

Policy on Planning Commission Communications

05 | 21 | 2009; updated 12 | 02 | 2011; 10 | 30 | 2014

The following policy is based on discussion with Benton County Counsel.

Regarding matters – typically land use applications – that are before the Planning Commission:

1. **Communication with Staff.**

Planning Commissioners may communicate with staff, ask questions, request information. Information requests will generally be copied to all Planning Commissioners so that all have the same factual basis upon which to consider the application.

2. **Communication between Planning Commissioners outside of hearings.**

Discussions between Planning Commissioners regarding issues upcoming before the Commission is strongly discouraged.

By law, any discussion involving a quorum of the Planning Commissioners occurring outside a meeting is improper. In the interest of fair, transparent and impartial decision-making, we strongly encourage Planning Commissioners to discuss matters only at public meetings.

Deliberations must occur as part of a duly noticed public meeting. Email discussions that constitute deliberations outside of a noticed meeting are not permitted under Oregon's Public Meeting Law.

3. **Planning Commissioner participation in decision-making.**

To participate, a commissioner must have reviewed the record and heard all testimony presented to the commission. If a commissioner is absent from a hearing that is continued, and the commissioner wishes to participate in the decision at the continued hearing, he/she needs to listen to the audio recording of the missed hearing and review any materials submitted.

Providing input if absent. If a Planning Commissioner is unable to attend a hearing but wants to provide input, he/she may participate at the continued hearing (if there is a Continuance) as described above or, alternatively, may recuse themselves from the

decision-making process and instead provide testimony as a member of the public. A Planning Commissioner providing testimony may not later resume a role in Planning Commission discussion, deliberation, nor decision.

4. Research by individual Planning Commissioners.

Personal research into the applicable law is okay. For example, looking at LUBA (Land Use Board of Appeals) case law to see how a particular law has been interpreted.

Research into the facts is generally improper, because it results in the individual Planning Commissioner having facts that could influence his/her decision and that are not in the record (meaning they are not available to all and are not open to scrutiny and refutation by parties involved).

If Planning Commissioners want information, request it from Staff. Staff will make sure it is properly handled.

5. Site Visits.

Individual Planning Commissioners – such visits are acceptable, provided the Planning Commissioner *discloses* this at the hearing as an ex parte contact. The Planning Commissioner should avoid discussing the matter with the property owner or anyone else encountered during the site visit.

Sub-quorum – This is acceptable, again provided the involved members disclose the visit. We strongly recommend that group site visits be accompanied by a staff member. Limited discussion during the site visit appears to be allowable.

Quorum – This constitutes a meeting of the Planning Commission and must be noticed in the newspaper. Staff should accompany. This is best arranged as part of a regularly scheduled meeting.

6. Ex Parte Contact.

Quasi-judicial: Ex parte contact is contact with one side without the other side being able to hear the conversation and rebut what was presented. Ex parte contact can be grounds for overturning a decision upon appeal. This can be avoided by the member of the decision-making body receiving the contact:

Placing on the record the substance of any written or oral ex parte communications concerning the decision or action; and

Making a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related.

Note that a communication between county staff and the planning commission or governing body shall not be considered an ex parte contact.

Legislative. The rules regarding ex parte contact do not apply in legislative proceedings. The state statutes lead County Counsel to conclude that the ex parte rules are designed to prevent outside communications from unduly influencing land use decisions or limited land use decisions only (not legislative decisions).

In a legislative proceeding, the governing body is not hearing the case of one side vs. the other (approve or not approve a specific land use action) but is rather considering whether and in what form to adopt a broadly applicable policy or regulation. In a sense, there is no such thing as ex parte contact in such a setting.

7. What constitutes new evidence?

Once the record is closed (public comment closed), the planning commission may not take any more testimony or evidence. That means no new documents may be submitted, no oral testimony presented and no new information may be elicited from prior testifiers. That means as long as the record is closed, the PC may not ask questions of anyone who provided written or oral testimony.

The only way the PC may ask questions of the audience is to reopen the record, ask questions and then ask if anyone else has additional testimony it wishes to present. And then, after that "solicitation" is complete, the PC should probably keep the record open for a period of time to allow anyone to submit evidence or testimony in response to information presented during the question-and-answer session and/or renewed open record period.

Reopening the record to allow the PC to ask questions is really a slippery slope. When does the circle of evidence and response end? I advise not reopening the record to allow the PC to ask questions, because then it'll have to offer anyone else an opportunity to testify, regardless of whether they were asked questions. The good news is that by keeping the record closed and not asking questions of prior presenters, those "foreclosed" presenters still have another opportunity to present testimony - at the Board hearing. So, they have another chance to offer evidence/testimony, not only the Planning Commission.

Questions of staff are encouraged. Such questions typically do not result in new evidence, so they rarely pose a problem.