Appendix I.B.1.2. Role of Hearing Bodies in Quasi-Judicial Land Use Proceedings

Hugo Land Use Committee
Hugo Neighborhood Association & Historical Society

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LEGISLATIVE LAND USE DECISION. When a governing body makes a legislative land use decision, it is deciding whether or not a proposed amendment to the Comprehensive Plan or Zoning Code is in the best interest of the local government as a matter of public policy. Because a governing body is the elected policymaking body of the local government, the governing body's policy judgment is given great deference by the courts.

Because legislative decisions do not involve specific persons or property, the procedural requirements for making legislative decisions are less complex than those for quasi-judicial decisions. In most local governments, proposed legislative amendments are first referred to a planning commission for public hearing and recommendation before coming to the governing body for public hearing and adoption.

There is no prescribed hearing procedure for legislative hearings. Most codes provide for general testimony; others call first for testimony in favor, followed by testimony in opposition. After the close of testimony, the legislative amendment is adopted, adopted with amendments, or rejected pursuant to the ordinance or resolution adoption procedures of the local government charter or code.

QUASI-JUDICIAL LAND USE DECISION. When a governing body makes a quasi-judicial decision, it is deciding whether the evidence and testimony in the record proves or fails to prove that the application complies with the applicable criteria for approval. The scope of a quasi-judicial decision is much more limited, and a governing body's discretion is much more constrained, both procedurally and substantively.

When making a quasi-judicial decision, the governing body must apply the adopted criteria for approval contained in the local government's Comprehensive Plan and development regulations. ORS 215.416/227.173. If an applicant demonstrates compliance with these criteria, the application must be approved even if the governing body disagrees with the criteria, or believes that additional unadopted criteria should be applied. Conversely, if the applicant fails to demonstrate compliance with the applicable criteria, the governing body must deny the application even if the governing body believes that the applicable criteria are unreasonable. These criteria can be and are frequently very subjective, however.

Which Criteria? ORS 227.178(3) and 215.427(3) require that an application be judged by the criteria in effect at the time the application is filed. In other words, the governing body cannot delay a decision on an application in order to rush through a legislative amendment to the criteria and then retroactively apply the new criteria to the pending application.

Interpretation of Criteria: In *Clark v. Jackson County*, 313 Or 508 (1992), the Oregon Supreme Court stated that LUBA is required to defer to a local government's interpretation of its code, so long as the interpretation is not "clearly contrary to the enacted language," or "inconsistent with express language of the ordinance or its apparent purpose or policy." The question is not whether a local government's interpretation is "right," but whether it is clearly wrong. *Goose Hollow Foothills League v. City of Portland*, 117 OR App 211 (1992). This high level of deference is only given to a governing body's interpretation, however; hearings officer and hearings body decisions are not entitled to that level of deference. *Gage v. the City of Portland*, 319 Or 308 (1994).

The decision as to whether an application complies with the applicable criteria has to be based on the evidence and testimony "in the record." Evidence is considered to be "in the record" if it has been submitted to the decision-maker as part of the application, staff report, or written or oral public testimony during the proceedings on the application. Even if a governing body is aware of some outside information that might be relevant to the decision, it may not consider that information unless it was presented by staff or one of the parties during proceedings.

Burden of Proof: The applicant has the burden of proof to demonstrate compliance with the applicable criteria. The "burden of proof" is the obligation to establish compliance by evidence to a particular degree. The typical evidentiary burdens are "beyond a reasonable doubt," "clear and convincing," and proof by a "preponderance of the evidence." The latter is the burden in most codes. In other words, if the planning commission believes that the evidence is 50-50 with regard to compliance with a particular criterion, then it must deny the application because the applicant has failed to carry the burden of proving his or her case.

Substantial Evidence: A decision to approve or deny must be based on "substantial evidence in the whole record." If a local decision is supported by substantial evidence, LUBA will not overturn the ruling even if it might reach a different conclusion on the same evidence. "Substantial" evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984). If LUBA concludes that a reasonable person could have reached the same conclusion as the local government in view of all the evidence in the record, it will defer to the local government's choice between conflicting evidence. *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988). "In order to determine whether evidence is 'substantial' it must be considered in the context of conflicting evidence in the record." The governing body is empowered to make the choice between different reasonable conclusions to be drawn from the evidence in the whole record.

The quasi-judicial decision-making process is controlled by both state law and local code and can differ substantially among local governments. See ORS 197.195, 197.763, 215.416, and 227.160 to 227.185. **The general rule is, however, that parties to a quasi-judicial decision are entitled to be treated as if they were parties to a court action**: They are entitled to present and rebut evidence and testimony and to be judged by an impartial decision maker. *Fasano v. Washington County*, 264 Or 574 (1973). Under state law, parties are also entitled to a written decision. ORS 227.173(2).

The Right to Present and Rebut Evidence: The standard practice in most local governments is for the applicant to begin the public **testimony**, followed by testimony in support of the application. Testimony in opposition is then taken, enabling opponents to respond to the evidence in support and to present additional evidence. The **applicant is then given the opportunity for rebuttal**, which is limited to responding to the evidence and testimony in opposition.

Local Hearings: Most local government codes provide for at least one hearing before a lower body (generally the planning commission or a hearings officer) before the application may be appealed to the governing body. Depending on the local government, an appeal to the governing body may be heard:

De Novo: A "de novo" hearing generally means that the parties may submit new evidence and testimony before the governing body, although some local governments limit the arguments to those stated in the notice of appeal.

On the Record: An "on the record" hearing means that the governing body's review on appeal is limited to argument based upon the issues raised and the evidence presented at the lower hearing. No new issues or evidence may be presented at the governing body hearing. The purpose of limiting evidence and testimony is to encourage issues to be fully presented and resolved at the lower level.

Impartial Tribunal: The requirement for the governing body to be impartial is one of the most important distinctions between legislative and quasi-judicial decisions. A legislative decision is essentially a political decision and people are entitled and should be encouraged to call, send letters, or otherwise attempt to influence a governing body's decision. Further, a governing body is expected and entitled to exercise its political judgment in making such decisions. **In contrast, a quasi-judicial decision is a legal judgment on a specific case which affects individual rights. The parties to such a case are entitled to a fair, equal, and unbiased consideration and decision**.

Ex Parte Contact: An "ex parte" contact is contact with a governing body regarding a land use application outside of the public hearing process. Ex parte contacts are discouraged because they can result in undue influence and because all parties do not have the opportunity to hear and respond to such comments. If a governing body has an ex parte contact (and sometimes they cannot be avoided), then the governing body must disclose and describe the content of that contact prior to opening the public hearing so that all parties may respond. ORS 227.180. Failure to disclose an ex parte contact taints the fairness of the hearing and can result in reversal or remand of the governing body's decision.

Bias: A member of a governing body should not participate in a decision if he or she has an actual bias regarding the application. "Actual bias" means prejudice or prejudgment of the facts to such a degree that he or she is incapable of rendering an objective decision on the merits of the case. *1000 Friends of Oregon v. Wasco County Court*, 304 Or 76, 742 P2d 39 (1987).

The courts have been very reluctant to overturn a local government decision based upon an

allegation of bias. The reasons are essentially two: First, elected officials are not judges and are expected to some political judgment – within the bounds of the law. Second, while you can easily replace a judge, disqualifying city councilors or county commissioners can create quorum and minimum vote problems, making it difficult for the governing body to even make a decision. *Eastgate Theatre v. Bd. of CountyComm'rs*, 37 Or App 745, 754, 588 P2d 640 (1978).

Conflicts of Interest: Prior to participating in any decision, a member of the planning commission or governing body must declare any potential or actual conflicts of interest pursuant to ORS Chapter 244 (Government Standards and Practices).

ORS 197.763 (the "Raise it or Waive it" law): Since 1989, the State Legislature has regulated local quasi-judicial land use hearing procedures pursuant to ORS 197.763. This statute is referred to as the "raise it or waive it" law because it provides that LUBA may not consider an issue on appeal unless a party raised it at the local level with "sufficient specificity to enable the local government to respond." In return for such issue preclusion, the legislature adopted a number of procedural requirements designed to ensure that parties have an adequate opportunity to raise issues at the local level.

ORS 197.763 may or may not apply to a hearing before the governing body. If the hearing is "de novo" before the governing body, ORS 197.763 applies. If the hearing is "on the record," however, ORS 197.763 may not apply. See *Murphey Citizens Advisory Committee v. Josephine County*, 25 Or LUBA 312 (1993). ORS 197.763 issues that are likely to come up at a hearing include:

Notice: ORS 197.763(3) requires that written notice be sent 20 days in advance of the hearing. The notice must explain the nature of the application, list the applicable criteria, and describe the procedures to be used at the hearing. A violation of the notice requirements can result in a remand if it prejudices a "substantial right."

LUBA/Takings Warning: At the beginning of each quasi-judicial hearing, the chair must state that evidence and testimony must be directed to the applicable criteria or criteria that the person believes should be applied, and must raise issues "accompanied by statements or evidence sufficient to afford" the parties an opportunity to respond.

The 1999 legislature enacted ORS 197.796, which requires an applicant alleging that a condition of approval unconstitutionally "takes" their property to raise that argument at the local level. ORS 197.796(3)(b) now requires a statement that "failure of the applicant to raise constitutional or other issues relating to the proposed conditions of approval with sufficient specificity to allow the local government or its designee to respond to the issue precludes an action for damages in circuit court."

Continuance/Open Record: Under ORS 197.763(6), any party can request either a continuance or an open record, and the choice of which process will be used is up to the hearings body. The kicker is that after the initial continuance or open record period, the parties have an additional seven days to respond to the new evidence submitted, and the extensions are not exempt from the 120/150-Day Rule, unless the continuance is agreed to by the applicant.

Final Rebuttal: Unless waived by the applicant, he or she is entitled to submit final written arguments after the record is closed to all other parties. ORS 197.763(6)(e). This extension is exempt from the 120/150-Day Rules.

Written Decision: The governing body's final decision must be expressed in writing. This decision, typically referred to as the "Findings of Fact, Conclusions of Law and Order" must set forth the relevant criteria, state the evidence on which the governing body relies, and explain the justification for the decision based on the criteria and the facts. Typically, a governing body will make a preliminary oral decision at the conclusion of the public hearing, which is followed up by adoption of the written decision at a later meeting. It is important to remember that the decision does not become final until the written order is adopted; during the interim between preliminary decision and adoption of the final order, you should continue to avoid ex parte contacts.

120/150-Day Rules: ORS 215.427, 215.429, 227.178, and 227.129 require local governments to make a final decision on a land use application, including resolution of all local appeals, within 120 days (cities/counties for territory within an urban growth boundary) or 150 days (counties outside of an urban growth boundary) of the filing of a complete application. If the local government fails to do so, then the applicant can file a "writ of mandamus" in circuit court to compel the local government to approve the application. If the applicant prevails on the writ, the court can make the local government pay the applicant's attorney fees.

Hearing. The description of the process in ORS 197.763 and the definition of "hearing" applicable to county proceedings are sufficiently related to suggest that they embody the same legislative intent. That is, the word "hearing" referred to in ORS chapters 197, 215, and 227 has the same meaning: it refers to a quasi-judicial proceeding held to determine whether an application for a land use permit should be granted. Of course, whether or not a permit should be granted depends on the law applicable to the proposal and to the facts underlying the application. A "hearing," then, as used and described above, connotes a proceeding to gather evidence about the application, or to hear and consider argument on issues of fact and/or law relevant to the application for a land use permit.