



**RESOLUTION 2013-034**

**A RESOLUTION CREATING A SPECIAL COMMITTEE TO ADVISE THE CITY COUNCIL ON POSSIBLE REFERRAL TO VOTERS OF ORDINANCES ESTABLISHING NEW BUSINESS REGULATIONS**

**WHEREAS**, Sherwood residents have suggested to the City Council that it consider adoption of new ordinances to regulate the conduct of businesses in at least three respects; and

**WHEREAS**, the City Council wishes to solicit advice from its citizens and business owners concerning options about the purpose, nature, scope and duration of such possible regulatory ordinances; and

**WHEREAS**, the City Council wishes to create a special committee to advise it on such ordinances and referral to City voters; and

**WHEREAS**, the City Council wishes to consider referring any such business regulatory ordinances to a City election at the November 5, 2013 state election; and

**WHEREAS**, the special committee must make timely recommendations to the City Council for it to submit ballot measures to City voters at the November 5, 2013 election.

**NOW THEREFORE, THE CITY OF SHERWOOD RESOLVES AS FOLLOWS:**

**Section 1.** A special committee is hereby created for the purpose of advising the City Council on the possible referral to City voters of new ordinances regulating the conduct of businesses within the City.

**Section 2.** The special committee will have nine members appointed by the City Council. At least five members will be residents of the City. Four members must conduct business within the City, but need not be City residents. Appointments to the special committee shall be made by resolution of the City Council.

**Section 3.** The special committee is an official public body governed by Oregon Public Meeting Law and other applicable statutes. Minutes shall be kept of all committee meetings in accordance with applicable law.

7-10-13  
Date

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Special Committee  
Gov. Body

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Exhibit #

**Section 4.** The Special Committee will appoint a special committee chair and vice-chair to preside at the committee's meetings. The committee will determine the time and place of its meetings. The committee will hold as many meetings as required to complete its work. A majority of the committee will be its quorum. The City Manager will provide or designate staff support for the committee. The City Attorney office will provide legal advice to the committee.

**Section 5.** The special committee will make a written and oral report and policy recommendations to the City Council at the first Council Meeting in August 2013. The terms of the special committee members will end at the conclusion of that meeting.

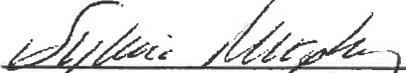
**Section 6.** The City Council will receive and consider the report and recommendations of the special committee and determine whether to refer ballot measures to City voters. The City Council must file any such measures with the Washington County elections office by September 5, 2013, in order for them to qualify for the November 5, 2013 election.

**Section 7.** City Council may choose to dissolve the committee at any time.

PASSED AND APPROVED this 18th day of June, 2013.

  
\_\_\_\_\_  
Bill Middleton, Mayor

Attest:

  
\_\_\_\_\_  
Sylvia Murphy, CMC, City Recorder



## RESOLUTION 2013-035

### **A RESOLUTION APPOINTING MEMBERS TO A SPECIAL COMMITTEE TO ADVISE THE CITY COUNCIL ON POSSIBLE REFERRAL TO VOTERS OF ORDINANCES ESTABLISHING NEW BUSINESS REGULATIONS**

**WHEREAS**, at the June 12, 2013 the City Council heard comments from the community related to ordinances that citizens proposed to establish new business regulations; and

**WHEREAS**, the City Council adopted Resolution 2013-034 at their June 18, 2013 meeting to form a special committee to advise the City Council on possible referral to voters of ordinances establishing new business regulations; and

**WHEREAS**, Resolution 2013-034 indicates the committee will be comprised of 9 members appointed by the City Council, at least five members will be residents of the City and four members must conduct business within the City, but need not be City residents.

**WHEREAS**, the City Council solicited applications which were reviewed by the Mayor, the Council President and the Assistant City Manager; and

**WHEREAS**, below are the applicants selected to serve on the special committee.

### **NOW THEREFORE, THE CITY OF SHERWOOD RESOLVES AS FOLLOWS:**

**Section 1. Resident representatives:**

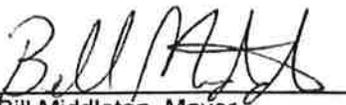
Beth Cooke  
Naomi Belov  
Meerta Meyer  
Doug Scott  
Dave Robins

**Representatives whom conduct business:**

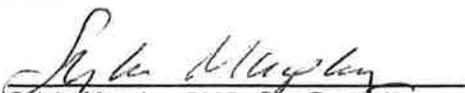
Lawrence O'Keefe  
Nancy Bruton  
Rachel Schoening  
Alicia Shaw

**Section 2:** This Resolution shall be in effect upon its approval and adoption.

**Duly passed by the City Council this 2<sup>nd</sup> day of July 2013.**

  
Bill Middleton, Mayor

Attest:

  
Sylvia Murphy, CMC, City Recorder

Protecting the public's right to know



A Freedom of Information Coalition

P.O. Box 172

Portland, Oregon 97207-0172



Protecting the public's right to know

## A QUICK REFERENCE GUIDE TO OREGON'S PUBLIC MEETINGS LAW

For local and state officials, members  
of Oregon boards and commissions, citizens,  
and non-profit groups

This guide is published as a public service by  
Open Oregon: a Freedom of information Coalition  
and the Oregon Attorney General's office.



7-10-13  
Date



Spec. Comm.  
Gov. Body

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Agenda Item

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## A Time Saving Reference

This guide is brought to you free of charge as a joint project between Open Oregon: A Freedom of Information Coalition and Oregon Attorney General Hardy Myers. Funding for this booklet came from the National Freedom of Information Coalition through a grant from the John S. and James L. Knight Foundation.

## How to Use This Guide

This summary is intended as a quick reference to the Oregon Public Meetings Law. The entire law may be found in Oregon Revised Statutes 192.610 to 192.690. Additional information may be obtained by sending an e-mail request to [info@open-oregon.com](mailto:info@open-oregon.com) or visiting [www.open-oregon.com](http://www.open-oregon.com)

For a comprehensive analysis of the law, refer to the latest edition of the Attorney General's Public Records and Meetings Manual, available for a nominal fee by calling (503) 378-2992 or writing to Department of Justice, Administrative Services, 1162 Court Street NE, Salem, Oregon 97301-4096.

## What is Open Oregon?

Open Oregon: A Freedom of Information Coalition is a non-profit educational and charitable organization with a single purpose: to assist and educate the general public, students, educators, public officials, media and legal professional to understand and exercise:

- Their rights to open government.
- Their rights and responsibilities under the Oregon public meetings and records laws.
- Their rights under the federal Freedom of Information Act.

**Open Oregon** is a 501(c)(3) non-profit corporation.

## For additional copies of this guide or information about Open Oregon, contact:

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[www.open-oregon.com](http://www.open-oregon.com)

### Additional resources:

- **Oregon Attorney General's Public Records and Meetings Manual**, available by calling 503-378-2992 or writing to Department of Justice, 1162 Court Street NE, Salem, OR 97301-4096; [www.doj.state.or.us/oregonians/pubs.shtml](http://www.doj.state.or.us/oregonians/pubs.shtml)
- **Oregon Revised Statutes 192.610 to 162.690**, the Oregon Public Meetings Law, available in most libraries and on the internet at [www.leg.state.or.us](http://www.leg.state.or.us).
- **Oregon Newspaper Publishers Association**, 503-624-6397. Offers legal advice to member newspapers and general information about public records and meetings requirements; [www.orenews.com](http://www.orenews.com)
- **League of Oregon Cities**, 1201 Court St. NE, Salem, OR 97301. 503-588-6550; [www.orcities.org](http://www.orcities.org)
- **Association of Oregon Counties**, 1201 Court St. NE, Salem, OR 97301. 503-585-8351; [www.aocweb.org](http://www.aocweb.org)
- **Oregon School Boards Association**, 1201 Court St. NE, Salem, OR 97301. 503-588-2800; [www.osba.org](http://www.osba.org)
- **Special Districts Association of Oregon**, PO Box 12613, Salem, OR 97301-0613, 503-371-8667; [www.sdao.com](http://www.sdao.com)

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the public merely because they will not be approved until the next meeting. Minutes of executive sessions are exempt from disclosure under the Oregon Public Records Law. Governing bodies are allowed to charge fees to recover their actual cost for duplicating minutes, tapes and records. A person with a disability may not be charged additional costs for providing records in larger print.

### **Enforcement**

County district attorneys or the Oregon Attorney General's Office may be able to answer questions about possible public meetings law violations, although neither has any formal enforcement role and both are statutorily prohibited from providing legal advice to private citizens.

Any person affected by a governing body's decision may file a lawsuit in circuit court to require compliance with or prevent violations of the Public Meetings Law. The lawsuit must be filed within 60 days following the date the decision becomes public record.

The court may void a governing body's decision if the governing body intentionally or willfully violated the Public Meetings Law, even if the governing body has reinstated the decision in a public vote. The court also may award reasonable legal fees to a plaintiff who brings suit under the Public Meetings Law.

Complaints of executive session violations may be directed to the Oregon Government Ethics Commission, 3218 Pringle Road SE, Suite 220, Salem OR, 97302-1544; 503-378-5105, for review, investigation and possible imposition of civil penalties.

Members of a governing body may be liable for attorney and court costs both as individuals or as members of a group if found in willful violation of the Public Meetings Law.

# The Spirit of Oregon's Public Meetings Law

## The Value of Openness

Understanding the letter of the Public Meetings Law is critical. Equally important is understanding and committing to the spirit of that law. Public bodies should approach the law with openness in mind. Open meetings help citizens understand decisions and build trust in government. It is better to comply with the spirit of the law and keep deliberations open.

*“Government accountability depends on an open and accessible process.”*

•  
**Hardy Myers**  
Oregon Attorney General

“Public bodies must conduct business in public - it’s really that simple.”

•  
**Bill Bradbury**  
Oregon Secretary of State  
Honorary Co-Chair, Open Oregon

“Oregon needs to protect its tradition of openness.”

•  
**Dave Frohnmayr**  
President, University of Oregon  
Honorary Co-Chair, Open Oregon

The media also is free to report on information gathered independently from executive session, even though the information may be the subject of an executive session.

**Example**

• A reporter attends the executive session on the city council’s discussion of the city manager’s performance. Afterwards the reporter asks a councilor what she thinks of the city manager’s performance. She shares her criticism. The reporter may use that interview to develop a story, even though the reporter first heard the information at the executive session.

**Minutes**

Written, sound, video or digital recording of minutes are required for all meetings.

The meetings law says minutes must be made available within a “reasonable time” after each meeting, but does not specify the time. Generally, this time frame should not exceed three weeks. Minutes must be preserved for a “reasonable time.” This is generally interpreted to be at least one year. Minutes of many governing bodies are subject to records retention rules and schedules established by the State Archivist.

**Minutes must indicate:**

- Members present
- All motions, proposals, resolutions, orders, ordinances and measures proposed and their disposition.
- The result of all votes by name of each member (except for public bodies consisting of more than 25 members). No secret ballots are allowed.
- The substance of discussion on any matter.
- A reference to any document discussed at the meeting.

Minutes are not required to be a verbatim transcript and the meeting does not have to be tape recorded unless so specified by law. Minutes are public record and may not be withheld from

9. **To discuss matters of trade** when the governing body is in competition with other states or nations.
10. **To negotiate with a private person** or business regarding public investments.
11. **To discuss matters of medical competency** and other matters pertaining to licensed hospitals.
12. **To consider information obtained by a health professional** regulatory board or State Landscape Architect Board as part of an investigation of licensee or applicant conduct.
13. **To discuss information relating to the security of:** a nuclear power plant; transportation of radioactive materials; generation, storage or conveyance of electricity, gas hazardous substances, petroleum, sewage or water; and telecommunications and data transmission.

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### **Media at Executive Sessions**

Media representatives must be allowed to attend executive sessions, with three exceptions. Media may be excluded from:

- Strategy discussions with labor negotiators.
- Meetings to consider expulsion of a student or to discuss students' confidential medical records.
- Meetings to consult with counsel concerning litigation to which the media or media representative is a party.

A governing body may require that specific information not be reported by the media. This should be done by declaration of the presiding officer or vote. In the absence of this directive, the executive session may be reported. Any discussion of topics apart from those legally justifying the executive session may be reported by the media.

## **Oregon's Public Meetings Law**

"Open government" or "sunshine" laws originally were enacted nationwide in the early 1970s because of growing public unhappiness with government secrecy. As a result, every state and the District of Columbia enacted laws requiring government to conduct its business openly, rather than behind closed doors.

Open government laws benefit both government and the public. Citizens gain by having access to the process of deliberation - enabling them to view their government at work and to influence its deliberations. Government officials gain credibility by permitting citizens to observe their information-gathering and decision-making processes. Such understanding leads to greater trust in government by its citizens. Conversely, officials who attempt to keep their deliberations hidden from public scrutiny create cynicism, erode public trust and discourage involvement.

### **Policy**

Oregon's Public Meetings Law was enacted in 1973 to make sure that all meetings of governing bodies covered by the law are open to the public. This includes meetings called just to gather information for subsequent decisions or recommendations.

The law also requires that the public be given notice of the time and place of meetings and that meetings be accessible to everyone, including persons with disabilities.

The Public Meetings Law guarantees the public the right to view government meetings, but not necessarily to speak at them. Governing bodies set their own rules for citizen participation and public comment.

## Who is covered?

Because questions often arise about what groups must comply with the public-meetings law, it is useful to look at the definitions in the law. The law says that any “governing body” of a “public body” is required to comply. It offers these definitions:

- A “**public body**” is any state, regional, or local governmental board, department, commission, council, bureau, committee, subcommittee, or advisory group created by the state constitution, statute, administrative rule, order, intergovernmental agreement, bylaw or other official act.
- A “**governing body**” is two or more members of a public body who have the authority to make decisions for or recommendations to a public body on policy or administration. A group without power of decision is a governing body when authorized to make recommendations to a public body, but not when the recommendations go to individual public officials.

### Example

- *A school board must meet in public.*
- *So must most advisory committees that the school board creates, such as a budget committee.*
- *But if the school board chair asks several business leaders to meet with him to discuss future building needs, that meeting may be held in private.*

Private bodies, such as non-profit corporations, do not have to comply with the public-meetings law, even if they receive public funds, contract with governmental bodies or perform public services.

### Example

- *A school district contracts with Regence BlueCross BlueShield of Oregon to provide health insurance for district employees. The BlueCross BlueShield board of directors is not required to meet in public.*

Public agencies contracting with private bodies may require a private body to comply with the law for pertinent meetings. Federal agencies are not subject to Oregon’s Public Meetings Law.

## Executive Sessions Criteria

Executive sessions are allowed only for very limited purposes. Those include:

- 1. To consider the initial employment of a public officer**, employee or staff member, but not to fill a vacancy in an elected office, or on public committees, commissions or advisory groups. These sessions are allowed only if the position has been advertised, standardized procedures for hiring have been publicly adopted, and the public has had an opportunity for input on the process. Executive sessions are not allowed to consider general employment policies.
- 2. To consider dismissal**, discipline, complaints or charges against a public official, employee, official, staff or individual agent, unless that person requests a public hearing.
- 3. To review and evaluate the job performance** of a chief executive officer, or other officer or staff member, unless that person requests an open hearing. Such evaluation must be pursuant to standards, criteria and policy directives publicly adopted by the governing body following an opportunity for public comment. The executive session may not be used for the general evaluation of agency goals, objectives, programs or operations, or to issue any directive to personnel on the same.
- 4. To deliberate with persons designated to conduct labor negotiations.** The media may be excluded from these sessions.
- 5. To conduct labor negotiations** if both sides request that negotiations be in executive session. Public notice is not required for such meetings.
- 6. To consider records** that are exempt by law from public disclosure.
- 7. To consult with counsel** concerning litigation filed or likely to be filed against the public body. Members of the media that are a party to that litigation, or represent a media entity that is a party, may be excluded.
- 8. To consult with persons designated to negotiate** real property transactions.

## Executive Sessions

Governing bodies are allowed to exclude the public - but generally not the media - from the discussion of certain subjects. These meetings are called executive sessions.

Executive sessions may be called during any regular, special or emergency meeting. A governing body may set a meeting solely to hold an executive session as long as it gives appropriate public notice. Notice requirements for executive sessions are the same as for regular, special or emergency meetings. However, labor negotiations conducted in executive sessions are not subject to public notice requirements.

Notice of an executive session must cite the specific law that authorizes the executive session. This authorization also must be announced before going into the executive session.

Governing bodies may formally specify that the media not disclose information that is the subject of the executive session. Governing bodies should not discuss topics apart from those legally justifying the executive session. Media representatives may report discussions that stray from legitimate executive session topics and are not required to inform the governing body when they intend to do so.

No final action may be taken in executive session. Decisions must be made in public session. If a governing body expects to meet publicly to make a final decision immediately after an executive session, it should try to announce the time of that open session to the public before the executive session begins.

### Example

*• City councilors meet in executive session to discuss the city manager's performance. A local reporter attends. During the meeting, the councilors discuss whether the city should put a bond measure on the next ballot. The reporter may write a story on the council's bond-measure discussion, because that discussion was not allowed under the executive session rules. The reporter may not write about the city manager's performance.*

## What is a Public Meeting?

A public meeting is the convening of any governing body for which a quorum is required to make or deliberate toward a decision on any matter, or to gather information. Decisions must be made in public, and secret ballots are prohibited. Quorum requirements may vary among governing bodies.

### Example

- A county commission's goal-setting retreat is a public meeting if a quorum is present and they discuss official business.*
- A training session for the commissioners is not a public meeting, unless a quorum is present and the commissioners discuss official business.*
- A staff meeting absent a quorum of commissioners, whether called by a single commissioner or a non-elected official, is not a public meeting.*

Meetings accomplished by telephone conference calls or other electronic means are public meetings. The governing body must provide public notice, as well as a location where the public may listen to or observe the meeting.

Governing bodies must hold their meetings within the geographic boundaries of their jurisdiction. However, a governing body may meet elsewhere if there is an actual emergency requiring immediate action or to hold a training session, when no deliberation toward a decision is involved.

### Example

- A library board is free to rotate meetings at different libraries in its district, but it may not meet outside its district.*

Federal and state law requires that meetings be held in places accessible to individuals with mobility and other impairments.

## What is Exempt from the Law?

On-site inspections, staff meetings and gatherings of associations to which a public body or its members belong are not considered public meetings. Chance social gatherings are not considered meetings as long as no official business is discussed.

### Example

- *Three out of five city councilors inspect a new landfill site. Their inspection does not constitute a public meeting, unless they deliberate toward a decision on a city matter.*
- *Later, the three city councilors attend a League of Oregon Cities conference. Again, this is not a public meeting, unless the councilors discuss official city business.*
- *That evening, the three councilors chat during a concert intermission. As long as they talk about the music, this is not a public meeting. But if they stray into discussion of official city business, then it is.*

Also exempt from the Public Meetings Law are:

- Meetings of state or local lawyers assistance committees.
- Meetings of medical peer review committees.
- Meetings of multidisciplinary teams reviewing child abuse and neglect fatalities.
- Judicial proceedings. However, see Oregon Constitution, Section 10.
- Review by the Workers' Compensation Board and the Employment Appeals Board of hearings on contested cases.
- Meetings of the Energy Facility Siting Council when it reviews and approves security programs.
- The Oregon Health and Science University regarding presidential selection process, sensitive business matters, or meetings of faculty or staff committees.
- Mediation by the agricultural mediation service program.

For some entities, the deliberation process alone is exempt, although information-gathering and decision-making must be public. This applies to the State Board of Parole, the Psychiatric Security Review Board, and state agencies conducting hearings on contested cases under the Administrative Procedures Act.

## Notice of Meetings

Governing bodies must give notice of the time, place and agenda for any regular, special or emergency meeting.

Public notice must be reasonably calculated to give actual notice to interested persons and media who have asked in writing to be notified of meetings and general notice to the public at large.

Governing bodies wishing to provide adequate notice should strive to provide as much notice as possible to ensure that those wishing to attend have ample opportunity – a week to 10 days for example.

At least 24-hour notice to members of the governing body, the public and media is required for any special meeting, unless the meeting is considered an emergency meeting. Appropriate notice is required for emergency meetings and should include phone calls to media and other interested parties. Notice for emergency meetings must also cite the emergency.

A meeting notice must include a list of the principal subjects to be considered at the meeting. This list should be specific enough to permit citizens to recognize matters of interest. However, discussion of subjects not on the agenda is allowed at the meeting.

### Example

*The State Board of Higher Education plans to discuss building new college campus in Burns. An agenda item that says "Discussion of public works" would be too general. Instead, the agenda should say something like "Discussion of proposed Burns campus."*

# PUBLIC RECORDS & MEETINGS

JULY 2013

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7-10-13  
Date

Special Committee  
Gov. Body

Mtg. Prep #3  
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Exh. C

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## **1. Introduction**

The Public Records Law (ORS 192.410 to 192.505) and the Public Meetings Law (ORS 192.610 to 192.690) were enacted in 1973. They established 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. Almost all deliberations and decisions of public bodies are open to attendance by interested persons. The Laws have been amended many times at subsequent legislative sessions.

## **2. Right to Inspect**

Under ORS 192.420, “every person” has a right to inspect any non-exempt public record. Any natural person or any corporation, partnership, firm or association has this right. 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 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.

## **3. Bodies Subject to the Law**

### **A. Public Bodies**

The Public Records Law applies to any public body in the state. ORS 192.410(3) defines “public body” to include every state officer, agency, department, division, bureau, board and commission; every county and county governing body, school district, special district, municipal corporation, and any board, department, commission, council, or agency thereof; and any other public agency of this state. Thus, all state and local government bodies are subject to the records law, including “public corporations” such as the Oregon State Bar, the SAIF Corporation, and the Oregon Health Sciences University. *State ex rel Frohnmayer v. Oregon State Bar*, 307 Or 304 (1989), and *Frohnmayer v. SAIF*, 294 Or 570 (1983).

### **B. Private Bodies**

In *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451 (1994), the Oregon Supreme Court determined that a group selected by a private association of school administrators

and charged by a public school district board with investigating and making recommendations about high school operations was not a “public body” within the meaning of public records law. However, in that case the Oregon Supreme Court held that if a private entity is the "functional equivalent" of a public body, the Public Records Law could apply to it. The court set forth several factors to assist with determining whether a private entity is the functional equivalent of a public body, which included:

- the entity's origin (was it created by government or was it created independently?);
- the nature of the function(s) assigned and performed by the entity (are these functions traditionally performed by government or are they commonly performed by a private entity?);
- the scope of the authority granted to and exercised by the entity (does it have the authority to make binding decisions or only to make recommendations to a public body?);
- the nature and level of any governmental financial and nonfinancial support;
- the scope of governmental control over the entity;
- the status of the entity's officers and employees (are they public employees?).

#### **4. 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. The 2011 legislature (HB 2244) expanded the ORS 192.005(5) definition of “public record” to include “any information” prepared, owned, used or retained by a city, relating to an activity, transaction or function of the city, or necessary to satisfy fiscal, legal, administrative or historical policies, requirements or needs of the city. Public records are no longer limited to “documents” and need not be prepared by the city. Records prepared outside government “owned, used or retained” by the city, 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. The 2011 amendments confirm that unrecorded spoken communications are not public records.

Materials prepared and owned by a private company do not become “public records” when they are in temporary custody of a public official for 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. 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. 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.

## **5. 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. *See* 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.

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 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 to merely delay or frustrate the inspection process.

## **6. 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

The exemptions under ORS 192.501 are all *conditional*; they exempt certain types of information from disclosure “unless the public interest requires disclosure in the particular instance.” 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. No balancing is required with regard to information covered by “unconditional” exemptions. The legislature has already balanced the competing interests and concluded that confidentiality interests outweigh public disclosure interests as a matter of law.

In the application of conditional exemptions, the identity of the requestor and the circumstances of the request are irrelevant to the determination of whether the information fits within the category of the exemption. Circumstances of a particular request become relevant only if the requested information fits into an “unconditional” exemption category.

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, “The 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).

## **7. 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.

## **8. Public Meetings Policy**

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 city council (council), and citizen advisory commissions and committees 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.

#### A. 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 subcommittee that has authority only to gather information for the full council, commission or committee is not a governing body. However, if the subcommittee has the authority to take action on a city issue of policy or administration, then it is a governing body under the meetings law.

#### B. 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 city manager or other individual city officials. For example, an advisory committee appointed by the city manager 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 the 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.

### **9. 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 meetings law does not define “Quorum.” Quorum is defined as a majority of the public body. .

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. Jurisdiction is determined by examining the authority granted to a particular governing body and any ordinances, resolutions or directives governing that authority.

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 and social media may be subject to the meetings law.

### **10. 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* 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.

### 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.

### 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. Any person who fails to comply with reasonable rules of conduct and who causes an actual 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).

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).

### 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.

## **11. Executive (Closed) 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:

- Labor Negotiator Consultations;
- 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 must 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).

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.

~ July 2013 ~						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
	1 Parks Board	2 Council Mtg.	3	4	5	6
	8	9 Planning Commission	10 Special Committee Mtg.	11	12	13
14	15	16 Council Mtg.	17	18	19	20
21	22	23 Planning Commission	24	25	26	27
28	29	30	31	Notes:		

7-10-13  
Date

Special Committee  
Gov. Body

Mtg. Prep #4  
Agenda Item

D  
Exhibit #

~ August 2013 ~						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
				1 Cultural Arts Comm.	2	3
4	5 Parks Board Mtg.	6 Council Mtg.  Spec. Comm. Recommendation /Report due to Council  Direction to staff /Legal to draft ordinances and ballot title and Explanatory Statement	7	8	9	10
11	12	13 Planning Comm.	14	15 Friends of Library Mtg.	16	17
18	19	20 Council Mtg.  Council adoption of Ordinances, Ballot title & Explanatory Statement	21 Library Adv. Board Mtg.  Submit Public Notice to Oregonian	22	23 Possible Notice Published	24 Possible Notice Published
25	26	27 Planning Comm.	28	29	30	31 End of 7 day wait period

Proposed timeline of events

~ September 2013 ~

Sun	Mon	Tue	Wed	Thu	Fri	Sat
1	2 Holiday-City hall Closed Parks Board-TBD	3 Council Mtg.	4	5 County Elections Filing Deadline-Ballot Title Cultural Arts Comm.	6	7
8	9	10 Planning Commission	11	12	13	14
15	16	17 Council Mtg.	18	19	20	21
22	23	24 Planning Commission	25	26	27	28
29	30	<b>Notes:</b>				



Beery Elsner & Hammond LLP

6-3-13  
Date

City Council  
Gov. Body

Work Session  
Agenda Item

A  
Exhibit #

**MEMORANDUM**

TO: Mayor Middleton and Sherwood City Council  
CC: Joseph Gall, Sherwood City Manager  
FROM: Christopher Crean, City Attorney's Office  
Heather Martin, City Attorney's Office  
SUBJECT: Proposed Ordinances Regulating Retail Activity  
DATE: May 31, 2013

\*\*\*\*\**Confidential Attorney-Client Privileged Communication*\*\*\*\*\*

You requested an initial legal analysis of several proposals for City ordinances to regulate certain commercial retail activity in the City of Sherwood. The specific proposals are set forth below, including a summary of each and a brief list of items the city will need to consider and resolve before it adopts one or more of the ordinances.

**General Considerations**

Before discussing the specific proposals, there are several things the Council will need to consider that apply equally to each proposal.

- Any ordinance must be rationally related to a legitimate governmental purpose. This is known as the "rational basis" test and is intended to prohibit arbitrary or discriminatory action by the government. It is a fairly low bar and can include such public health and safety considerations as preventing noise, litter or stormwater runoff. The purpose of an ordinance is often stated in the recitals.
- The scope of the ordinance. The City may limit the scope of an ordinance to a specific area within the City – for example, areas zoned for commercial use. Similarly, the City may limit an ordinance to a specific type of use – for example, retail uses larger than 100,000 square feet or a business that employs more than 100 people. Again, the scope of the ordinance must be rationally related to a legitimate governmental purpose but, assuming that threshold is met, the City generally has authority to regulate business activity within the City.

7-10-13  
Date

Special Committee  
Gov. Body

Reg. Item # 6  
Agenda Item

E  
Exhibit #



- Any ordinance will affect all employers within the identified scope. For example, an ordinance that applies to retail facilities larger than 100,000 square feet will affect not only Walmart but also Home Depot and Target. An ordinance that applies to employers with more than 100 employees also will affect the same group of employers (and potentially others).
- The City Council must consider the City's ability to administer and enforce the specific terms of any ordinance it adopts. For example, an ordinance that regulates employee benefits likely will require coordination with BOLI as further described below. Conversely, an ordinance regulating hours of operation or overnight parking may be administered through the City's development code. Finally, the process the City must follow to adopt an ordinance will vary depending on how the City Council resolves issues surrounding administration and enforcement.

### **Regulating Hours of Operation**

The City may lawfully regulate the hours of operation of commercial establishments within the City. For example, the City of Beaverton prohibits businesses in many commercial zones from operating between 10:00 pm and 7:00 am unless the business obtains a conditional use permit (CUP) from the city. An excerpt of the relevant sections of the Beaverton Development Code is attached to this memorandum. The restriction is part of the Beaverton Development Code, presumably because the city determined the impacts from commercial operations to be appropriately addressed within the context of a land use permit. However, Sherwood may wish to consider placing the restriction in the Sherwood Municipal Code (SMC), Chapter 5 (Business Licenses, Regulation and Recycling), while retaining the CUP exemption in the Sherwood Zoning and Community Development Code (SMC Chapter 16).

### **Regulating Overnight Parking**

Like an ordinance regulating hours of operation, the City may lawfully regulate overnight parking, and many cities in Oregon do so. The City Council will need to determine where the restriction will apply; for example, whether it is limited to public rights-of-way or applies more broadly to parking lots that are open to the public. Copies of local ordinances from the City of

Beaverton and the City of Hermiston are attached to this memorandum. Significantly, in both cases the prohibition was placed in the city's motor vehicle code and not the development code.

### **Regulating the Sale of Firearms**

With few exceptions, the City may not regulate the sale of firearms or ammunition. ORS 166.170 provides:

166.170 State preemption. (1) Except as expressly authorized by state statute, the authority to regulate in any matter whatsoever the sale, acquisition, transfer, ownership, possession, storage, transportation or use of firearms or any element relating to firearms and components thereof, including ammunition, is vested solely in the Legislative Assembly.

(2) Except as expressly authorized by state statute, no county, city or other municipal corporation or district may enact civil or criminal ordinances, including but not limited to zoning ordinances, to regulate, restrict or prohibit the sale, acquisition, transfer, ownership, possession, storage, transportation or use of firearms or any element relating to firearms and components thereof, including ammunition. Ordinances that are contrary to this subsection are void.

Subsequent statutes allow the City to prohibit the discharge of firearms in the city (ORS 166.172), the possession of a loaded firearm in a public place (ORS 166.173) and the sale of firearms in pawnshops and second-hand stores (ORS 166.175). Otherwise, the City may not regulate the sale of firearms.

### **Regulating the Sale of Alcohol**

Alcohol sales in Oregon are regulated by the Oregon Liquor Control Commission (OLCC). Under ORS 471.045, state law preempts any inconsistent local regulations:

471.045 Liquor laws supersede and repeal inconsistent charters and ordinances. The Liquor Control Act, designed to operate uniformly throughout the state, shall be paramount and superior to and shall fully replace and supersede any and all

municipal charter enactments or local ordinances inconsistent with it. Such charters and ordinances hereby are repealed.

In order to sell alcohol, a business must obtain a license from the OLCCC. ORS 471.313(1) allows the OLCC to deny a license if it determines that granting the license “is not demanded by public interest or convenience.” OAR 845-005-0326 sets forth the criteria under which the agency may determine whether a license is in the “public interest or convenience.” With respect to the location of a licensed premises, the rule provides in relevant part:

845-005-0326. License Not Demanded by Public Interest or Convenience

ORS 471.313(1) allows the Commission to deny a license that public interest or convenience does not demand. The following are some of the public interest or convenience reasons for which the Commission may deny a license unless the applicant shows good cause to overcome the criteria:

\* \* \*

(2) Proximity to Facilities:

(a) The licensed premises:

(A) *Will be located within 500 feet in urban or suburban areas or within 1,500 feet in a rural area of the boundary (measured property line to property line) of a licensed child care facility or elementary or secondary school; a church; a hospital, nursing care facility or convalescent care facility; a park or children-oriented recreational facility; or alcohol and other drug treatment or rehabilitation facility; and*

(B) Will adversely impact the facility.

(b) Good cause to overcome this criterion includes, but is not limited to, a showing by the applicant that:

(A) The proposed operation is consistent with the zoning where the proposed premises will be located, is consistent with the general character of the area and the adverse impact will not unreasonably affect the facility; or

(B) The size of the proposed premises' community is so small that the proposed location is a reasonable location for the proposed operation.

\* \* \*

As you can see, the rule establishes a locational standard for the issuance of a liquor license. Because ORS 471.045 prohibits local laws that are inconsistent with state law, the City could adopt an ordinance to establish similar locational standards for businesses that sell alcohol but the ordinance could not be more restrictive than the OLCC rule.

However, the OLCC licensing process requires a recommendation from the affected local government. ORS 471.166. That recommendation could apply the “public interest” and “proximity” standards of the OLCC rules to recommend the license be denied. In short, while City cannot prohibit the sale of alcohol that is authorized by the OLCC, it can rely on the OLCC rules to recommend that a license application be denied if it is within 500 feet of a child care facility, school, hospital or other facility listed in OAR 845-005-0326(2).

#### **Regulating Employment Conditions (Part-time Employee “Bill of Rights”)**

Several proposals concerning employment conditions were raised at a recent public hearing; each proposal is discussed in turn below.

1. Part-time employees may request a full-time schedule without penalty before an employer hires any additional employees.

While the City generally has authority to regulate working conditions, the main issue here would be enforcement. It would be a substantial burden for the City to ensure this is enforced properly because it would likely include quarterly or yearly reports from affected employers, as well as an adjudication and penalty process for any violations. As an example, the City of Portland recently enacted a sick leave requirement for employers in Portland and, under the terms of that ordinance, the state Bureau of Labor and Industries (BOLI) will enforce the requirement under administrative rules to be adopted by the City. In addition, BOLI will enter into an IGA with the City to further define their role in the process. Unfortunately, this process is still undefined as the administrative rules and the IGA have not been drafted so there is no way to determine what the fiscal impact would be or how this will work in practice. One critical distinction is that sick leave provisions can be interpreted under a wage and hour analysis - - a system that is already in place at BOLI due to its enforcement of the state’s wage and hour laws. The proposal involved here is not directly related to hours worked but rather focuses more on scheduling and hiring practices so it would likely be much harder to enforce because

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there is not an existing mechanism within BOLI. However, this is still an option the City could explore.

2. Employers must notify employees of their work schedules at least two weeks in advance of the first scheduled work date.

As with the previous proposal, this is something the City may consider adopting but the same issues mentioned in #1 above would apply.

3. Proportional benefits for full- and part- time employees who work at least 15 hours per week.

Initially, we have some legal concerns about this proposal. Without doing in-depth research, it appears on the surface that this type of ordinance may be pre-empted by the federal Employee Retirement Income Security Act (ERISA) because it would require an employer to offer certain health care benefits in Sherwood that it does not offer to employees in other locations.. ERISA establishes a comprehensive scheme of federal regulation regarding employers' benefits, including employee benefit plans (i.e. health care, retirement). One of ERISA's primary objectives is to provide a uniform regulatory regime for employee benefit plans (particularly for multi-state employers) and it broadly preempts any and all state (including local) laws that might relate to any employee benefit plan covered by ERISA. Before adopting this type of ordinance, we will need to research the potential legal implications.

4. Employers with employees who receive state assistance such as food stamps, Oregon Health Plan assistance, etc. would be required to cover those costs so that they are not borne by state taxpayers.

If an ordinance is structured so that it does not impact any employer-provided benefits (i.e. health care), the City may be able to adopt an ordinance of this type. However, several states (Hawaii and Maryland) and one county (Suffolk County, New York) passed similar laws that were later struck down by the courts. In each case, the law would have required the employer to pay for health care costs covered by the state. Those laws were found to be preempted by ERISA because even if the law did not *require* the employer to revise its health care benefits, the practical result was that the employer would need to offer different benefits to employees in those states/localities to avoid paying into the state system. Here again, we will need to do more research and

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also examine how this would interface with the current Oregon Health Plan (ORS Chapter 414).

There are other types of regulations that cities have enacted to create better working environments for employees including paid sick leave (Portland, Seattle, San Francisco), higher minimum wage (D.C., San Francisco), and establishing a minimum amount that must be spent on health care per employee (San Francisco). This last option regarding health care standards could address some of the concerns related to employers passing on health care costs to the public.

Finally, it is worth noting that there is currently a bill pending in the U.S. House of Representatives that proposes a Part-Time Employee Bill of Rights and encompasses many of these same issues. While it is unlikely that House will act on the legislation, it has specific provisions addressing ERISA and would create a uniform system for handling these issues for multi-state employers. Our office will keep the City apprised of this bill should it begin moving forward.

We will be available at Monday night's work session to answer any questions you may have about these proposals.

Category and Specific Use Superscript Refers to Use Restrictions		NS	CS	CC	GC
		P: Permitted	C: Conditional	N: Prohibited	
12. Storage	A. Self Storage Facilities	N	N	C	P
	B. Storage Yards	N	N	C	P
13. Temporary Living Quarters		N	C <sup>4</sup>	P	P
14. Vehicles	A. Automotive Service, Major	C	C	N	C
	B. Automotive Service, Minor	C	P	C	P
	C. Bulk Fuel Dealerships	C	P	C	P
	D. Sales or Lease	N	N	N	P
	E. Rental	N	C	C	P
<b>Civic</b>					
15. Cemetery		N	N	N	N
16. Education	A. Commercial Schools	C	P	P	P
	B. Educational Institutions	P	P	P	P
17. Places of Worship		C	P C <sup>7</sup>	P	P
18. Public Buildings, Services and Uses		C	C	C	C
19. Recreation	A. Public Parks, Parkways, Playgrounds, and Related Facilities	P	P	P	P
	B. Recreational Facilities	P	P	P	P
20. Social Organizations		C	P C <sup>7</sup>	P	P
21. Transit Centers		N	C	C	N
22. Utilities	A. Utility Substations and Related Facilities other than Transmission Lines	C	C	C	C
	B. Transmission Lines	P	P	P	P
<b>Hours of Operation</b>					
23. Uses Operating between 10:00 p.m. and 7:00 a.m. <sup>5</sup>		P C <sup>6</sup>	P C <sup>6 7</sup>	P	P C <sup>8</sup>

Category and Specific Use Superscript Refers to Use Restrictions		NS W1: WCF Type 1	CS W2: WCF Type 2 N: Prohibited	CC W3: WCF Type 3	GC
<b>Wireless Communication Facilities (WCF)</b>					
24. New WCF	A. Tower Construction	W3	W3	W3	W3
	B. Attachment to existing or new building or structure not using stealth design	W3	W3	W3	W3
	C. Replacement tower to provide collocation opportunity <sup>9</sup>	W1	W1	W1	W1
	D. Attachment of a new WCF to buildings or structures and utilize stealth design <sup>10</sup>	W1	W1	W1	W1
	E. Attachment of WCF to existing structures, tower or pole structures <sup>11</sup>	W1	W1	W1	W1
25. WCF in Right-of-Way	A. Installation of WCF within right-of-way <sup>12</sup>	W2 / W3	W2 / W3	W2 / W3	W2 / W3
26. Collocation	A. New WCF on existing WCF tower	W1	W1	W1	W1
	B. New WCF inclusive of antennas on existing WCF tower exceeding height standard	W2	W2	W2	W2
27. Antennas	A. Attachment of antennas to WCF tower or pole structures other than used for cellular phone service	W1	W1	W1	W1
28. Satellite Antennas and Direct to Home Satellite Service	A. DHSS antennas >1 m. in diameter	W1	W1	W1	W1
	B. Up to 2 antennas >2 m. in diameter	W1	W1	W1	W1
	C. Up to 5 antennas >2 m. in diameter	W2	W2	W2	W2
	D. More than 5 antennas >2 m. in diameter	W3	W3	W3	W3

**20.10.25. USE RESTRICTIONS**

The following Use Restrictions refer to superscripts found in Section 20.10.20.

1. Detached or Attached Dwellings; only 50% of the contiguous area within any NS zone may be developed residentially.
2. No freestanding office structure or group of office structures shall exceed a combined total of 15,000 square feet.
3. No sales or outdoor storage of animals or livestock are allowed with this use.
4. Limited to Hotels and Extended Stay Hotels located on a lot or parcel adjoining U.S. Highway 26, Canyon Road, Tualatin Valley Highway or Oregon State Highway 217, subject to the following:
  - a. It shall be located on the portion of the lot immediately adjoining the highway.
  - b. Signage is allowed as per Section 60.40.35.3. of this code. However, only one freestanding sign, up to 32 square feet per face, 64 square feet for all four faces combined or one wall sign up to 64 square feet may orient toward an abutting Arterial or regional traffic route.
  - c. Signage shall not be allowed for auxiliary uses such as restaurants, meeting rooms, etc.
  - d. Auxiliary uses such as restaurants and meeting rooms shall be designed to meet the needs of the guests of the facility and not the general public.
5. Applicable to all uses.
6. Office uses do not require a Conditional Use for extended hours of operation.
7. If property is greater than 500 feet from an existing Residential use in a Residential zone the use is Permitted. If property is within 500 feet from an existing Residential use in a Residential zone the use requires Conditional Use approval.
8. Conditional Use required when abutting a Residential Zone.
9. On a location containing an existing tower supporting one carrier and shall be consistent with other approvals.
10. Provided the buildings or structures are not exclusively used for single-family or multi-family residential purposes.

## **CITY OF HERMISTON:**

### **72.09 PARKING AND USING RECREATIONAL VEHICLES FOR SLEEPING OR LIVING PURPOSES OUTSIDE RECREATIONAL VEHICLE PARKS.**

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(A) Recreation Vehicle means a vehicle with or without motive power, which is designed for human occupancy and is to be used temporarily for recreational, seasonal, or emergency purposes.

(B) Except in a recreational vehicle park, it shall be unlawful to park any recreational vehicle on any public way, road, street, or place within the city while using it for sleeping or living purposes for any period of time exceeding three hours except in residential neighborhoods where the period of time will not exceed 24 hours.

(C) Except in a recreational vehicle park, it shall be unlawful to park any recreational vehicle within the city while using it for sleeping or living purposes for any period of time exceeding seven days within the last six months.

(D) This section provides an exemption from §72.09(C) for the construction, reconstruction, or remodeling of a public or private nonprofit social service, community, religious, or recreational facility (hereinafter referred to as "project"). Recreational vehicles may be parked for sleeping or living purposes at or near the project in excess of seven days in conjunction with a project until the completion of the project or six months, whichever is less, provided that the following requirements are met:

(1) The property owner and the person or agent in charge of the project, if the two are different, submit a complete application for the exemption permit together with a basic site plan (scale drawing not necessary); written consent to the parking of recreational vehicles for sleeping or living purposes at or near the project from all adjacent property owners and residents to the project site; and allow access by city officials to the project site and the location of the recreational vehicles for the purposes of inspection and enforcement of the terms and conditions of the permit, including towing of the recreational vehicles and removal of temporary sewer and water service connections, whether or not the permit has expired.

(2) The exemption permit must be issued to the property owner and the person or agent in charge of the project, if the two are different, before the recreational vehicles are used for sleeping or living purposes in conjunction with the project.

(3) Before a recreational vehicle is used for sleeping or living purposes in conjunction with a project, the owner(s) and/or occupant(s) of the recreational vehicle must sign a release allowing access to and

## **CITY OF BEAVERTON:**

### 6.02.323 Prohibited Vehicle Camping.

A. Definitions. For the purposes of this ordinance the following terms have the stated meanings:

1. Commercial structure – A building in which the predominant activity is connected with the sale, rental, or distribution of, or performance of services to, end users of products or services.
2. Commercial parking lot – A parking lot adjacent to a commercial structure, or a lot if not adjacent then within the control of the commercial interest occupying the structure, which lot is privately owned but open to the public.
3. Person in charge – A person, typically employed in a management capacity by the corporate entity which occupies a commercial structure, who is at the time of an offense the most authoritatively in charge person actually present upon commercial premises and is then present in the normal course and scope of employment.

B. Between the hours of 12:00 a.m. and 5:00 a.m., no operator or owner of a trailer house, camp trailer, mobile home, auto home, camp car, recreational vehicle, or similar conveyance for accommodating sleeping people shall park said conveyance tended or unattended in a commercial parking lot for a period in excess of 30 minutes.

C. A person in charge of a commercial structure during hours the business is open to the public who believes that it is more likely than not a vehicle has been parked in violation of this section shall do all of the following:

1. Make a reasonable effort under the circumstances to locate the operator of the offending vehicle; and
2. Make a reasonable effort under the circumstances to request that the person cease the offending conduct.

D. A person in charge of a commercial structure who fails to follow the sequence of events listed in subsection (C) of this section commits a violation.

E. This ordinance does not apply upon commercial premises upon which is conducted a wholesale or retail business directly concerning the vehicles listed in subsection (B) of this section. Such businesses include, but are not limited to, sales, service, impound, long-term storage during a period of vehicle non-use, salvage, and cleaning. [BC 6.02.323, added by Ordinance No. 4384, 3/6/06]