters – Section D. of the Council Rules that were adopted on June 24, 2019.
- Specifically, when challenges are made to the participation of a HRB member based on bias (subsection 1) or an ex parte communication (subsection 4) the process stated in the Rules must be followed.



# Elements of Due Process

- Opportunity to present and rebut evidence
  - Every party to a quasi-judicial hearing has the right to:
    - Present evidence
    - Rebut evidence presented by other parties
  - The HRB has the right to establish time, place and manner on presentations, following those adopted within West Linn's Council Rules
    - Create the order for presenters, set time limits, hold the record open
  - To rebut evidence a party must:
    - Know what evidence is in the record; review the evidence



# The Record

- The record also includes:
  - All documents, application materials, letters and emails submitted concerning the application
  - The written minutes of the hearing
  - Tape or video of the hearing (today this includes WebEx, Zoom, etc.)
  - The decision including conditions of approval and findings



# The Record

- The record is everything “placed before” the HRB during the hearing
- When the Planning Commission considers a recommendation of the HRB, or the City Council hears an appeal of a HRB decision, the record brought forward is everything that the HRB reviewed as well as the recommendation or decision it made.
- Record materials are submitted by:
  - The applicant – application, studies, testimony of the applicant and its advisors, maps, photographs, drawings, etc.
  - Staff – notice of hearing, staff report, comments from officials
  - Public – letters, emails, testimony, documents
  - HRB members – the record of disclosures, questions



# Procedural Items and Requirements

- Pay attention to the requirements of ORS 197.797 (formerly ORS 197.763) including:
  - Notice of Hearing – what is in it, when is it sent, who is it sent to?
  - Staff report – what is in it, when is it available, who receives it?
  - Documents submitted by the applicant in support of the application must be available to the public
  - Statement made at the commencement of the hearing providing direction on hearing conduct
  - Right to a continuance –
    - automatic if requested before conclusion of the first evidentiary hearing on an application (typically the first evidentiary hearing is at the HRB level)
    - Discretionary if requested at any hearing other than the first evidentiary hearing



# Scripts

- The script must be legally sufficient with all the required statutory language
- It should be easy for the Chair to deliver and follow
- The Chair typically delegates responsibility for the “legal matters” if the city attorney attends the hearing
- It must provide notice of the right to request a continuance or keep the record open before the conclusion of the first evidentiary hearing
- Some cities provide the script to all board or committee members along with sample motions which might be made.



# Elements of the Script

- Introduction and opening statement – identify application
- Hearing Procedure – including time limits if used
- Legal Matters – burden of proof, criteria, appeal rights
- Testimony Order
- Staff Report and Presentation
- Presentation of the Applicant
- Public Testimony

and (next slide)



# Elements of the Script (continued)

- Rebuttal by the applicant
- Address any request(s) for continuance – if any
- Questions of staff
- Deliberations and decision
- Sample motions for the land use action
- Final comments and next steps (including appeal rights if applicable)



# Impartial Tribunal

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



# Ex Parte Contacts

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



# Ex Parte Contact – City Council

- If an ex parte contact takes place, what should you do?
  - Disclose - put the matter on the record at the next hearing on the matter prior to the commencement of the hearing, that is, before any testimony is received and before any proceedings on the matter take place.
  - Reveal the contact and the substance of the contact or communication.
  - Be sure the disclosure is noted in the record (minutes) of the hearing.
  - The Chair must follow Council Rule Section D. 4 and provide a right to interested parties to rebut the substance of the communication.
  - The HRB determines whether the board member should step down.
  - Failure to make a disclosure of ex parte contact could result in a remand.



# Site Visits

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



# Conflict of Interest

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



# Conflict of Interest

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



# Conflict of Interest - Potential

- What should you do if you have a potential conflict?
  - Publicly announce the potential conflict prior to participating in debate and voting on an issue – provide details
  - Announce the potential conflict when the Chair calls for declarations before the hearing is opened, have it recorded
  - If the conflict is not apparent until the hearing has begun, ask the Chair for permission to be recognized and make the disclosure as soon as possible
  - When there is a potential conflict, the HRB member can take part in the hearing. But, be concerned about appearance.
  - If there is more than one hearing on the matter – make the announcement each time the matter is on the agenda.
  - The requirements of Council Rules Section D.2. apply.



# Conflict of Interest - Actual

- What should you do if you have an actual conflict?
  - Publicly announce the conflict prior to participating in the hearing, and
  - Refrain from participating in a debate on the issue or from voting on the issue
  - Have the declaration go into the minutes of the hearing
  - Make the announcement at each meeting the matter is on the agenda
  - Best practice tip: leave the hearing room after making the declaration. Do not discuss the item with anyone. You can return for the next agenda item.



# Exception

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



# Personal Bias

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

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



# Bias: What to Do

- When bias exists a HRB member should:

- Disclose the nature of the bias
- State whether or not in their opinion it requires disqualification

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

Council Rules Section D.1. must be followed.

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



# Bias: What to Do

Council Rules Section D.1. must be followed (and WLCDC 99.180). The Rules and Code require:

- prior to the commencement of the hearing all members “must disclose their previous pre-judgement, personal interest or participation in any manner or action on the matter to be heard and shall state whether they can participate in the hearing with an open mind.”
- If a member is unable to hear the matter impartially, they have a duty to step down.
- There is a challenge process stated in Council Rules Section D. 1.a. (and WLCDC 99.180 B) which must be followed.



# Burden of Proof

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



# Burden of Proof - continued

- The applicant should respond to all issues raised by opponents by pointing to evidence in the record or bringing forward more evidence.
- Applicants should not rely on staff presentations alone to meet the burden. An applicant can rely on its experts to address the application, code criteria and questions.
- If an applicant or its experts provide new information at a hearing, the public must be given a chance to rebut it.



# Public Testimony

- Each member of the public has the right to speak after the applicant's testimony. During their allotted time, members of the public can present their thoughts orally and in writing. This is also their opportunity to rebut what the applicant has presented.
- Public testimony should be directed at the applicable criteria identified by the staff as applying to the application. A member of the public can also identify other criteria which they believe should apply. The HRB can later question staff about any "new criteria" and will need to determine whether it agrees the criteria apply.
- The public testimony portion of the meeting is the time when the HRB allows the public to express their points of view – pro and con the application. After a person concludes their testimony, members of the HRB may ask clarifying questions outside of the time allotted to that speaker. A back-and-forth dialogue is discouraged. The applicant will have an opportunity to rebut at the appropriate time.



# Making a Decision

The HRB must make its decision based on the local approval criteria by applying the criteria to the facts. It must rely on the adopted criteria for approval contained in the Community Development Code. If the applicant demonstrates compliance with these criteria, the application must be approved even if the HRB disagrees with the criteria, or believes that additional, un-adopted criteria should be applied. If the applicant fails to demonstrate compliance with the applicable criteria, the HRB must deny the application - unless through the application of conditions of approval the criteria can be satisfied.



# Appeal Process When a HRB Decision is Appealed to the City Council

- Appeals of HRB decisions are processed as a de novo hearing at Council (WLCDC 99.280 A.)
- Any appeal must be filed by the applicant or someone with “standing” who participated in the HRB process in some way.
- An appeal must be filed within the appeal period, be in writing, and may state the grounds or reasons for the appeal (but grounds for the appeal are not required by WLCDC 99.250 D.).
- Anyone who established standing has the right to participate in the City Council appeal hearing.
- The City Council has before it the entire record of the HRB proceedings (the application, hearing, and decision) which are incorporated and considered as evidence in the appeal procedure. The Council holds a full evidentiary hearing on the matter.



# The Record of the HRB – what is in it?

- The items in the record brought to the City Council on appeal include:
  - The original notice
  - The application and supporting documents
  - The staff report and agency comments
  - All comments submitted by the public pro, con and neutral about the application
  - Any documents submitted at the HRB hearing(s) and during the period the record was open
  - All documents and illustrations submitted at the hearing
  - Minutes of the HRB hearing(s)
  - The decision of the HRB and the notice of decision that was sent
  - The appeal notice(s) filed within the established appeal period.



# Allowing a Continuance and Keeping the Record Open

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

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



# Additional Information When the HRB Allows a Continuance and Keeps the Record Open

If the HRB continues a hearing to finish the hearing (a continuance) or leaves the record open, the HRB has the right to ask for additional information. New information should be required in advance of the next hearing to allow staff to review the information and post it so it is available to the HRB members and public before the hearing. Any new information submitted by the applicant in support of its application must be available for rebuttal by other parties.

Requests should be made at the hearing and the person making the request should be as specific as possible.



# Some Issues With Continuances, etc.

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



# Evidence in Land Use Cases

- Evidence in the record must be the basis of the HRB's decision.
- Evidence is defined in ORS 197.763(9)(b) as “facts, documents, data or other information offered to demonstrate compliance or noncompliance with the standards believed by the proponent to be relevant to the decision.”
- Evidence rules are not as strict in land use settings as they are in a court.



# Evidence in Land Use Cases

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



# Substantial Evidence

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



# Substantial Evidence on Appeal

- Typically, when a matter is on appeal, the standard is that a reviewing body will not disturb a decision that is based on substantial evidence even if there is some conflicting evidence in the record.
- The findings must be sufficient to show why certain evidence was believed over other evidence in the record.
- Since any HRB decision will be reviewed de novo, the City Council will find the HRB findings to be useful, but it will make an independent decision.



# Admitting Evidence

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



# Raise It Or Waive It

- Oregon requires detailed notice and certain procedural requirements at quasi-judicial land use hearings.
- ORS 197.797 Conduct of local quasi-judicial land use hearings; notice requirements; hearing procedures.
- The statute provides procedures to govern the conduct of quasi-judicial land use hearings on land use applications and must be made part of local land use regulations.



# Raise It Or Waive It

- It provides standards for:
  - Notice
    - Who notice must be provided to
    - What must be included in the notice – ORS 197.797(3)
      - The nature of the application and the proposed uses which could be authorized
      - The applicable criteria that apply to the application
      - The address of the subject property
      - The date, time and location of the hearing
      - “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”
      - And more details.



# Raise It Or Waive It

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



# Findings

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



# Findings

- When an application is approved:
  - The applicant typically introduced the majority of evidence
  - The staff interpreted the evidence against the criteria and stated whether it believed the evidence shows criteria is met
  - Opponent testimony has been responded to with evidence
- When an application is denied:
  - The staff provided code interpretation, data and suggested findings recommending denial, or
  - The staff recommended approval, but the HRB determined that the application did not meet all approval criteria and voted to deny. The HRB must state on the record the reason for denial supported by evidence in the record. Staff can assist.



# Findings

- Are an outline of the evidence in the record relied upon for the decision.
- Are not conclusions or opinions.
- Are drawn from the facts to arrive at a decision.
- State what the relevant criteria are and apply the facts proven in the hearing to those criteria.



# The Final Order

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



# The 120 Day Rule

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



# Questions?

- Questions can be directed to me at:
  - **Bill Monahan, [bmonahan20@comcast.net](mailto:bmonahan20@comcast.net)**
  
- Thank you!