

Land Use Training

January 2025

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Agenda

- **Brief Overview of Land Use Basics**
 - History and Purpose of Oregon Land Use Law
 - Role of State and Cities
 - Types of Land Use Decisions
 - Land Use Process
- **Important Issues**
 - Bias, Ex Parte Contacts, and Conflicts of Interest
 - Other Government Ethics Issues
 - Public Meetings Issues
 - Hearing Requirements and Issues
 - Criteria and Findings
 - Appeals
 - 120-Day and Fixed Goalpost Rules
 - Clear and Objective Requirements
 - Constitutional Issues
 - Recent Legislation (SB 1537)
- **Questions and resources**

History and Purpose of Oregon Land Use

- Over 50 years of land use law in Oregon
 - 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
 - DLCDC, 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 primary types of land use decisions you will encounter:

- Legislative
- Quasi-Judicial

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.

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 decisions you encounter will be quasi-judicial. As “judicial” suggests—the city decision-maker will be effectively acting as a judge to determine an application’s compliance with applicable requirements. Because of that, additional requirements 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 Depoe Bay*, 39 Or LUBA 702 (2001).

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: Biased. 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

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 project's opponent and included them in the record.
- LUBA: Biased. "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

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. Expressed concerns about conditions imposed on church, but ultimately voted to approve permit.
- LUBA: Not biased. 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.

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 commissioner'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).

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

Other Government Ethics Issues

- Use of Position or Office (ORS 244.040(1))
 - Prohibits every public official from using or attempting to use their position to obtain a financial benefit, if the opportunity for the financial benefit would not otherwise be available but for the position held by the public official.
 - Examples: Using public resources to conduct private business
 - Sometimes overlaps with conflict of interest
- Gifts (ORS 244.025)
 - A “gift” is anything of economic value (including discounts or forgiveness of debt) not offered to the general public
 - Does giver have a legislative or administrative interest in the decisions or votes of the public official?
 - Refers to an economic interest distinct from the general public in the decision or vote of a public official
 - If so, maximum \$50 total per calendar year.
- Includes relatives, household, businesses.
- Can result in personal liability for the official (fines, plus up to 2x financial gain).
- Call OGEC

Public Meetings Issues

- The Planning Commission and City Council are both subject to Oregon Public Meetings Law (ORS 192.620 et seq.).
- All meetings must be publicly noticed and open to the public.
- Applies to meetings where decisions or deliberations on matters of official business occur.
- Includes electronic communication.
- Also includes so-called “serial meetings,” where a quorum isn’t directly involved in the meeting at the same time or the same place (HB 2805 (2023)):
 - Non-contemporaneous electronic communications (e.g. e-mail, social media)
 - Through an intermediary

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.

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

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
 - Tip: Limit all decision-maker discussion to criteria and evidence

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
 - LUBA
 - 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.

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 (or 335 days if the parties are undertaking mediation).
 - Tip: Have blank extension forms at hearings.
- HB 3395 (2024) allows a city seven additional days to reduce an *approval* decision to writing after making a tentative decision on an application for development of residential structures within a UGB

Fixed Goalpost Rule

- Decision must be based on the standards and criteria applicable at the time the application was first submitted.
- HB 4063 (2024) modified this long-standing requirement to allow housing developers to opt in to standards and criteria that went into effect after the application was submitted.
 - Aligns with many cities' existing practices
 - Completeness review and 120 day clock start over

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.

Recent Legislation – SB 1537 (2024)

- Among other changes, creates a process for “mandatory adjustments” starting January 1, 2025.
- Cities will be required to allow up to 10 adjustments to certain specified land use regulations in applications for development of housing.
- Unclear how “ten” is counted.
- Long list of qualifying regulation types includes side or rear setbacks (max 10%), minimum lot sizes (max 10%), parking minimums, façade materials, color, or pattern, roof forms or materials, requirements for balconies or porches, etc.

Recent Legislation – SB 1537 (2024)

- Effective January 1, 2025, this legislation also expanded the definition of “limited land use decision” and made the streamlined no-hearing review process for limited land use decisions in ORS 197.795 mandatory except for ministerial decisions.
- The definition was expanded as follows:
 - “Limited land use decision” means a final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns:
 - (A) The approval or denial of a tentative subdivision or partition plan, as described in ORS 92.040 (1).
 - (B) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review.
 - (C) The approval or denial of an application for a replat.**
 - (D) The approval or denial of an application for a property line adjustment.**
 - (E) The approval or denial of an application for an extension, alteration or expansion of a nonconforming use.**

Questions?

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

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