



## MEMORANDUM CITY OF TUALATIN

**TO:** Honorable Mayor and Members of the City Council

**FROM:** Sherilyn Lombos, City Manager

**DATE:** January 23, 2017

**SUBJECT:** Work Session for January 23, 2017

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**6:15 p.m. (30 min) – Land Use Hearings – a Briefing.** The City Attorney will give an informational briefing about land use hearings (legislative and quasi-judicial). He will cover information about the process for each type of hearing, appeals, ex parte communication, conflict of interest, and bias, all to hopefully provide you useful tools to use in your role as the City's policy makers.

**6:45 p.m. (15 min) – Council Meeting Agenda Review, Communications & Roundtable.** Council will review the agendas for the January 23<sup>rd</sup> City Council meeting and brief the Council on issues of mutual interest.



# STAFF REPORT

## CITY OF TUALATIN

**City Council Work Session**

**Meeting Date:** 01/23/2017

**Subject:** Land Use Hearings- A Briefing

**Through:** Sherilyn Lombos, Administration

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PowerPoint

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*City of Tualatin*

# Land Use Hearings

CITY COUNCIL WORK SESSION

JANUARY 23, 2017

Sean Brady  
City Attorney

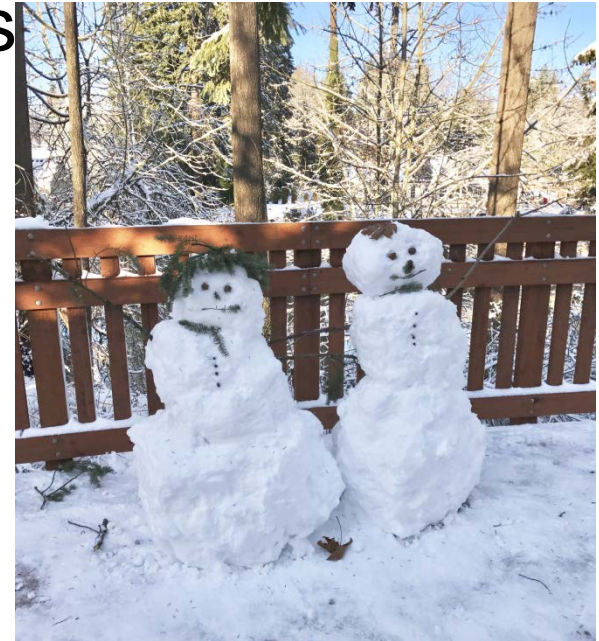
# Overview

- Land Use Hearings
- Ex Parte Contacts
- Bias
- Conflicts of Interest



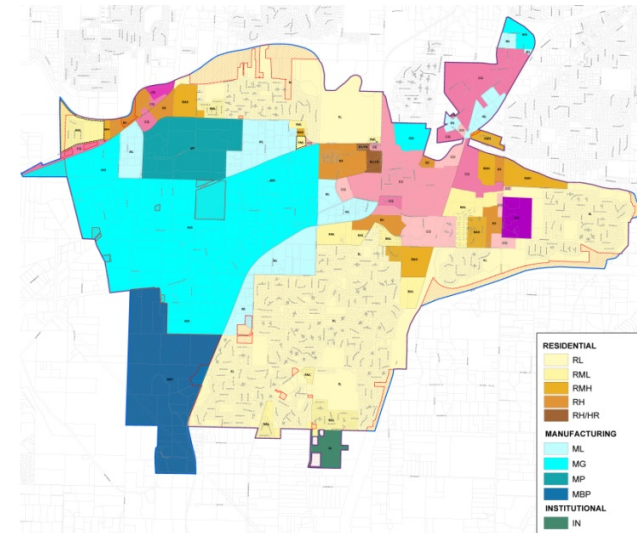
# Land Use Hearings

- Two Types of Land Use Hearings
  - Legislative
    - Sitting as a Legislator
    - Enacting a law that broadly applies
    - No Requirement to Enact the Law
  - Quasi-Judicial
    - Sitting as a Judge
    - Considering and Applying Evidence to Criteria in the Code
    - Site-specific Zoning or Map Changes
    - Must Issue a Written Decision within 120-days



# Legislative Hearings Process

- Notice of Public Hearing to Public and DLCD
- Conduct Public Hearing
- Ordinance Enacted
  - ▣ Includes Legislative Findings and Conclusions
    - Compliance with State Land Use Laws
    - City Comprehensive Plan and Master Plans
    - Metro Urban Growth Management Plan
- Staff Notifies DLCD of Final Action



# Quasi-Judicial Hearings Process

- ❑ Provide Notice of Public Hearing
- ❑ Mayor Reads the Script
- ❑ Disclose
  - ❑ Ex Parte Communications
  - ❑ Bias
  - ❑ Conflicts
- ❑ Evidentiary Portion of Hearing
- ❑ Close Hearing, Deliberations, and Vote
- ❑ Direct Staff to Bring back a Final Written Decision at Future Meeting
- ❑ At Future Meeting, Council votes on Resolution or Ordinance, which includes Findings



# Land Use Appeals

- Legislative – Appeal to LUBA
  - Challenge whether Legislative Action Complied with:
    - State Land Use Laws
    - City Comprehensive Plan and Master Plans
    - Metro Urban Growth Management Plan
- Quasi-Judicial – Appeal to LUBA
  - Challenge Criteria
  - Challenge Application of the Criteria
  - Challenge Sufficiency of the Evidence





# Ex Parte Contacts

- Applies To Quasi-Judicial Not Legislative Decisions
- Origins in Due Process
  - ▣ Right to Be Heard
  - ▣ Right to Impartial Tribunal
  - ▣ Present and Rebut Evidence

# Ex Parte Communication

- Elements:
  - 1) Communication;
    - Written
    - Oral
    - Electronic
  - 2) Made to a Decision-Maker;
  - 3) Outside of the Quasi-Judicial Hearing;
  - 4) Concerning the subject matter of the Quasi-Judicial Hearing; and
  - 5) Occurs While a Matter is Pending
    - After a formal application is filed
    - Before Final Decision



# Contacts with Staff

- Communication with Staff
  - Not Ex Parte When:
    - Consulting regarding the evidence presented
    - Concerning interpretations or application of code
  - Is Ex Parte If:
    - Communication with Staff presents new evidence; and
    - Decision-maker wants to rely on that evidence, in whole or in part, as a basis to make the decision



# Other Contacts

- Attorneys
  - City Attorney
    - Not Ex Parte
  - Party Attorney
    - Ex Parte
- Site Visits
  - Ex Parte
- Newspaper Articles
  - Ex Parte if:
    - Urge a Result; and
    - Discuss a Fact at issue in the pending matter



# Other Contacts (Cont.)

- Recess of Hearing
  - Discussions with audience members about substance of hearing during a recess
    - Ex Parte
- After Close of Hearing
  - Contacts relating to substance of hearing after hearing closed, but before final written decision issued
    - Ex Parte
  - Contacts while case on Appeal to LUBA
    - Ex Parte if case is remanded from LUBA

# How to Cure Ex Parte Contact

- 1) Announce that an Ex Parte contact has occurred:
  - ▣ At the next public hearing immediately after contact occurs
  - ▣ Before the public hearing begins or resumes
- 2) State the **nature** and **substance** of the contact
  - ▣ Specific enough to allow the parties to respond or offer evidence in rebuttal
- 3) Decision-making body allows all parties to the proceeding the opportunity to question the decision-maker to clarify the contact, and to present evidence and argument to rebut the substance of what was discussed outside of the hearing

# Risks If Do Not Cure

- Violates Substantial Rights of Parties
  - Right to Be Heard
  - Right to Impartial Tribunal
  - Present and Rebut Evidence
- Basis for Invalidating the Decision



# Bias

- A decision-maker that substantially impairs a party's ability to receive a full and fair hearing.
  - Can be in favor or against
- Actual Bias
  - Prejudice or prejudgment of the case to such a degree that the decision-maker is incapable of making a decision on the merits
    - Personal bias
    - Personal prejudice
    - Interest in the outcome





# Bias

- Established through:
  - Explicit statements, pledges, or commitments that the elected local official has prejudged the specific matter before the tribunal.
- Insufficient:
  - Circumstantial Evidence based on Prior Acts
    - Statements made in a campaign
    - Prior active appeal and opposition to a similar project
    - Prior praise for legislation opposing the project
    - Prior newspaper editorials about the project being a “bad idea”

# Conflict of Interest

- Two Types of Conflicts
  - ▣ Actual Conflict
  - ▣ Potential Conflict

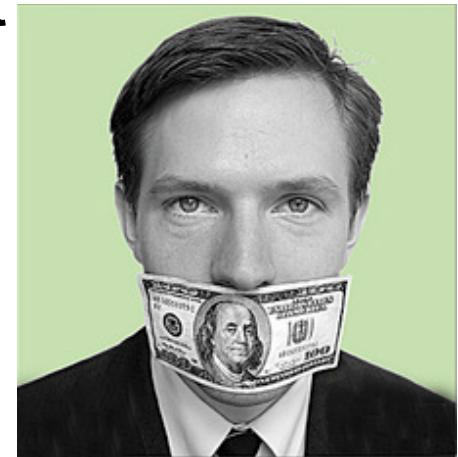


# Actual Conflict of Interest

- Action, decision, or recommendation by a public official
  - The Effect of which “**would be to the private pecuniary benefit or detriment**” of:
    - Public Official
    - Relative of the Public Official
    - Business with which the Public Official is Associated
    - Business with which a relative of the Public Official is associated.
  - Business Does Not Include Non-profit - 501(c) corporations if:
    - Member of a Nonprofit
    - Position on Board of Directors; or
    - Association is unpaid relationship
- ORS 244.020(1)

# Required Action if Actual Conflict

- ❑ Disclose the nature of the conflict and reason for abstention
  - ❑ Abstention alone is insufficient
  - ❑ Must give reasons
- ❑ Refrain from Discussions
- ❑ Refrain from Voting



# Potential Conflict of Interest

- Action, decision, or recommendation by a public official
- The Effect of which “**could be to the private pecuniary benefit or detriment**” of:
  - Public Official
  - Relative of the Public Official
  - Business with which the Public Official is Associated
  - Business with which a relative of the Public Official is associated.
- Business Does Not Include Non-profit - 501(c) corporations if:
  - Member of a Nonprofit
  - Position on Board of Directors; or
  - Association is unpaid relationship

ORS 244.120(13)

# Required Action if Potential Conflict

- ❑ Disclose nature of the conflict
  - ❑ Stating “I have a conflict” is insufficient
- ❑ May participate in Discussions
- ❑ May participate in Voting
  - ❑ May still choose recusal, but not required



# Question Whether Conflict Exists

- Consult with Oregon Government Ethics Commission (OGEC)
- City Attorney
  - ▣ Assist through Process



# Scenario 1

- A developer speaks to the City Planning Department about a zoning issue
- A zoning application has not been filed, but the person intends to submit an application soon
- The proposed applicant contacts each member of the Council and asks whether they would support a re-zone of a property from Residential to Commercial

**IS THIS AN EX PARTE CONTACT?**

yes  no

**WHY?**

**Contacts Occurred Before Submit Application**

**WOULD THIS ALONE CONSTITUTE BIAS?**

**No**



# Scenario 2

- Property abuts a park and Person applies to rezone property from residential to commercial
- After the application is submitted but before the hearing, Ms. Smith contacts a Councilor to urge the Councilor to vote against the rezone because it will increase the amount of traffic near the park
- At the close of hearing Councilor discloses: “I had an ex parte contact with Ms. Smith and she urged me to vote no.”

**WAS THIS EX PARTE DISCLOSURE SUFFICIENT?**

yes  no

**WHY?**

**Occurred Too Late - After Close of Hearing  
Lacks Substance**

# Questions on Land Use Hearings

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