



MAYOR TED TOSTERUD  
COUNCIL PRESIDENT MIKE WEATHERBY      COUNCILOR LISA BARTON MULLINS  
COUNCILOR CATHI FORSYTHE              COUNCILOR NATALIE VORUZ  
COUNCILOR KEITH KUDRNA                COUNCILOR BRIAN COOPER

## FAIRVIEW CITY COUNCIL AGENDA

Fairview City Hall-Council Chambers  
1300 NE Village Street, Fairview, Oregon

WEDNESDAY, JANUARY 18, 2017

### WORK SESSION

1. CITY COUNCIL TRAINING 6:00 PM  
(Heather Martin, City Attorney)
2. UPDATE STATUS & PRIORITIES OF GOAL OBJECTIVES & TASK LIST  
(Nolan Young, City Administrator)

### REGULAR SESSION

1. CALL TO ORDER 7:15 PM  
ROLL CALL  
PLEDGE OF ALLEGIANCE
2. CONSENT AGENDA (A)
  - a. Minutes of January 4, 2017
3. CITIZENS WISHING TO SPEAK ON NON-AGENDA ITEMS (I)
4. PRESENTATION (I)  
None
5. CITY ADMINISTRATOR AND DIRECTOR REPORTS (I)
6. MAYOR/COMMITTEE REPORTS AND COUNCIL REPORTS (I)
7. PUBLIC HEARING (A)  
None
8. COUNCIL BUSINESS (A)
  - a. Amend the Fairview City Council Rules: Meeting Time  
Ordinance 3-2017 [ASR 4-2017]  
1st Reading & Staff Report  
(Nolan Young, City Administrator)
9. ADJOURNMENT (A)

Ted Tosterud, Mayor

Jan. 12, 2017  
Date

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(A) Action requested (I) Information only

**NEXT COUNCIL MEETING IS FEBRUARY 1, 2017**

COUNCIL EXECUTIVE SESSION – IF NECESSARY – END OF MEETING

PARK VIEW CONFERENCE ROOM

ORS 192.660(2)(d) - Labor Negotiations, ORS 192.660(2)(e) - Real Property Transactions,  
ORS 192.660(2)(f) - Exempt Public Record and ORS 192.660(2)(h) - Legal Counsel

City Council regular meetings are broadcast live on Comcast Cable Channel 30 or Frontier Channel 38. Replays are shown on Sunday at 4:00 PM and Monday at 2:00 PM following the original broadcast date. Meetings are also available for viewing the Monday following the meeting through MetroEast Community Media at [metrocast.peg.tv](http://metrocast.peg.tv). Go to the Playlist tab and select Municipal Meetings. Further information is available on our web page at [www.fairvieworegon.gov](http://www.fairvieworegon.gov) or by calling 503.665.7929. The meeting location is wheelchair accessible. A request for an interpreter for the hearing impaired or for other accommodations for persons with disabilities should be made at least 48 hours before the meeting to 503.665.7929.



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# **CITY OF FAIRVIEW COUNCIL WORKSHOP**

## **I. AUTHORITY OF THE CITY**

Appendix A sets forth the legal structure pursuant to which the city derives authority. There are two broad categories:

- 1992 Fairview Charter (Charter) and home rule authority; and
- State law and constitutional context.

### **Administrative**

As the administrative head of the city government, Charter Section 23 delegates specific powers and duties to the city administrator (Administrator). Implicit with these delegations is the authority to make rules governing the administrative practices and procedures necessary to discharge these powers and duties.

The Administrator has duties to attend all meetings of the City Council (Council) unless excused by the Mayor or Council; make reports and recommendations to the Mayor and Council about the needs of the city; administer and enforce all city ordinances, resolutions, franchises, leases, contracts, permits and other city decisions; appoint, supervise and remove city employees; organize city departments and administrative structure; prepare and administer the annual city budget; administer city utilities and property; encourage and support regional and intergovernmental cooperation; promote cooperation among the Council, staff and citizens in developing city policies, and building a sense of community; perform other duties as directed by the Council; and delegate duties, but remain responsible for the acts of all subordinates. These duties imply authority to adopt rules, practices, and procedures to perform them. The Council may by ordinance specifically delegate authority to the Administrator to adopt other administrative rules. Councilors have no legal authority over staff activities, and neither Councilors nor the Council should fall prey to micromanaging staff performance.

The Administrator in turn may sub-delegate authority to department directors and other city employees. All such authority is exercised in the name of the Administrator, and the Administrator remains legally responsible for the actions. All departmental regulations, practices and procedures, whether written or unwritten, formal or informal, must be consistent with the Charter, Fairview Municipal Code (Code), and all state and federal law.

A major Council responsibility is the evaluation of the Administrator based on clearly defined goals, guidelines, and executive performance.

## II. CITY ENACTMENTS

A policy is a city enactment adopted by Council ordinance or resolution. All city legal authority not delegated to the Administrator, municipal judge or city attorney by the Charter remains with the Council. The Council has the authority to make city policy through its formal decisions. The Council must work in partnership with city staff to make good policy for the city.

### **Ordinances – purposes and drafting**

A city may exercise legislative authority by adopting ordinances. Only a city council may adopt an ordinance, and this authority may not be delegated to others. An ordinance may be amended or repealed only by another ordinance. After adoption, the city recorder or other custodian of records must attest to the adoption and the date of adoption and submit the ordinance to the Mayor for signature which must occur within three days of passage. Ordinances are retained as permanent city records and often are codified in the Code. The Code contains the general laws of the city that are uniformly applicable without exception.

State law provides that certain city decisions must be made by ordinances. For example, city annexation decisions under ORS 222.120 must be by ordinance. The Charter also requires some Council actions by ordinances. City policies relating to council rules, public improvements and special assessments must all be by ordinance.

Charter Section 31 requires each ordinance to have an ordaining clause that states: “The City of Fairview ordains as follows:” An ordinance may be adopted after approval by a majority of the Council at two Council meetings on two different days or at a single Council meeting if it is by unanimous vote of all Council members present. Ordinances normally take effect on the 30<sup>th</sup> day after adoption by the Council. If an ordinance has an emergency clause, it may take effect immediately or at some other time less than 30 days.

In 2012, Fairview’s Charter was amended so that under Section 32, there must also be a public hearing/comment period before each ordinance is enacted.

### **Resolutions – purposes and drafting**

A resolution is a form of council action less formal than an ordinance. Resolutions are passed at one council meeting and are used for council administrative decisions. Resolutions and other administrative decisions take effect on the date of approval or on a later day provided in the resolution. State law permits certain city decisions to take place by resolution. For example, annual city budgets and budget amendments or transfers may be approved by resolutions.

Council resolutions may establish city policies and procedures. Resolutions may also adopt procedures for appointing city committees, a comprehensive risk management policy, and financial policies and goals.

Resolutions are often used to set city fees and charges. The city imposes a wide range of fees for specific administrative and other services. It also imposes both systems and user charges for

sewer, water, and storm water utilities. The legal authority for fees and charges is often provided by ordinances that are incorporated into the Code.

### **III. COUNCIL RULES AND PROCEDURES**

Parliamentary procedure is a set of rules that regulates and standardizes how the Council conducts its business. The parliamentary rules that apply to the Council are primarily set forth under Sections 5 and 6 of the Council Rules which are adopted by ordinance. The Council may amend its rules to modify procedures to best suit its needs. The Council rules also default to Robert's Rules of Order Newly Revised as a guide for all parliamentary situations not covered by the rules.

#### **Council Rules**

Council meetings are for conducting Council business. For effective and productive meetings, clearly defined rules and procedures are needed, the adoption of which are required in Charter Section 12. Rules help councils maintain focus and avoid redundant discussions. Rules can also promote useful citizen input, courtesy, and sensitivity to public concerns and viewpoints. They help the Mayor maintain civility in public discourse. They facilitate conducting business in an orderly, disciplined, and productive manner.

Charter Section 13 requires the Council to meet at least once a month at a time and place designated by its rules. Charter Section 14 allows less than a quorum of the Council to meet and compel attendance of absent members as prescribed by council rules. Finally, Charter Section 15 provides that a record must be kept of council meetings in a manner prescribed by council rules.

Any Council meeting requires a minimum of four Councilors or the Mayor and three Councilors to conduct business (i.e. a quorum). Under City Charter Section 13, regular council meetings must be held at least once a month at a time and place designated by council rules.

#### **Conduct of meetings: agenda, decorum and protocol**

The Council is the elected governing body of the city government. Councilors only exercise legal authority when meeting as the governing body. The Council is responsible for council functions including:

- Establishing community-wide goals that address short- and long-range needs;
- Formulating policies that define a course of action and shape city operations including analysis and balancing of complex and sometimes competing issues;
- Legislation / administrative / quasi-judicial decisions;
- Community relations – constituencies & intergovernmental; and

- Providing quality services using available resources.

Councilors are local leaders who are expected to perform their roles and fulfill their responsibilities. The electorate expects the Council to act as the city “board of governors” and set the tone and direction for municipal operations.

#### **IV. PUBLIC MEETINGS LAW (ORS 192.610 – 192. 710): OPEN AND EXECUTIVE SESSIONS**

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

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 Council and citizen advisory commissions and committees of the city are “governing bodies.” A subcommittee of a commission or committee can also be a “governing body” if it is authorized to make decisions for or to advise the Council.

#### **Public Body Decisions**

A committee or commission that has authority to make decisions for the city on “policy or administration” is a governing body. ORS 192.610(3).

##### **A. Recommendations to a Public Body**

An advisory committee, subcommittee, task force or other official group that has authority to make recommendations to the public body on policy or administration also is a governing body. ORS 192.610(3).

“Public body” does not include the Administrator or other individual city officials. For example, an advisory committee appointed by the Administrator is *not* a governing body subject to the law if the advisory committee reports only to the appointing official. However, if the individual official lacks authority to act on the advisory group's recommendations, and must pass those recommendations unchanged to the Council, then the meetings law applies to the advisory group.

If an advisory body is created by a public body to advise it, the fact that its members are all private citizens is irrelevant. The meetings law applies to private citizens, employees, and others without decision-making authority when they serve on a group that is authorized to advise the public body.

### **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).

#### **A. Quorum Requirements**

The Public Meetings Law does not define “Quorum.” For the city’s purposes, a majority of the Council constitutes a quorum.

A gathering of less than a quorum is not a meeting under the meetings law. The law applies to committees, subcommittees and other advisory groups that are charged by the public body with making recommendations. The recommendations must be the result of formal votes taken at meetings at which a quorum was present.

Staff meetings are not subject to the meetings law because they are not “governing bodies” and quorums are not required. ORS 192.610(3). Similarly, the law does not apply to individuals who are authorized to make recommendations. However, if staff meets with a quorum of the Council or a city commission, committee, or subcommittee 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).

#### **B. Meetings and Social Gatherings**

The Public Meetings Law applies to all public body 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.

If a quorum of the governing body gathers to discuss matters outside its jurisdiction, the “meeting” is not legal under the meetings law. Governing bodies sometimes want to have retreats or goal-setting sessions. These types of meetings are nearly always subject to the Public Meetings Law because the governing body is deliberating toward a decision on official business

or gathering information for making a decision. Council “retreats” and other gatherings must be held within the jurisdiction.

The law does not cover purely social meetings of council or committee members. In *Harris v. Nordquist*, 96 Or 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 if 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 members of a public body on electronically linked personal computers, including email, text messaging, and social media may be subject to the meetings law.

### D. Serial Communications

Members of a governing body may violate the Oregon Public Meeting Law’s prohibition on meeting in private even if a quorum never gather contemporaneously.

ORS 192.630(2) provides that a “quorum of a governing body may not meet in private for the purpose of deciding on or deliberating towards a decision on any matter.” A decision is “any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required, at any meeting at which a quorum is present. ORS 192.610(1). In other words, a quorum of a governing body may violate the prohibition against private meetings by (1) communicating in private, (2) for the purpose of deciding or deliberating, on (3) any topic that may require a vote.

A recent Oregon Court of Appeals case held that the prohibition against meeting in private includes both when a quorum meets contemporaneously *and* when a series of non-contemporaneous communications between members of the governing body, in the aggregate, include a quorum and the purpose of the communications is to decide or deliberate on a matter

that may come before the governing body. *Handy v. Lane Cty.*, 274 Or. App. 644, 689, 362 P.3d 867, 894 (2015).<sup>1</sup>

To illustrate this point, the following communications between members of a five person governing body may violate the state's public meeting laws:

- A councilor forwards an email discussion she had with another member of the Council regarding a matter that may come before the governing body to a third member of the Council. Because the email messages, in the aggregate, include a quorum of the Council (3 Councilors), and the purposes of the communications was to discuss a matter that will require a vote before the Council, the email exchanges in the aggregate could violate state law under the *Handy* Court of Appeals decision.
- A staff person individually calls members of a governing body to discuss a matter that will require a vote. When the staff person talks to each member, she shares with the member the opinions and comments of the other members. Although the members never speak directly, the staff person is acting as a conduit and allowing the members of the governing body to deliberate through her. These conversations, in the aggregate, could likewise violate state law.
- A citizen posts a comment on the city's Facebook page about an upcoming land use hearing and the comment generates a discussion. Two members of the governing body make comments and share opinion on the Facebook "thread." A third member reads the comments and also makes a comment. Because a quorum (3 members) have communicated opinions on the social media site on a matter that will require a vote before their body, the members may have violated state law.

As explained by the Court of Appeals, the prohibition against meeting in private does not include communications that are purely "information gathering." Members of a governing body should be aware, however, that the parameters of "information gathering" are not clear, and questions regarding whether and to what extent serial communications may occur should be directed to staff and/or the City Attorney's Office.

## **Legal Requirements**

### A. Notice

The Public Meetings Law requires public notice of the time and place of meetings. This requirement applies to regular, special and emergency meetings. ORS 192.640. The public notice requirements apply to *any* "meetings" of the governing body, and committees, subcommittees and advisory committees. Regular meeting notice must be *reasonably calculated*

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<sup>1</sup> On November 25, 2106, the Oregon Supreme Court overruled the Court of Appeals decision in part, but it did not directly address the issue of whether serial meetings could violate the state's public meeting laws. Thus, although the Court of Appeals decision is no longer binding, it is still persuasive to trial courts and instructive to public officials regarding the limitations on their ability to communicate with each other outside the scope of a public meeting.

to give actual notice of the time and place of the meeting “to interested persons including news media that have requested notice.” ORS 192.640(1). Notice must be given to persons and media that have stated in writing that they wish to be notified of every meeting.

If the meeting will consist of only an executive session, notice still must be given to members of the public body, the general public and news media that have requested notice. The notice must also state the specific legal section authorizing the executive session. ORS 192.640(2).

To help satisfy the accessibility requirements of ORS 192.630(5) and the Americans with Disabilities Act, the notice may provide the name of a person and telephone number (including TDD number) at the city to contact to request an interpreter for the hearing impaired or for other communication aids.

The notice for each meeting must “include a list of the principal subjects anticipated to be considered at the meeting.” ORS 192.640(1). The list should be specific enough to permit members of the public to recognize the matters in which they are interested; ordinarily this can be met by distribution of an agenda. The agenda need not go into detail about subjects scheduled for discussion or action, but should be sufficiently descriptive so interested persons can understand agenda topics.

The meetings law does not require the description of every proposed item of business in the notice. The law requires a reasonable effort to inform the public and interested persons of the nature of the more important matters (“principal subjects”) coming before the body. The public body may consider additional “principal subjects” arising too late to be included in the notice. The listing of principal subjects “shall not limit the ability of the governing body to consider additional subjects.” ORS 192.640(1).

The purpose of meeting notice is two-fold: general notice to the public at large and *actual* notices to specifically interested persons.

i. Regularly Scheduled Meetings: News media requesting notice *must* be given notice. Paid advertising is *not* required. If the city is aware of persons having a special interest in a particular action, those persons generally should be notified. This is not required if such notification would be unduly cumbersome or expensive.

ii. Special Meetings: At least 24 hours’ notice is required for special meetings. This may be accomplished by press releases or phone calls to the media. The city should make reasonable attempts to notify interested persons either by mail or telephone. News media requesting notice must be notified.

iii. Emergency Meetings: An emergency meeting is a special meeting called on less than 24 hours’ notice. An “actual emergency” must exist, and the minutes must describe the emergency justifying less than 24 hours’ notice. ORS 192.640(3). The public body must identify and describe in the minutes the reason the meeting could not be delayed to allow at least 24 hours’ notice. The law requires that “such notice as is appropriate to the circumstances” be

given for emergency meetings. The city must attempt to contact the media and other interested persons to inform them of the meeting. Generally, such contacts are made by telephone.

The Oregon Court of Appeals stated in *Oregon Association of Classified Employees v. Salem-Keizer*, 95 Or App 28 (1989) that it will closely scrutinize any claim of an “actual emergency.” The “emergency” must relate to the matter to be discussed at the emergency meeting. An actual emergency on one matter does not “justify a public body's emergency treatment of all business coming before it at approximately the same time.” 95 Or App at 32. Nor does the convenience or inconvenience of members of the public body provide justification for an emergency meeting.

iv. Space and Location: Public bodies should consider the probable public attendance and meet where there is sufficient room for the expected attendance. If the regular meeting room is adequate for usual attendance, the public body is not required to seek larger quarters for a meeting that unexpectedly attracts an overflow crowd.

v. Geographic Location: Meetings of the council and other city bodies must be held within the city boundaries. ORS 192.630(4). A joint meeting with two or more governing bodies must be held within the geographic boundaries of the area over which one of those bodies has jurisdiction, or at the nearest practical location. This does not apply in the case of an actual emergency requiring immediate action. Additionally, the law permits public bodies to hold “training sessions” outside their jurisdiction, so long as no deliberation toward a decision is involved.

vi. Nondiscriminatory Site: Public bodies may hold public meetings in private places such as restaurants or residences, if *fully* adequate notice is given of the location so interested persons may attend, and if *fully* adequate arrangements are made for their convenient attendance. Municipal bodies may not meet at a place where discrimination based on race, creed, color, sex, age, national origin or disability is practiced. ORS 192.630(3). The Americans with Disabilities Act, 42 USC 12131 *et seq.*, prohibits discrimination against persons with disabilities by public entities, and by places of public accommodation for meeting sites owned by private entities.

## B. Accessibility to Persons with Disabilities

ORS 192.630(5)(a) states:

It is discrimination on the basis of disability for a governing body of a public body to meet in a place inaccessible to persons with disabilities, or, upon request of a person who is deaf or hard of hearing, to fail to make a good faith effort to have an interpreter for persons who are deaf or hard of hearing provided at a regularly scheduled meeting.

This statute imposes two requirements. First, public meetings must be held in places accessible to individuals with mobility and other impairments. Second, there must be a good faith effort to provide an interpreter for hearing impaired persons.

BEERY, ELSNER & HAMMOND, LLP  
CITY OF FAIRVIEW  
JANUARY 2017

### C. Public Attendance

The meetings law is a public attendance law, not a public participation law. Meetings are open to the public except for closed meetings specifically authorized. ORS 192.630. *The right of public attendance guaranteed by the Public Meetings Law does not include the right to participate by public testimony or comment.*

Other statutes, rules, charters, ordinances, resolutions, and bylaws outside the meetings law may require the council and other city bodies to hear public testimony or comment on certain matters. In circumstances where such requirements do not apply, the public body may conduct a meeting without public participation. As noted above, Fairview's Charter allows for public comment before any ordinance is passed.

### 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. Presiding officers need to ensure consistency in the application of whatever rules are imposed.

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).

Any person who fails to comply with reasonable rules of conduct and actually 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). Cities should not eject an individual from a council meeting or otherwise prohibit free speech related activities, however, unless those actions actually disrupt the meeting. *See Norse v. City of Santa Cruz*, 629 F3d 966, 976 (9th Cir. 2010); *Acosta v. City of Costa Mesa*, \_ F.3d \_ (9th Cir. 2013).

### E. Voting

All official actions by a public body must be taken by public vote. The vote of each member must be recorded. ORS 192.650(1)(c). Written ballots may be used, but each ballot must identify the member voting and the vote must be announced. *Secret ballots are prohibited.*

The failure to record a vote is not itself a ground for reversing a decision. Without a showing that the failure to record a vote was related to a manipulation of the vote, a court will presume that public officials lawfully performed their duties. *Gilmore v. Board of Psychologist Examiners*, 81 Or App 321, 324 (1986).

## F. Minutes and Recordkeeping

ORS 192.650 requires that a sound, video or digital recording or the taking of written minutes be taken at all meetings, except for executive sessions. Meeting minutes shall include at least the following:

- i. Members of the governing body present;
- ii. Motions, proposals, ordinances, resolutions, orders and measures proposed and their disposition;
- iii. Results of all votes and the vote of each member by name;
- iv. The substance of any discussion on any matter; and
- v. Subject to the Public Records Law (ORS 192.410 to 192.505), a reference to any document discussed at the meeting. This reference does not change the status of the document under the Public Records Law.

Minutes need not be a verbatim transcript, and the meeting does not have to be recorded unless otherwise required by law. The minutes must be a true reflection of the matters discussed at the meeting and the views of the participants. ORS 192.650(1).

The public body must prepare minutes and have them available within a “reasonable time after the meeting.” ORS 192.650(1). After minutes are prepared, they are public records subject to disclosure under the Public Records Law. They may not be withheld from the public merely because they have not yet been approved. If minutes have not been approved, they may be so identified.

Executive session minutes may be kept in the form of a tape recording rather than written minutes. ORS 192.650(2). No transcription of executive session minutes must be made unless otherwise required by law. If disclosure of material in the minutes would be inconsistent with the purpose of the executive session that was held under ORS 192.660, the material may be withheld from disclosure. ORS 192.650(2).

The media has no right to the minutes or tapes of executive sessions greater than that of the general public.

Oregon’s public meeting law gives members of the public the right to attend all meetings of governing bodies of public agencies with a few exceptions. The right to attend is not the same as a right to participate in the meetings. Governing bodies include all city councils, planning commissions, budget committees, citizen advisory committees, council committees, and others if their functions are advisory to a city council. The public meeting law does not apply to staff meetings.

## Executive Sessions

### A. Permissible Purposes

Public bodies may meet in executive sessions only in specified situations. ORS 192.660. An “executive session” is defined as “any meeting or part of a meeting of governing body that is *closed* to certain persons for deliberation on certain matters.” ORS 192.610(2) (emphasis added).

The public body may hold an open session even when the law permits it to hold an executive session. A public body is authorized to hold closed sessions regarding the following subjects:

- Real Property Transactions;
- Exempt Public Records;
- Legal Counsel;
- City Employees; and
- Labor Negotiations.

#### B. Final Decision Prohibition

ORS 192.660(6) states: “No executive session may be held for the purpose of taking any final action or making any final decision.” The public body may reach a consensus in executive session. The purpose of the “final decision” requirement is to allow the public to know the *results* of the discussions. Taking a formal vote in open session satisfies that requirement, even if the public vote merely confirms a decision made informally in closed session.

#### C. Method of Convening

An executive session may be called during a regular, special or emergency meeting for which notice has already been given in accordance with ORS 192.640. The person presiding at the meeting should announce the statutory authority for the executive session before going into closed session. ORS 192.660(1). When a meeting that will be solely an executive session is called, the statutory authority for the executive session must be set forth in addition to notice requirements for any other meeting.

#### D. Media Representation

The Public Meeting Law expressly provides that representatives of the news media *shall be allowed* to attend all executive sessions except for sessions involving deliberations with persons designated to carry on labor negotiations, *Barker v. City of Portland*, 67 Or App 23 (1984). (Note: although internet bloggers are gaining additional recognition as members of the “news media” they are not always necessarily entitled to statutory benefits, such as the right to attend executive sessions).

As stated above, the public bodies may consult with their attorney about pending litigation or litigation likely to be filed. The public body may exclude any member of the media from such a meeting if the member is a party to the litigation to be discussed or is an employee, agent or contractor of a new media organization that is a party to the litigation. ORS 192.660(5).

The public body may require the non-disclosure of specified information that is the subject of the executive session. ORS 192.660(4). The presiding officer should make the specification. Absent a specification, the entire proceedings may be reported and the purpose of the executive session may be frustrated. The media may discuss the statutory grounds justifying the executive session.

The meetings law contains no sanction to enforce the requirement that a news representative not disclose specified information. Penalties may raise freedom of press and speech questions. The Attorney General has concluded, “‘enforcement’... depends upon cooperation between public officials and the media.” AGM 146.

Reporters have no obligation to refrain from disclosing information obtained at an executive session if the public body fails to specify that certain information is not for publication. Reporters may, but are not required to, inquire whether a public body’s failure to specify was an oversight. Reporters are under no obligation to keep confidential any information the reporter independently gathers as the result of leads obtained in executive session. Reporters may disclose matters discussed in executive session that are not properly within the scope of announced statutory authorization of executive sessions.

The public body may request a news medium not to assign a particular representative to cover its meetings if the representative has irresponsibly violated a clearly valid nondisclosure requirement. That representative may be barred from future executive sessions because the meeting law purposes will be met by allowing attendance of another representative, and representatives from other news media.

#### E. Other Persons Attendance

The public body may permit others to attend executive sessions. Generally, executive sessions are closed to all except members of the public body, their staff, their attorney, persons reporting on the subject of the executive session or otherwise involved, and news media representatives. However, the law does not prohibit the public body from permitting other persons to attend.

#### **Council communication and confidentiality**

The public meetings law applies whenever a governing body convenes on any matter to make a decision or to deliberate toward a decision—this includes “conference call” telephone meetings. In general, meetings may not be held outside the city limits. Notice is required for all public meetings and must include the date, location, time and principle subjects to be considered.

### **V. PUBLIC RECORDS LAW**

The Public Records Law (ORS 192.410 to 192.505) was enacted in 1973. It establishes state policy that the public is entitled to know how governments operate. The written record of public business is available, with some important exceptions, to any person.

## **Scope and purpose of the law**

### **A. Right to Inspect**

Under ORS 192.420 “every person” has a right to inspect any non-exempt public record. Any natural person, corporation, partnership, firm or association has this right. ORS 192.410(2). The identity, motive and need of persons requesting access to public records are irrelevant unless an exemption from disclosure allows consideration of those factors. Interested persons, news media representatives, people seeking access for personal gain, busybodies on fishing expeditions, persons seeking to embarrass government agencies, and scientific researchers all have equal footing. *See MacEwan v. Holm*, 226 Or. 27 (1961).

The identity and motive of the person seeking a specific public record may be relevant in determining if a record is exempt from disclosure under a conditional exemption. ORS 192.501 conditionally exempts certain records from disclosure “unless the public interest requires disclosure in the particular instance.” Many exemptions in ORS 192.502 require balancing privacy rights, governmental interests, and other confidentiality policies against the public interest in disclosure. The identity of the requestor and the use to be made of the record may be relevant in determining the weight of the public interest in disclosure.

ORS 192.420(2) places an additional requirement on a person who is a party to civil litigation or has filed notice under ORS 30.275(5)(a). When such a person makes a request for a public record that the person knows relates to the litigation or notice, the person must submit the request to the custodian and the attorney for the public body at the same time.

### **B. Records Covered**

The definition of “public records” and the ORS 192.420 policy statement make it clear that the records law applies to all government records of any kind. Oregon public records laws define “public record” as:

- any information that is prepared, owned, used or retained by a public body;
- any document or retainable information that relates to an activity, transaction or function of a public body; and
- is necessary to satisfy the fiscal, legal, administrative or historical policies requirements or needs of a state agency or political subdivision.

The definition of public record was expanded during the 2011 legislative session to include social media communications including information found on Facebook or Twitter, etc.

Records need not be prepared originally by the city to qualify as public records. If records prepared outside government contain “information relating to the conduct of the public's business,” and are “owned, used or retained” by the city, the records are within the scope of the records law. For example, letters written to the city, retained and used by the city are public records.

However, a document prepared by a private entity does not become a public record merely because a public official reviews the document in the course of official business. Materials prepared and owned by a private company do not become “public records” when they are in the temporary custody of a public official for the purpose of preliminary review.

Public records include any “writing” containing information relating to the conduct of public business. ORS 192.410(4). “Writing” is broadly defined by ORS 192.410(6) to include:

handwriting, typewriting, printing, photographing and every means of recording, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, files, facsimiles or electronic recordings.

“Writing” thus includes information stored on computer tape, microfiche, photographs, films, tape or videotape recordings and virtually any other method of recording information.

Note that the Public Records Law does not require the city to *create* public records. This is especially important for computer-stored data. Although the data in computer programs and printouts generated for use by the city are public records, the city is not obligated to perform specific computer runs or manipulate computer data in a requested manner.

#### C. Inspecting and Obtaining Public Records

Under the records law, the “custodian” of the public records has the duty to make non-exempt public records available for inspection and copying. The Legislature has defined “custodian” as a public body mandated to create, maintain, care for or control the records. ORS 192.410(1). However, the public body that has custody of a public record as an agent for another public body is not the custodian, unless the record is not otherwise available. When the city is a custodian of public records received from another public body, it should consult with the other public body to determine whether the records may be exempt from disclosure. ORS 192.502(10).

The 2007 legislature amended ORS 192.440 to assure more timely disclosure to interested parties by requiring a response to requests as soon as practicable and without unreasonable delay. Additionally, as of January 1, 2008, all public bodies must make available to the public a written procedure for submitting the requests, including at least one person and address to which it can be delivered along with the methods that will be used to calculate the fees charged.

The city may delay action on a public record disclosure request to consult with the city attorney. It is reasonable for a record custodian to obtain legal advice before responding to an extensive public record disclosure request when compliance could disrupt operations. It is also reasonable for a records custodian to consult with the city attorney about the disclosure of documents that appear to be exempt, in whole or in part, from disclosure requirements under law. Consultation with the city attorney should not be used merely to delay or frustrate the inspection process.

#### D. Individual Councilor Right to Review Exempt Records

While the public has the right to review certain “public records,” there are exemptions under state law whereby a “public body” should not release specific records. A “public body” is defined under ORS 192.410(3) to include city governing bodies, but it does not include individual governing body members. Therefore, as the custodian of the record, the Council could potentially view otherwise exempt public records. However, individual councilors, without the consent of the entire governing body, are not entitled to view otherwise exempt public records. *See State ex rel Weldon v. Campbell, Fisher et al* (Linn County Case No. 11-1589).

If a councilor, in his or her personal capacity, wishes to view a public record, the councilor may submit a request to the city as a member of the public.

### **Public Records Exempt from Disclosure**

#### **A. Nature of Exemptions**

The records law is primarily a *disclosure* law not a confidentiality law. Exemptions are limited in nature and scope because state policy favors public access to government records. When the city denies a records inspection request, it has the burden of proving that the record information is exempt from disclosure. Oregon courts interpret the records law exemptions *narrowly*, and the courts “presume” that exemptions do not apply.

Even though information may meet the test to qualify for exemption from disclosure, it does not necessarily mean that the city is prohibited from disclosing the information. In most cases, exemptions do not prohibit disclosure, and the city has discretion to disclose record information that qualifies for exemption under the law. In only rare cases may the city say, “This record is exempt from disclosure under the records law, and therefore we may not disclose it.”

There are a few instances where a government is barred from disclosing information that is exempt from inspection under the records law. ORS 192.445 *prohibits* a public body from disclosing a home address or personal telephone number if the requirements of that section are met. The “catch-all” exemption in ORS 192.502(9) incorporates into the records law some other statutes that prohibit public release of certain types of information such as income tax information. In addition, the federal law exemption in ORS 192.502(8) incorporates some federal laws that bar public dissemination of certain types of records, such as student record information under 20 USC 1232. Release of personal privacy information exempt under ORS 192.502(2) is likely to result in claims against the city. The city attorney should be consulted before such information is disclosed.

#### **B. Conditional and Unconditional Exemptions**

Exemptions are generally found in ORS 192.501 and 192.502. There are two types of exemptions under Oregon law: conditional and unconditional exemptions. All the exemptions under ORS 192.501 are *conditional*; they exempt certain types of information from disclosure “unless the public interest requires disclosure in the particular instance.” In addition, several ORS 192.502 exemptions are conditioned on the extent to which governmental and private

interests in confidentiality outweigh the public interest in disclosure. Conditional exemptions require the city to balance carefully confidentiality interests against public disclosure interests. Some of the exemptions in ORS 192.502 are unconditional, meaning that no balancing is required. The legislature has already balanced the competing interests and concluded that confidentiality interests outweigh public disclosure interests as a matter of law.

In determining whether an exemption applies, the identity of the requester and the circumstances surrounding the request are irrelevant. The circumstances of a particular request become relevant only if the requested information comes under exemption that requires a balancing of interests. In that context, the requester's purpose in seeking disclosure may be relevant to determining whether the public interest requires disclosure.

The 2011 legislature (SB 437) amended ORS 192.502(17)(a) to make records, communications and information submitted to the cities by applicants for investment funds, grants, loans, services or economic development moneys, support or assistance exempt from disclosure.

### C. "Public Interest in Disclosure"

The public record law does not define "public interest in disclosure." However, the Oregon Court of Appeals stated, "[t]he Public Records Law expresses the legislature's view that members of the public are entitled to information that will facilitate their understanding of how public business is conducted." *Guard Publishing Co. v. Lane County School District*, 96 Or App at 468-69. It previously characterized the public interest in disclosure as "the right of the citizens to monitor what elected and appointed officials are doing on the job." *Jensen v. Schiffman*, 24 Or App 11, 17 (1976). The public's right to monitor public employees includes the right to inspect records of alleged misuse and theft of public property by public employees. *Oregonian Publishing Co. v. Portland School District*, 329 Or 393 (1999). The term "public" means that the "focus is on the effect of the disclosure in general, not disclosure to a particular person at a particular time." *Morrison v. School District No. 48*, 53 Or App 148, 156 (1981).

### **Special considerations: email, calendars, etc.**

The city uses electronic mail (e-mail) for communications. E-mail is a public record. Even after e-mail messages are "deleted" from individual computer accounts, they generally continue to exist on computer back-up tapes that are also public records. The city must make non-exempt e-mail available for inspection and copying. It is recommended that councilors use their city e-mail for all communication on matters that concern the city. This will make it easier to respond to potential public records requests as the collection can be done by the city using the city servers.

If a state or local elected official claims a right to withhold disclosure of a public record, the claim is not subject to administrative review by the Attorney General or a district attorney. The person denied access to the record may immediately file legal action in the Multnomah County Circuit Court. ORS 192.480. The petitioner who prevails will be compensated for the cost of litigation, including attorney fees.

## **Destruction of Public Records**

State laws and regulations govern the retention and destruction of public records. ORS 192.001 to 192.170. In order to comply with these laws, public employees and officials are required to identify public records and determine their retention period; retain records in compliance with records retention schedules promulgated by the State Archivist; and destroy those records that are non-public records and those that have reached their retention period. For purposes of the record retention and destruction laws, “public record” includes correspondence, including email, but excludes extra copies of a document preserved only for convenience. ORS 192.005(5)(d). Even public records exempt from disclosure are subject to the retention schedules. See Appendix C.

It is important to follow these requirements as state law makes it a crime to knowingly destroy, conceal, remove or falsely alter a public record. ORS 162.305.

## **VI. LOCAL BUDGET LAW**

### **Oregon Budget Law**

The Oregon budget law is found in ORS chapter 294. The Oregon Department of Revenue administers this law and publishes the *Local Budgeting Manual* that serves to guide the city budgeting process. The law sets standards for preparing, presenting and administering the budget. It requires citizen involvement through the budget committee and public hearings before the annual budget may be adopted by the Council.

City governmental accounting requires the recording of city financial transactions and reporting them back to city administration, the Council and the public. Governmental agencies must comply with generally accepted accounting principals (GAAP), as approved by the Government Accounting Standards Board (GASB).

Unlike private sector accounting, government accounting is on a fund basis. State law requires separate funds. There are specific requirements for separate funds for Bancroft bond debt service (ORS 223.285), and reserves (ORS 294.525).

ORS 294.100 makes it unlawful for any public official to expend money in excess of the amounts provided by law, or for any other or different purpose than provided by law. Any official that violates this law is civilly liable for the return of the money in a suit by the District Attorney or any city taxpayer, if the expenditure constitutes malfeasance in office or willful or wanton neglect of duty.

### **Budget Committee**

The law requires the City Administrator, as the budget officer, to prepare a budget message. The budget message must be given at the first budget committee meeting when the budget is presented to the committee.

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JANUARY 2017

The budget committee is composed of the Council and an equal number of appointed citizens. The committee must elect a chair and secretary. Its function is to receive the budget message, hear public testimony on the proposed budget, prepare meeting minutes, request information from city staff, amend a budget for Council adoption and set the property tax levy. The Council is required to adopt a budget no later than each June 30, the last day of each fiscal year. The budget and related forms must be filed with the County Assessor by July 15.

## APPENDIX A

### CITY LEGAL AUTHORITY

#### Structure of City Authority

1. Oregon Constitution
  - Home Rule – Art. XI, sec. 2 (1906)
2. City Charter
  - a. General powers
  - b. Powers vested in Council – legislative, administrative & quasi-judicial
  - c. Council president
  - d. Mayor authority & duties
  - e. Quorum & vote
  - f. City Administrator
  - g. Ordinances – adoption procedures
3. Ordinances & City Code (legislative)
  - a. Council meetings & decision practices
  - b. Ordinance preparation
  - c. Boards, commissions & committees
  - d. Business licenses & regulations
  - e. Buildings & construction
  - f. Health & safety regulations
  - g. Public peace, morals & welfare
  - h. Zoning & community development
4. Resolutions (administrative)
  - a. Council decisions, less formal
  - b. Budget decisions
  - c. Policy statements
  - d. Political statements
  - e. Council rules
5. Orders (quasi-judicial)
  - a. Decisions on appeals to & from Council
  - b. Adoption of administrative rules (City Administrator or department head)

#### Limitations on City Authority

1. Federal Law
  - a. U.S. Constitution
    - i. Supremacy clause (federal / state / local hierarchy)
    - ii. Commerce clause (protects interstate commerce)
    - iii. Due process clause (procedural & substantive)
  - b. Federal statutes – U.S. Code
    - i. Civil rights acts

- ii. Fair Labor Standards Act
- iii. Environmental protection acts
- iv. Cable Communications Act
- v. Equal Employment Opportunity Act
- vi. Americans with Disabilities Act
- vii. Tax acts
- viii. Transportation acts
- ix. Many others

2. State Law

- a. Oregon Constitution
  - i. Property tax limitations
  - ii. Art. I, sec. 8 & other Bill of Rights provisions
  - iii. Initiative & referendum
  - iv. Recall
- b. Oregon Revised Statutes (ORS)
  - i. Public meetings – ORS 192.610 *et seq.*
  - ii. Public records – ORS 192.410 *et seq.*
  - iii. Land Use, Measure 37 & Measure 49 – ORS 197
  - iv. Cities – ORS 221
  - v. Local budget law – ORS 294
  - vi. Public ethics law – ORS 244
  - vii. Election law – ORS 250.255 *et seq.*
  - viii. Public contracts – ORS 279
  - ix. Public improvements – ORS 223
  - x. Intergovernmental agreements – ORS 190
  - xi. Urban service agreements – ORS 195
  - xii. Workers compensation – ORS 656
  - xiii. Criminal law, civil forfeitures & many other



# Oregon Government Ethics

**JANUARY 2017**

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# OREGON GOVERNMENT ETHICS

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After the Watergate scandal in 1974, Oregon voters adopted a comprehensive ethics law for public officials. The law attempts to ensure that government officials promote general public interests rather than private financial interests. The policy states, "that service as a public official is a public trust, and that, as one safeguard for that trust, the people require all public officials to comply with the applicable provisions of this chapter." ORS 244.010(1).

ORS chapter 244 has six major parts: (1) abuse of office, (2) reporting requirements, (3) conflicts of interest, (4) nepotism, (5) the ethics commission and (6) penalties. The first four parts are of major importance to public officials and employees. The 2007 Legislature amended ORS 244 changing the commission name back to the Oregon Government Ethics Commission (OGEC).

The most significant changes were the broadened definition of "relative", adding "members of household" to the reporting requirements for gifts and income, an aggregate gift value limit from those with an administrative or legislative interest and new quarterly filing requirements. While voicing many concerns and submitting some resignations, most public officials complied with the reporting requirements while waiting and working for legislative changes in 2009 that have now been realized. The 2009 Legislature further amended ORS 244 repairing many, if not all, of the perceived problems that arose from the 2007 session.

## 1. Abuse of Office

### A. Who does the ethics law apply to?

The law applies to all "public officials" and in some cases to candidates for public office. The definition of "public officials" is broad and includes any person who serves state or local government as an officer, employee or agent. It includes council, committee and commission members, city attorneys, city employees and persons who work for the city on contract. It applies whether or not a public official is paid. ORS 244.020(14).

### B. What does the ethics law prohibit?

#### i) Use of position

Public officials may not use or attempt to use their position to obtain financial gain or avoid financial detriment that would not otherwise be available but for the holding of the official position. This applies to public officials and "relatives" of public officials, which includes (1) the spouse, parent, step-parent, child, sibling, step-sibling, son-in-law and daughter-in-law of a public official; (2) the parent, step-parent, child, sibling, son-in-law and daughter in law of the spouse of a public official; (3) any individual that the public official has a legal obligation to support; and (4) any individual to whom or from whom the official provides or receives benefits from employment. ORS 244.020(15).

It is improper for a public official to lobby council, committee or commission members or public employees to award a contract to a business with which the official or any member of the household of the official is associated. Member of household is defined as any person who resides with the public official. ORS 244.020(10). In addition, public officials may not use their positions to avoid taxes, charges or fees paid by other residents.

The state law does not apply to official compensation, honoraria, reimbursement of expenses, or unsolicited award for professional achievement for a public official or relative. ORS 244.040(2).

Official compensation is not defined by the statutes. The OGEC has interpreted official compensation package as “wages and other benefits provided to the public official.” To be part of the package, the wages and benefits must be specifically and formally approved by the public body. The benefits provided by contract or personnel policies must generally apply to public employees or other public officials. Official compensation also includes direct public body payment of a public official’s expenses. OAR 199-005-0035(3).

Example: An SAIF official purchased a personal car as an "add-on" to the SAIF fleet purchase and saved about \$1300. There was no additional cost to SAIF and no cost to the vehicle vendor.

Held: Ethical violation because official "availed himself of" financial benefit accessible only because of his status as a public official. Person would not have been benefited “but for” the official position. *Davidson v. Oregon Government Ethics Commission*, 300 Or 415 (1985).

Example: Public employees’ personal use of employer’s telephones, cellular phones, and computers (including Internet access).

Held: (a) Personal use of public telephones is not an ethical violation because “it is normal practice by both public and private employers to permit employees to use business telephones...” for personal business. However, personal long distance calls, even if employee reimburses public employer may be an ethical violation. (b) Use of a public computer on employee’s own time may not be ethical violation. However, public computer use by employee to avoid a financial detriment is legally prohibited. This may include personal use to avoid private purchase of computer hardware or software. (c) Personal use of a public cellular phone does not violate ethics code where use is **directly** related to official duties, such as phone use to inform family of a late meeting or schedule change. However, personal uses beyond those necessary for public business or emergency would violate ethics code. This is the result even where an employee reimburses the employer for personal use. *Oregon Government Standards and Practices Commission*, Technical Advisory Opinion 98A-1003 (July 1998).

## ii) Gifts

The law prohibits public officials, relatives of public officials and members of a public official’s household from soliciting or receiving any gifts over **\$50** in a calendar year from any source that has, or could reasonably be expected to have, a legislative or administrative interest in the public official’s decisions or votes. ORS 244.025; OAR 199-005-0003.

A gift is anything of economic value, but the definition excludes things such as:

- gifts from relatives or members of the household of the public official;
- food / lodging / travel reimbursed by the public body when representing the public body;
- food / lodging / travel reimbursed by another government agency, organization, company or person when the official is representing the public body and under specific limited circumstances;<sup>1</sup>
- campaign and legal expense fund contributions;
- gifts in the form of tokens, plaques, trophies, or mementos with a resale value less than \$25;
- publications, subscriptions, or other informational material related to the official's duties;
- waivers or discounts for continuing education for professional licensing;
- entertainment incidental to the main purpose of an event or when the official is acting in an official capacity and representing the public body for a ceremonial purpose.<sup>2</sup> ORS 244.020(6);
- gifts received as part of one's private business, employment or volunteerism; and
- gifts received that bear no relation to one's position or public office.

Example: A mayor, council president and city manager traveled to New York City to present the city's bond proposal to an investment rating service. The travel expenses of the officials' spouses were paid by the financial institution that prepared the city bond package.

Held: The food, lodging, and travel exemption does not apply to family household members. Payments of these expenses were illegal gifts because they were not "extended to others who are not public officials." Officials were fined twice the value of the reimbursed expenses. *Keller v. Oregon Government Ethics Commission*, 94 Or App 462 (1988), 106 Or App 727 (1991).

### iii) Confidential information

Public officials may not further or attempt to further personal gain through use of confidential information gained in the course of or by reason of their official positions or activities in any way. Public officials often receive information that is not available to the general public. It is improper for an official to sell such information for use by another or to make use of such information for personal gain. ORS 244.040(4).

### iv) Employment

A public official may not solicit or receive promises of future employment when there is any relationship or understanding that the promise will influence the official's actions. ORS 244.040(3).

## 2. Reporting Requirements

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<sup>1</sup> The law was amended in 2007 and 2009. Under ORS 244.020(6)(b), reimbursement or payment of expenses for reasonable food, travel or lodging to a city official, and in some cases a relative, household member or staff member accompanying a city official, representing city government is not a gift, depending on the facts as they relate to ORS 174.111, 174.116 and 174.117.

<sup>2</sup> Reimbursement or payment of entertainment expenses to public officials, their relatives or household member are sometimes defined as gifts and in those instances, are allowed under ORS 244.025(4).

The regulation of the receiving of gifts, honorariums, expense reimbursements and certain forms of income is governed by a set of laws that apply to public officials, as defined in ORS 244.020(14), and includes “an elected official, appointed official, employee or agent, irrespective of whether the person is compensated for the services.” However, state law only imposes the associated reporting requirements on some of these public officials including elected city officials, members of planning, zoning, and development commissions, the city administrator and as of April 15, 2010 each current candidate for any of these offices or positions. The remaining members of the staff and governing commissions and committees are not subject to the reporting requirements. ORS 244.050.

A. Annual Verified Statement of Economic Interest

The Annual Verified Statement of Economic Interest (SEI) must be filed by April 15 of each year and becomes a public record. The SEI is best characterized as a declaration of income, holdings, and business associations. The information to be included changed in 2009 and a brief description is:

- the businesses controlled or affiliated with the public official and members of their household;
- the sources of income for the official’s household that produce 10% or more of the total annual household income;
- any real property owned by the household within the geographic boundaries of the jurisdiction of the public body with the exception of the primary residence. ORS 244.060;
- any expenses reimbursed with an aggregate value exceeding \$50 and the name of the organizations or governments from which they were received;
- all honoraria received with a value exceeding \$15; and
- each source of income in excess of \$1,000 from an individual or business that could have a legislative or administrative interest in the public body. ORS 244.100.

A further requirement of the SEI only applies to those individuals or businesses that have done, or could reasonably be expected to do, business with the public body and has an administrative or legislative interest in the public body. If the foregoing is found to exist, then the official must also report the following as they relate to those individuals or businesses only:

- debts owed by the official in the amount of \$1,000 or more;
- beneficial interest or investment by stocks or bonds by the official in excess of \$1,000; and
- any fee for services in excess of \$1,000. ORS 244.070.

**3. Conflicts of Interest**

A. What is an actual conflict of interest?

An actual conflict of interest exists whenever the effect of any action, decision or recommendation by a person acting as a public official **would** cause private pecuniary benefit or detriment for the person or the person's relative or any business with which the person or a relative is associated.

ORS 244.020(1). If public officials approve or recommend approval of applications involving their own land, award contracts or make purchases from persons to whom they owe money, or approve employment agreements with organizations for whom spouses work, then there is an actual conflict of interest. A conflict exists even if the official would lose money by taking a particular action. When an official's relative or a business associated with a relative would be affected by an official decision, there is also an actual conflict of interest.

B. What is a potential conflict of interest?

A potential conflict of interest exists whenever the effect of any action, decision or recommendation by a person acting as a public official **could** cause private pecuniary benefit or detriment for the person or person's relative or any business with which the person or a relative is associated. ORS 244.020(12).

Excluded from the definition of "business" is any nonprofit IRC 501(c) corporations where the associated public officials receive no remuneration. ORS 244.020(2). The statute excludes from the definition of potential conflict of interest "membership in or membership on the board of directors of a nonprofit corporation that is tax-exempt under section 501(c) of the Internal Revenue Code". ORS 244.020(12)(c).

There is a class exemption to the definition of a potential conflict of interest. Whenever the public official's action would affect other members of a large class the same way it affects the official, there is no legal potential conflict of interest. For example, if a city considers a storm water charge, then city officials who are city customers would have a potential conflict of interest were it not for the "class exemption." There are enough members of the class that the interest of each official is small compared to all the other members of the class. On the other hand, if the city official owns property about to be rezoned with other properties, a conflict of interest exists because the number of other property owners who are members of the class is small. ORS 244.020(12)(b).

C. What do I do if I have an actual or potential conflict of interest?

The simple answer is to disclose, disclose, disclose. Elected and appointed public officials serving on the council, committees, or commissions must announce publicly any potential conflicts of interest prior to taking any action. When there is an actual conflict, the official must announce publicly the nature of the actual conflict and refrain from participating as a public official in any discussion or debate on that issue. This official must not vote on the issue. ORS 244.120(2). An actual or potential conflict of interest must be declared at any meeting where the issue is acted upon, discussed, or considered in any manner.

The public body must record the actual or potential conflicts of interest in its public records when a public official gives notice of an actual or potential conflict. The notice and how it was disposed of may be provided to the OGEC within a reasonable period. ORS 244.130(1).

A council, committee, or commission member may not participate in any proceeding or action in which the following have a direct or substantial financial interest:

- member or spouse, brother, sister, child, parent, father-in-law, mother-in-law;

- any business in which the member is currently serving or has served within two years; and
- any business in which the member is negotiating or has an understanding concerning future partnership or employment.

Any actual or potential conflict of interest must be disclosed at the meeting where the action is being taken. ORS 244.135.

Appointed public officials must notify in writing the person who appointed them to office of the nature of the conflict. Notification must include a request that the appointing authority dispose of the matter giving rise to the conflict. The appointing authority then has the obligation to assign the matter to another person, or to prescribe a manner for the public official to dispose of the matter. ORS 244.120(1)(c).

#### **4. Nepotism**

This law applies to all public officials, members of household and relatives as previously defined under the law relating to gifts and expense reimbursement. Nepotism is favoritism based on kinship. The law states that a public official may not participate in the appointment, employment, promotion, discharge, firing, or demoting of a relative or member of the household. A public official must not participate in preliminary discussion of or interviews regarding any of these activities. There is an exception to these requirements for unpaid volunteer positions, but not for the public body the official serves. Reimbursable expenses for volunteers do not constitute nepotism. ORS 244.177.

Much like the law governing conflicts of interest, the public body is not prohibited from any of these activities provided the public official to whom the individual is related or is a member of a common household does not participate. ORS 244.177(4).

Public officials may not directly supervise a relative or member of the household either, with the same exceptions regarding unpaid volunteers and reimbursable expenses. A public body may adopt policies specifying further exceptions. ORS 244.179.

#### **5. Oregon Government Ethics Commission**

The Governor appoints all seven members of the Commission who are confirmed by the Senate. The Commission selects an executive director to administer the Commission and the Oregon Department of Justice provides legal counsel. ORS 244.250. The Commission's duties include training, advice, compliance and investigation. ORS 244.290. Advice is divided into staff advice, staff advisory opinions and commission advisory opinions.

Training is one of the highest priorities of the Commission and is available in presentations, the internet, topical written materials, and guidance in response to inquiries.

Advice can be requested and received in various forms, depending on the level of advice sought. Telephone, email, letters and written requests for written opinions are all accepted. Staff advice takes all of these forms, originates with Commission staff or the executive director and affords a

public official some protection should a penalty later be considered for an action taken on the advice received. ORS 244.284. Staff advisory opinions come from the executive director upon written request, may take 30 to 60 days to receive and generally afford an official with more protection than staff advice. ORS 244.282. Commission advisory opinions originate with the Commission itself based on adoption by a vote, may take 60 to 120 days to receive and provide an official with absolute protection if the advice is followed completely and the facts were accurately reported to the Commission in the initial request. ORS 244.280.

Another duty of the Commission is compliance and it refers to the review of the approximately 6,000 people and entities that must file annual and quarterly reports.

Investigations are in response to the receipt of written complaints alleging violations of Oregon Government Ethics law and follow strict procedure to determine whether wrongdoing has occurred. The process begins with a consideration of whether there is reason to believe there has been a violation. Next, there is a preliminary review phase to determine whether there is a finding of cause to initiate further investigation. The investigatory phase follows and the culmination of a case is a contested hearing if requested by the public official. ORS 244.260.

## **6. Penalties**

Violations of public ethics laws may result in a civil penalty of up to \$5,000 imposed by the Commission. This fine is in addition to any other penalty or sanction that may be imposed by any other law, including removal from office. ORS 244.350. If the OGEC finds a violation has occurred, the finding is prima facie evidence of unfitness where removal is authorized for cause by law. ORS 244.270.

In addition, public officials who financially benefit from a violation of any provision of ORS chapter 244 may be required to forfeit twice the amount of that profit. ORS 244.360.

Specific criminal statutes may also apply to public officials including receipt of a bribe by a public official, ORS 162.025, and misuse of confidential information for personal financial benefit, ORS 162.425.

## CITY OF FAIRVIEW

### LEGAL REQUIREMENTS FOR LAND USE DECISIONMAKING

January, 2017

#### **I. WHAT IS A LAND USE DECISION?**

##### **A. “Land Use Decision” is Defined by Statute and Case Law**

A simple definition of the term “land use decision” is a discretionary decision by a governmental body that applies the government’s land use regulations, unless exempt under one or more of the statutory exceptions (discussed below). The statute that sets forth the definition and 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) that concerns the adoption, amendment or application of Statewide Planning Goals, a comprehensive plan provision, the local land use regulations.

##### **B. “Limited Land Use Decision” as Defined by Statute**

Oregon law distinguishes a “land use decision” from a “limited 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 regarding a site within an urban growth boundary;
- c) that 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,<sup>1</sup> 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, 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. However, as a practical matter, the findings for a limited land use decision will look much the same as the findings for a standard land use decision.

Note, however, that a decision to approve a preliminary plat may not qualify as a limited land use decision when it involves other discretionary standards. For example, 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).

In either case, approval of the *final* plat is not a land use decision. ORS 197.015(10)(b)(G), (12)(b).<sup>2</sup>

### 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 but describes the actions you are most likely to encounter that are *not* land use decisions per ORS 197.015(10)(b). A local government decision is *not* a “land use decision” if it:

- a) involves land use standards that do not require interpretation, or the exercise of policy or legal judgment (i.e. “ministerial” decisions);
- b) approves or denies a building permit under clear and objective land use standards;
- c) is a limited land use decision;

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<sup>1</sup> 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.

<sup>2</sup> This statutory provision was adopted in 2007 in response to Oregon Court of Appeals decision in *Homer v. City of Eugene*, 202 Or. App. 189 (2005).

- d) involves a transportation facility that is otherwise authorized by and consistent with the comprehensive plan and land use regulations;
- 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 simultaneously regulate land use — the state, city, county and special districts. A local government, such as a city or county, adopts its own land use plan as well as regulations to implement the plan. However, the local government’s plan 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, those cities and counties located within Metro must meet regional requirements established by Metro.

Oregon law requires coordination between cities and counties. Except for cities and counties within Metro, counties are responsible for coordinating all planning activities affecting within the county, including planning activities of cities, special districts and state agencies.<sup>3</sup> Within Metro’s boundary, Metro is designated by statute to coordinate planning activities.

State law imposes substantial procedural requirements for local land use decisions, depending on 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) adopts the statewide land use goals and administrative rules, assures local plan compliance with applicable land use laws, coordinates state and local planning, and manages the coastal zone program. LCDC is comprised of seven appointed volunteer members and meets about every six weeks to direct the work of the Department of Land Conservation and Development (DLCD).

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

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<sup>3</sup> 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.

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

When “good cause” exists,<sup>4</sup> LCDC may 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. Failure to comply with an enforcement order under ORS 197.328 may result in the loss of certain public revenue, including state shared revenue.

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

Most appeals of a local land use decision go to the Land Use Board of Appeals (LUBA). LUBA is comprised of three board members who are appointed by the governor and confirmed by the state senate. Anyone who participated in a local land use decision may appeal the decision to LUBA within 21 days of the date the decision becomes final. It is important to note that the date the decision becomes “final” is when it is put in writing and signed by the decision-maker (e.g. Planning Commission Chair, Mayor, or Hearings Officer). Alternatively, a city may specify in its code when the decision becomes final, such as the date the decision is mailed. In any case, it is not the same as the date the decision becomes *effective*, which may be much later.

Once notice of appeal is served, the local government must compile and submit the record of the decision to LUBA within 21 days. LUBA is required to issue a decision on the appeal within 77 days after the record is transmitted, though there are some exceptions to this deadline. Finally, LUBA’s decision may be appealed to the Oregon Court of Appeals.

An important aspect of an appeal is that LUBA’s review is limited to the contents in the record. Therefore, it is important that the City Council ensure that all applicable criteria, goals, arguments, staff reports, studies, etc. 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 the interpretation of a local code provisions was not a “new” issue and prohibited the appellant from raising the issue on appeal

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<sup>4</sup> 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.

because, even though the provision was not specifically referenced in the City’s notice of hearing the record showed that 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).

Because of the specific procedural requirements for an appeal to LUBA, the City Council 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<sup>5</sup>**

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 noted, the City’s comprehensive plan and development code must be consistent with the goals and are periodically reviewed by LCDC for compliance.

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<sup>5</sup> 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

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### **III. TYPES OF LAND USE DECISIONS**

#### **A. Quasi-Judicial Process and Appeals**

##### (1) Overview.

A quasi-judicial decision typically applies pre-existing criteria to an individual person or piece of land. Determining whether a proceeding is “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, the proceeding must be “bound to result in a decision.” *Id.* at 775. Second, the local government must be “bound to apply preexisting criteria to concrete facts.” *Id.* Third, the decision must be “directed at a closely circumscribed factual situation or a relatively small number of persons.” *Id.* While the court held that no single factor is determinative, the more closely a local decision comes to meeting these criteria, the more likely the decision is quasi-judicial. Typical examples of a quasi-judicial decision include design review, partition and subdivision, a zone change for a small number of lots or parcels, development permits and variances.

In Oregon, a quasi-judicial decision must comply with general standards of due process. This requirement arises from Oregon Supreme Court’s decision in *Fasano v. Washington County Commission*, 264 Or. 574 (1973). Due process standards typically 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 some local codes.

##### (2) State law procedural requirements.

The procedures that apply to the City’s review of a quasi-judicial application are largely determined by ORS 197.763. A copy of that statute is attached to these materials. For example, at the “initial evidentiary hearing,” the City must read a statement that lists the applicable criteria in the City development code; ask that testimony and evidence be directed at the applicable criteria (or other criteria in the plan or development code the person believes apply to the decision); and stating that the failure to raise an issue with sufficient specificity to allow the City and other parties an opportunity to respond prohibits an 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. Typically, these statements are included in a script for the presiding officer but also may be presented by staff or legal counsel.

The City must provide a description of the applicable standards that is “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).

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At the close of the “initial evidentiary hearing,” *any* participant may request that the record be held open in order to allow additional evidence regarding the application. The City can either hold the record open for a specific period to allow additional written evidence, or continue the hearing to a specific date, time and place at least seven days in the future. It is the City’s choice whether to continue the hearing or leave the record open, which 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, a person may request that the record be left open for at least seven days to submit additional written testimony/evidence. Then, after all of the written evidence has been submitted and the record is closed to all other parties, the applicant is allowed at least seven days to submit a final written argument in support of the application.

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. ORS 227.173. The City’s interpretation of its own code must be consistent with the express language of the code. *Siporen v. City of Medford*, 231 Or. App. 585 (2009). The courts will defer to a City’s interpretation of its own code, provided the interpretation is made by the City Council. Conversely, the courts do not defer to an interpretation made by a lower body such as the Planning Commission or a hearings officer.

The City’s final decision must include a brief description of the criteria, a description of the evidence that addresses each criterion, 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), a city may establish its own hearing procedures provided they are consistent with ORS 197.763. Hillsboro’s code addresses hearings and appeal procedures throughout Chapter 12 – Community Development Code, specifically under subchapter 12.70.

**B. Final decision (Quasi-Judicial)**

ORS 227.173(4) requires 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 Hillsboro Municipal Code in Chapter 12.70 details the City procedures for issuing a final decision for different types of decisions, specifically quasi-judicial decisions under Section 12.70.050. Finally, ORS 227.175(12) requires that the final order include notice of appeal procedures.

Finally, under ORS 227.178(1), a final decision must be made within **120 days** of the date the application was “deemed complete,” including “resolution of all [local] appeals.” While ORS 227.178(5) allows *the applicant* to extend the deadline in writing, the total of all extensions may not exceed 245 days. Accordingly, the City must reach a final decision on an application for a “permit, limited land use decision or zone change” within one year from the date the application is deemed complete.

### **C. Legislative Process**

The procedural requirements for a legislative land use decision differ from the procedural requirements for a quasi-judicial decision. 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.

In Hillsboro, revisions and amendments to the comprehensive plan are processed as a legislative decision under Subchapter 12.70.060 of the Code.

## **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 ensure that *quasi-judicial* land use applications are decided by an impartial hearing body. Declaring ex parte contacts, bias, or conflict of interest is required prior to conducting a hearing on any quasi-judicial land use decision.<sup>6</sup> It is important to note that, as a resident of the community, City Councilors frequently have personal beliefs, business associations, membership with organizations, and relatives living and working within the community who may be affected directly or indirectly by issues presented by a land use application. Disclosing these beliefs or associations is required only where such beliefs or associations will affect the ability of the hearing body member to render an impartial decision. The exception to this general rule is ex

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<sup>6</sup> 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, 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.

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.<sup>7</sup>

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 person is not capable of making 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).

With respect to bias or a conflict of interest, a Planning Commission or City Council member may step down and not participate in a decision if the person believes that bias or a potential conflict of interest will prevent the person from being impartial. The decision to step down is up to the person based on whether he or she believes 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, ORS 244 prohibits the person from participating in the decision unless a class exception exists. Bias and conflict of interests are discussed in more detail below.

Although not required, a person who recuses himself from the decision may step down from the dais and join the general public seating during the discussion and decision. There is no legal requirement that prevents a person who steps down from participating as an interested citizen, although, when there is an actual financial benefit, a decision maker is 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.

It is important to note that ex parte contacts are not 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 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.

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<sup>7</sup> 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

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.<sup>8</sup>

(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. 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.

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<sup>8</sup> 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.

### (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. Conflict 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 is 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 is owner of property that includes an intermittent stream that will be impacted by the ordinance. Because Councilor Park is 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 owns commercial property in the City of Sherwood. The City was considering establishing an urban renewal area that includes 260 acres of land. Councilor Figley owns 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 owns 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

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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.<sup>9</sup>

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<sup>9</sup> 204 Or App 359, review denied, 341 Or 80 (2006).

## APPENDIX A

**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;

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(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:

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(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]

**MINUTES  
CITY OF FAIRVIEW  
CITY COUNCIL**

January 4, 2017

**Council Members**

Ted Tosterud, Mayor  
Cathi Forsythe  
Mike Weatherby  
Keith Kudrna  
Lisa Barton Mullins  
Natalie Voruz  
Brian Cooper

**Staff**

Nolan Young, City Administrator  
Harry Smith, Interim Police Chief  
Heather Martin, City Attorney  
Devree Leymaster, City Recorder

**WORK SESSION (6:15 PM)**

**1. BUDGET COMMITTEE INTERVIEWS**

City Recorder Leymaster asked the same seven questions of each candidate. (*Exhibit A*) Below is a brief summary of how each candidate answered.

Tamie Arnold

1. I have served on City Council and have Budget Committee experience. I care about the community and want to be involved in helping to address the important issues the city is facing i.e. PERS, law enforcement merger, etc.
2. I have five years plus background in finance, a Bachelor in Nursing, and I am working towards a master degree in health care administration. I have the ability to prioritize and know what the right questions are to ask.
3. Services: police, fire, water, sewer, local streets, staffing, communication, mild recreation activities, parks, building maintenance, etc.
4. Yes, I am familiar with the budget law process, time line, and requirement for public input.
5. The impact of state level decisions on the city. There needs to be fixes at the state level to prevent cities from going bankrupt. The city needs to remain diligent and proactive in caring for its financial health.
6. Prioritize and know the core needs. Do a better job of connecting with the community i.e. citizen budget summary.
7. Identify priorities as a city i.e. clean water, public safety, look at all the options, and work as a team.

Jeff Dennerline:

1. I want to be involved.
2. I have not specific budget background. I am an engineer and have had experience budgeting money for projects. I believe I can bring a fresh perspective.
3. I have glanced at the budget. I know the city receives some services from Gresham and Troutdale. Probably know more than the average person.
4. No, but I am willing to learn.
5. Not sure; livability issues; the city needs to figure out what it wants to be; do things smart; and care for all the citizens.
6. Prioritization and meeting the needs of the community.
7. Prioritize core needs. Look at all options including options to raise revenue.

Dan Kreamier:

1. I have budget experience. The city has some big issues to face in the future i.e. compression, PERS. I want to be involved and share my knowledge.

2. I have worked in the finance industry for 25 years and currently manage a credit union.
3. I am very familiar. Services: public safety, water, sewer, streets, code enforcement, sidewalks, livability needs, public works, planning, building, etc.
4. I am familiar with budget law, have served during eight budget cycles, and I am aware of the requirements surrounding restricted funds.
5. Need for growth, building and businesses, to increase city tax base.
6. Identify the true basic needs/core services; separate needs vs. wants; and operate within the budget.
7. Focus on core needs i.e. public safety, clean potable water; look at options for partnerships or outsourcing; identify if one-time or reoccurring shortfall; and advocate for the city at the state level to change state laws that would provide more advantages for the city.

Steve Prom:

1. The city has important issues to address. I want to be a voice to keep it mindful, it is taxpayer money.
2. I am a doctor, I run successful chiropractic office, and have participated in 4 budget cycles as a Councilor.
3. Very familiar. Services: public safety, fire services, public works (water, sewer, streets), parks, etc.
4. Yes, I have served four budget cycles and would ask the city attorney or city administrator if I needed clarification.
5. Potential law enforcement consolidation and repeal of the business incentive program.
6. Operate within the budget; and have reserves. The reserves should only be used for one time emergency needs, not for sustaining the budget.
7. Review individual line items within each department and look at areas for savings i.e. outsourcing, sharing service with other cities.

Councilor Weatherby commented the priorities may be different in different areas of the city i.e. addition of code enforcement staff vs. an additional police officer may be of higher priority to citizens in Historic Fairview. Councilor Weatherby asked if an item could be added to the budget, what would they add; and if something had to be removed, what would they remove; and to please be specific.

Tamie Arnold replied she would add a position to market economic development to help increase revenue. She would most likely not target one program but look at the whole picture and see if cuts could be shared.

Steve Prom responded he would increase fire service. Develop a better structure for medical response needs. Expand services for emergency medical response i.e. quick response vehicles. He would review individual line items when looking at making cuts.

Dan Kreamier answered he would add a full time code compliance position and look at completing the sidewalk infill within the city. Increase and maintain the city's livability. If cuts were needed he would look at each line item, be smart, and disseminate the wants vs. the needs.

Jeff Dennerline replied he would look at individual line items when assessing for cuts. If an item could be added it would be for livability issues and taking care of the city i.e. provide better drinking water for citizens.

Mayor Tosterud asked Mr. Dennerline about his prioritization of committee interest on his application. Mr. Dennerline answered his main priority was to be appointed to EDAC. He felt the committee had a lot of potential to do more i.e. helping to identify and answer what the city wants to be.

## 2. SIDEWALK CONCEPTUAL DESIGN & COST ESTIMATE REVIEW

CA Young reviewed the four areas the city was divided into to develop cost estimates: west (areas around Fairview Lake Way), central (Historic Fairview and the Village), east (more rural street lanes), and county roads for connectivity. He noted the estimated cost range, \$20.6 Million (M) to \$25.7 M, includes a 40% contingency. As the design gets further along the costs will be refined and the contingency reduced. The estimated cost includes design, construction, and storm sewer systems.

Councilor Barton Mullins inquired if the city has asked the neighborhoods if they want sidewalks. CA Young replied not yet.

Councilor Voruz commented on the public safety need to provide safe sidewalks for kids to walk on when going to/from school. Councilor Kudrna agreed and noted the need for safe access along 205th and in Historic Fairview.

Mayor Tosterud recessed the work session at 7:10 PM for the Recognition of Service Reception.

Mayor Tosterud resumed the meeting at 7:30 PM.

CA Young reviewed the funding options outlined in the staff report: Local Improvement District (LID) with city financial participation, LID without city participation, a city wide General Obligation (GO) Bond, and a city wide transportation fee for sidewalk construction. He noted the linear foot estimate for Historic Fairview is \$110 to \$154 per linear foot. The city could use reserves for a portion of the funding to complete sidewalks in Historic Fairview.

Councilor Barton Mullins inquired about the transportation fee. CA Young replied typically transportation fees or GO bonds are used for city-wide streets, not sidewalks. Council could make the decision to enact a transportation fee or refer it to the voters. He noted the citizens could also initiate a referendum.

Councilor Cooper inquired about assessing a city-wide fee and the city taking control of all sidewalks and maintenance.

Councilor Weatherby remarked Historic Fairview is where there is the most need, yet also has the lower incomes.

CA Young proposed conducting a public forum and surveying the neighborhoods to see what the citizen interest is.

Councilor Weatherby noted it has been deferred to long. This is a public safety issue.

Councilor's Voruz and Kudrna agreed, it is a public safety issue, but supported starting the process with public outreach/forum to see what the citizens want.

Councilor Forsythe asked if the city takes full responsibility for the sidewalks then who is responsible if someone is hurt. City Attorney Martin replied the city reduced its liability by having a proactive plan. If the city were to solely be responsible then the city could reduce liability by developing and implementing another proactive plan.

CA Young summarized the direction is to move toward developing and executing a public outreach process i.e. survey, public forum, a variety of outreach methods. Staff will bring the information to Council for review.

Councilor Forsythe inquired if the city could influence the county to move the area between Sandy Blvd. and Halsey on 223rd up the project list. There is no safe pedestrian access and the traffic traveling through the area is only increasing. Mayor Tosterud replied he has, and will continue, to advocate for safety improvements in that area at the different transportation related committee meetings.

### 3. UPDATE STATUS & PRIORITIES OF GOAL OBJECTIVES & TASK LIST

CA Young reviewed the advisory committee work plans. He noted the work plans were developed to correlate and support Council goals.

#### ACEAC

- Completed 3 successful events and will begin work on the Easter Egg Hunt.

#### PRAC

- Staff is working with the East County Historical Organization (ECHO) on a plan and cost for a historic sign and door for the city jail. PRAC will review options and make a recommendation to Council for consideration.
- Council approved a 3 year improvement plan for Lakeshore Park. The materials have been ordered for year 1 an IGA for work over the next 6 months has been signed.
- PRAC is working on the Park Master Plan.
- There was one, minor, fish stocking at West Salish Pond this summer. It went very well. PRAC is preparing recommendations for youth fishing opportunities which will involve stocking in preparation.

#### PSAC

- Neighborhood readiness brochure should be ready within the next month. A digital version will also be available on the website. Councilor Forsythe commented the brochure is designed to initiate conversations. The brochures release will be followed by an emergency planning event.
- Working on developing an independent city emergency preparedness plan.
- Chief Smith is working on an emergency checklist and is reviewing the current Emergency Operation Plan for needed updates.

#### EDAC

- Halsey Corridor project is ongoing. Will review results of survey at the January meeting.
- Staff will share a Development Incentive Program update at a meeting in the near future.
- Waiting on a recommendation from the Halsey Corridor consultant for the proper time to work in City branding.
- Developing a scope of work for a business retention plan.
- Staff is updating the vacant land inventory and will bring to EDAC for review.

Councilor Cooper inquired when the advisory committee work plans will be evaluated and items potentially added.

CA Young proposed scheduling goal setting in middle to late February. He would like to prepare the goals with the new Council for the upcoming fiscal year, prior to budget. The budget may then reflect and support the goals. Once Council has their goals they can evaluate and adjust advisory committee work plans.

CA Young inquired what type of process Council would like to follow for goal setting. He reviewed the current process and the option for a more strategic/visioning process with a facilitator. Council supported having a more strategic, goal setting process with CA Young acting as the facilitator and approved scheduling a four hour retreat on a Saturday in February.

Councilor Cooper proposed Fairview host an elected official meet-n-greet, inviting other local councils.

Some Councilors reflected on prior 3 and 4 City Council meetings held in past years. CA Young suggested he would follow up with the Mayor about hosting a meeting and they would get back to Council.

## **COUNCIL MEETING (8:15 PM)**

### **1. CALL TO ORDER**

ROLL CALL

PLEDGE OF ALLEGIANCE

### **2. PRESENTATION**

#### a. Swearing-in Ceremony: Newly Elected City Councilors

City Attorney Martin sited the Oath of Office, individually, to the elected Councilors: Cathi Forsythe to Position 1; Mike Weatherby to Position 2; Keith Kudrna to Position 3; and Lisa Barton Mullins to Position 4, who each recited it back.

### **3. CONSENT AGENDA**

#### a. Minutes of December 7, 2016

#### b. Update Employee Handbook – Whistleblower Protection: Resolution 1-2017

Councilor Cooper moved to approve the consent agenda and Councilor Barton Mullins seconded. The motion passed unanimously.

AYES: 7

NOES: 0

ABSTAINED: 0

### **4. PUBLIC HEARING**

#### a. Adopt 2016 Transportation System Plan (TSP) Volume 1 & 2 and Amend the Fairview Comprehensive Plan: Ordinance 1-2017

City Recorder Leymaster read the second reading of the ordinance by title. Councilor Weatherby commented there seems to be a consistent theme throughout the plan - bicycles. Though access for bicycles is important the plan seems to indicate there isn't concern for vehicles/trucks. In his view it is a matter of priority. He proposed making subtle changes to better prioritize our needs/issues beyond bicycles.

Mayor Tosterud opened the public hearing. There was no public comment. Mayor Tosterud closed the public hearing.

Councilor Cooper moved to approve Ordinance 1-2017 and Councilor Barton Mullins seconded. The motion passed by majority.

AYES: 6

NOES: 1 – Councilor Weatherby

ABSTAINED: 0

#### b. Amend Fairview Municipal Development Code, Title 19, in Concordance with the Adoption of the TSP: Ordinance 2-2017

City Recorder Leymaster read the second reading of the ordinance by title. Mayor Tosterud opened the public hearing. There was no public comment. Mayor Tosterud closed the public hearing.

Councilor Cooper moved to approve Ordinance 2-2017 and Councilor Weatherby seconded. The motion passed unanimously.

AYES: 7  
NOES: 0  
ABSTAINED: 0

## 5. COUNCIL BUSINESS

### a. Nominate and Appoint Council President

Councilor Barton Mullins nominated Councilor Weatherby to be appointed Council President and Councilor Voruz seconded. The motion passed unanimously.

AYES: 7  
NOES: 0  
ABSTAINED: 0

### b. Appoint Budget Committee Members: Resolution 2-2017

Each Council member voted by ballot selecting up to four candidates. City Recorder Leymaster read the results of each Council member selection into the record as follows:

Councilor Barton Mullins → Jeff Dennerline, Dan Kreamier and Steve Prom; Councilor Kudrna → Tamie Arnold, Jeff Dennerline, Dan Kreamier and Steve Prom; Councilor Weatherby → Tamie Arnold, Dan Kreamier and Steve Prom; Councilor Voruz → Tamie Arnold, Dan Kreamier and Steve Prom; Councilor Cooper → Jeff Dennerline; Councilor Forsythe → Tamie Arnold, Dan Kreamier and Steve Prom; and Mayor Tosterud → Tamie Arnold, Dan Kreamier and Steve Prom.

Councilor Voruz moved to approve Resolution 2-2017 appointing Dan Kreamier to Position 1, Steve Prom to Position 2, and Tamie Arnold to Position 6 and Councilor Forsythe seconded. The motion passed unanimously.

AYES: 7  
NOES: 0  
ABSTAINED: 0

Mayor Tosterud directed staff to advertise/recruit for the one remaining open position.

### c. Other

Mayor Tosterud read the proposed Council Liaison appointments for advisory committees, sub committees, and regional committees as follows.

Arts & Community Events Advisory Committee → Councilor Barton Mullins; Economic Development Advisory Committee → Mayor Tosterud; Parks & Recreation Advisory Committee → Councilor Voruz; Public Safety Advisory Committee → Councilor Kudrna; Audit Committee → Mayor Tosterud, Councilor Voruz and Councilor Kudrna; Consolidation Committee → Mayor Tosterud and Councilor Voruz; Two City Recreation Committee → Mayor Tosterud and Councilor Kudrna; Utility Rate Review Committee → Mayor Tosterud and Councilor Barton Mullins; Halsey Corridor → Mayor Tosterud; Fire User Board → Mayor Tosterud; Heslin House/East County Historical Organization → Councilor Weatherby; East Metro Economic Alliance → Mayor Tosterud and Councilor Barton Mullins as alternate; Regional Disaster Preparedness → City Administrator Nolan Young; and East Multnomah County Transportation Committee Mayor Tosterud and Councilor Barton Mullins as alternate. He noted the regional representative for the Joint Policy Advisory Committee on Transportation → Wood Village Councilor Tim Clark and Metro Policy Advisory Committee → Troutdale Councilor Larry Morgan.

He requested any Councilor who has questions or scheduling conflicts with his proposed appointments to please talk with him directly within the next week.

CA Young inquired about changing the work session start time. Council indicated they had no issue beginning work sessions at 6:00 PM, which in turn means regular sessions no longer need to convene at 7:15 PM as outlined in the Council Rules. Mayor Tosterud directed staff to prepare an ordinance for first reading at the January 18 meeting to amend the Council Rules, Meeting Time.

5. ADJOURNMENT

Councilor Cooper moved to adjourn the meeting and Councilor Barton Mullins seconded. The motion passed, and the meeting adjourned at 8:40 PM.

AYES: 7

NOES: 0

ABSTAINED: 0

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Devree Leymaster  
City Recorder

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Ted Tosterud  
Mayor

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Date of Signing

A complete recording and/or video of these proceedings is available.  
Contact the City of Fairview City Recorder Office, 1300 NE Village St., Fairview, OR 97024, (503) 674-6224.

## Exhibit A

### **BUDGET COMMITTEE INTERVIEW QUESTIONS – January 4, 2017**

1. What prompted you to apply for this volunteer position?
2. Please talk about your education and background and how it relates to finance.
3. How Familiar are you with the services the City of Fairview provides through its' annual budget.
4. Do you have any knowledge of, or experience with, Oregon Budget Law?
5. What do you think is the biggest issue facing Fairview with regard to its budget?
6. Please tell us your philosophy on balancing budgets.
7. If the City of Fairview had a large budget shortfall, how would you propose determining where to make the necessary budget cuts?



# AGENDA STAFF REPORT

MEETING DATE	AGENDA ITEM #	REFERENCE NUMBER
January 18, 2017	8.a.	4-2017

**TO:** Mayor and City Council  
**FROM:** Devree Leymaster, City Recorder  
**THRU:** Nolan K. Young, City Administrator  
**DATE:** January 5, 2017

**ISSUE:**

Amend Fairview City Council Rules regarding meeting time.

**BACKGROUND:**

In April 2016 the work session meeting start time was adjusted from 6:00 PM to 6:15 PM to accommodate Councilor schedules. The Council Rules regular session convene time was amended from 7:00 PM to 7:15 PM to accommodate the work session time change so there would be no loss of meeting time. Section 13 of the City Charter requires Council meet in the City regularly at least once a month at a time and place designated by Council Rules, and may meet at other times in accordance with the rules. The Council Rules were amended by ordinance to reflect the change in meeting time as required by the City Charter Section 12. This time change unknowingly impacted the broadcast schedule for our video provider MetroEast.

Council at their January 4, 2017 meeting indicated they no longer need the adjusted meeting times and proposed setting the meeting time back to the whole hour.

**RECOMMENDED ACTION:**

Adopt Ordinance 3-2017 amending the Council Rules item 2.C. Meeting of Council to convene regular sessions at 7:00 PM.

**ALTERNATIVE ACTIONS:**

Take no action. Regular session meeting time will remain at 7:15 PM.

**COUNCIL ALTERNATIVES:**

1. **Staff Recommendation:** Adopt Ordinance 3-2017 amending the Council Rules item 2.C. Meeting of Council to convene regular sessions at 7:00 PM.
2. Take no action.





**ORDINANCE**  
**(3 - 2017)**

**AN ORDINANCE OF THE FAIRVIEW CITY COUNCIL AMENDING THE CITY  
COUNCIL RULES CONCERNING MEETING TIME**

**WHEREAS**, the Council has a duty under City Charter Section 12 to adopt and modify Council Rules by ordinance; and

**WHEREAS**, the City Council desires to amend the Council Rules to clarify the rules concerning meeting time; and

**WHEREAS**, the Council desires to amend its' Council Rules as shown in attached Exhibit A.

**THE CITY OF FAIRVIEW ORDAINS AS FOLLOWS:**

**Section 1**      The Council hereby adopts Council Rule amendments as shown on Exhibit "A" attached hereto.

**Section 2**      This ordinance is and shall be effective thirty (30) days from its passage.

Ordinance adopted by the City Council of the City of Fairview, this 1st day of February, 2017.

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Mayor, City of Fairview  
Ted Tosterud

ATTEST

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City Recorder, City of Fairview  
Devree Leymaster

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Date

## **EXHIBIT A**

(deletions in ~~strike~~through and additions in *italics*)

### **2. MEETING OF COUNCIL**

C. Regular sessions will convene at ~~7:15 p.m.~~*7:00 p.m.* All regular sessions will be adjourned at 9:15 p.m. unless extended by consent of each and every Councilor present at that meeting.



City of Fairview

# Check Register

Packet: APPKT01934 - 12/29/2016 AP RA

By Check Number

Vendor Number	Vendor Name	Payment Date	Payment Type	Discount Amount	Payment Amount	Number
Payable #	Payable Type	Payable Date	Payable Description	Discount Amount	Payable Amount	
<b>Bank Code: US BANK-OPERATING ACCOUNT</b>						
00026	ALL COUNTY SURVEYORS & PLANNE	12/30/2016	Regular	0.00	1,470.00	63626
<a href="#">15442</a>	Invoice	12/19/2016	7TH STREET , SOUTH OF MAIN STREET PR	0.00	1,470.00	
01659	CARDNO INC	12/30/2016	Regular	0.00	3,512.50	63627
<a href="#">214815</a>	Invoice	12/12/2016	PROFESSIONAL SERVICES OCT- NOV 2016	0.00	3,512.50	
00152	CENTRAL ELECTRONIC ALARM INC	12/30/2016	Regular	0.00	59.85	63628
<a href="#">R41462</a>	Invoice	12/20/2016	HESLIN HOUSE QTRLY MONITORING FEE J	0.00	59.85	
00178	CITY OF GRESHAM	12/30/2016	Regular	0.00	68.77	63629
<a href="#">INV0024206</a>	Invoice	12/15/2016	STORMWATER/POLICE FIRE PARKS FEE	0.00	68.77	
01872	CUSTOM SOFT TECHNICAL SERVICES	12/30/2016	Regular	0.00	900.00	63630
<a href="#">1997</a>	Invoice	12/16/2016	PD -IT SERVICES	0.00	90.00	
<a href="#">INV0024208</a>	Invoice	12/30/2016	ADMIN /FIN -IT SERVICES	0.00	765.00	
<a href="#">INV0024209</a>	Invoice	12/16/2016	PW -IT SERVICES	0.00	45.00	
00293	DIAL TEMPORARY HELP SERVICES IN	12/30/2016	Regular	0.00	501.60	63631
<a href="#">314484</a>	Invoice	12/21/2016	TEMP/HELP GALLAGHER WEEK ENDING 1	0.00	501.60	
00297	ENVIROMENTAL CONTROLS CORP	12/30/2016	Regular	0.00	765.60	63632
<a href="#">62065</a>	Invoice	12/22/2016	CH WALL SENSOR	0.00	765.60	
00314	FASTENAL COMPANY	12/30/2016	Regular	0.00	12.20	63633
<a href="#">ORPO841961</a>	Invoice	12/07/2016	TOILET SEAT COVERS	0.00	12.20	
00640	NEXTEL WEST CORP	12/30/2016	Regular	0.00	745.67	63634
<a href="#">365712310-181</a>	Invoice	12/18/2016	PD CELL PHONES	0.00	579.85	
<a href="#">887622317-181</a>	Invoice	12/18/2016	PW CELL PHONES	0.00	165.82	
00647	NORTHSTAR CHEMICAL INC	12/30/2016	Regular	0.00	313.10	63635
<a href="#">96213</a>	Invoice	12/16/2016	SODIUM HYPOCHLORITE	0.00	313.10	
00648	NORTHWEST NATURAL GAS COMPA	12/30/2016	Regular	0.00	504.65	63636
<a href="#">INV0024215</a>	Invoice	12/19/2016	CITY HALL GAS HEAT	0.00	211.28	
<a href="#">INV0024216</a>	Invoice	12/20/2016	SHOP GAS HEAT	0.00	87.60	
<a href="#">INV0024217</a>	Invoice	12/20/2016	CC GAS HEAT	0.00	205.77	
00692	OREGON ASSOCIATION OF CLEAN W	12/30/2016	Regular	0.00	616.00	63637
<a href="#">7487</a>	Invoice	12/21/2016	OACWA- MEMBERSHIP	0.00	616.00	
00674	US BANK NATIONAL ASSOCIATION	12/30/2016	Regular	0.00	325.00	63638
<a href="#">319758140</a>	Invoice	12/14/2016	C754E COPIER CONTRACT PAYMENT	0.00	325.00	
01184	VERIZON WIRELESS	12/30/2016	Regular	0.00	600.17	63639
<a href="#">97777201598</a>	Invoice	12/18/2016	PD WIRELESS	0.00	400.12	

Check Register

Vendor Number	Vendor Name	Payment Date	Payment Type	Discount Amount	Payment Amount	Number
Payable #	Payable Type	Payable Date	Payable Description	Discount Amount	Payable Amount	
97777201599	Invoice	12/18/2016	PW WIRELESS	0.00	200.05	

Bank Code US BANK Summary

Payment Type	Payable Count	Payment Count	Discount	Payment
Regular Checks	20	14	0.00	10,395.11
Manual Checks	0	0	0.00	0.00
Voided Checks	0	0	0.00	0.00
Bank Drafts	0	0	0.00	0.00
EFT's	0	0	0.00	0.00
	<b>20</b>	<b>14</b>	<b>0.00</b>	<b>10,395.11</b>



City of Fairview

# Check Register

Packet: APPKT01936 - 12/30/2016 PO #17-0009 RA

By Check Number

Vendor Number	Vendor Name	Payment Date	Payment Type	Discount Amount	Payment Amount	Number
Payable #	Payable Type	Payable Date	Payable Description	Discount Amount	Payable Amount	
<b>Bank Code: US BANK-OPERATING ACCOUNT</b>						
00381	GRESHAM AUTOMOTIVE INC	12/30/2016	Regular	0.00	27,972.91	63640
GGB65779	Invoice	12/30/2016	2016 FORD K8A AWD POLICE INTERCEPT	0.00	27,972.91	

**Bank Code US BANK Summary**

Payment Type	Payable Count	Payment Count	Discount	Payment
Regular Checks	1	1	0.00	27,972.91
Manual Checks	0	0	0.00	0.00
Voided Checks	0	0	0.00	0.00
Bank Drafts	0	0	0.00	0.00
EFT's	0	0	0.00	0.00
	<b>1</b>	<b>1</b>	<b>0.00</b>	<b>27,972.91</b>

