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LEGAL MEMORANDUM

TO: Mayor Cook and Members of the City Council

FROM: Timothy Ramis, City Attorney

DATE: September 18, 2013

RE: **Quasi-judicial hearing procedures**
File No. 50014-36799

INTRODUCTION

This memorandum responds to Council's request for a refresher on the law and process associated with quasi-judicial hearings. The following sections address the role of the Council and procedural issues associated with the quasi-judicial hearing setting.

ROLE OF THE COUNCIL: QUASI-JUDICIAL VS. LEGISLATIVE

Quasi-judicial proceedings refer to Council's role in deciding contested cases. The role is usually contrasted to legislative proceedings, in which Council's role is to make laws. As a practical matter, City staff will inform the Council whether it is sitting as a quasi-judicial or legislative body. However, the distinction between quasi-judicial and legislative can arise in a number of settings and can be a pretty close call sometimes, so it is beneficial for the Council to understand the principal indicators that an issue is quasi-judicial, which are:

- the decision of Council generally impacts a localized area (not the entire City);
- affected persons receive notice, plus an opportunity to comment;
- Council has to make a decision to either approve or deny (as opposed to taking no action);
- Council sits as a non-partial decision maker; and
- the decision of Council is based on application of some criteria—usually embodied in one or more ordinances—to the evidence provided during the hearing.

These elements of a quasi-judicial hearing are in contrast to the legislative setting where Council makes laws that are effective City-wide, and can rely on its own policy judgments instead of being impartial.

Quasi-judicial power resembles the power of a law court to decide cases.

The constitutional and statues of Oregon empower Council to decide cases—that is, disputed questions—under certain sources of laws (such as city ordinances). Deciding cases involves acting judiciously: deciding which evidence to accept, interpreting unclear law, and applying the law fairly and equally to affected persons. In the municipal context it is called "quasi" judicial power for two reasons. First, to distinguish it from the formal judicial power of the State of Oregon, which belongs to state court judges. Second, to signify that almost all municipal quasi-judicial decisions can ultimately be reviewed for legal errors by a state court judge, should disappointed parties before the City Council wish to seek such review.

Exercising quasi-judicial power requires the Council to receive evidence and evaluate it under elements of the law involved in the case. Council must also ensure there has been sufficient due process, which usually consists of notice before a hearing, fairness at the hearing, and a right to present evidence and arguments in favor of one side or the other. Examples of quasi-judicial decisions include a property specific zone change, or an appeal of a termination by an employee.

In contrast, the role of the Council in legislative hearings is akin to that of the U.S. Congress, as each of the Councilor's can rely upon their own policy judgments and concerns to determine what decision to make. Also, there is no requirement that the Council act on a legislative matter, so it can be table or simply dropped for lack of a majority vote to take action.

DUE PROCESS IN THE QUASI-JUDICIAL SETTING

Based on the nature of the quasi-judicial hearing, there may be applicable procedural standards either found in state law or in the City Code. City staff will prepare materials to assist the Council in meeting these requirements. However, there are procedural elements required in all quasi-judicial proceedings, which are summarized below.

Quasi-judicial proceedings require heightened "due process"

a. **Process before the decision**

- Persons affected by the decision typically receive advance notice of the proceedings. Staff members typically publish these notices for the Council.

- The City's professional staff may study the issues presented by the question, and create written analysis for the Council. Staff members typically share such analysis with the affected parties at or before the hearing.

- Parties expect each Councilor to prepare him or herself for the hearing. This includes devoting time to studying materials provided by staff. This also includes thinking about any bias, ex parte contact, or conflict of interest issues *before* the hearing, so that the Councilor is prepared to address any such issues *at* the hearing. The City Manager and other staff are available before hearings to help Councilors examine such matters.

b. **Process at the hearing**

- Persons affected by the decision typically have a right to testify, either in person or in writing.

- The principal parts of a Councilor's role, at a quasi-judicial hearing, are to:

  - **Focus on the criteria:** statutes or ordinances typically provide several standards or criteria that must guide the decision. Evidence, testimony, arguments, and Councilor discussions tend to increase in quality the more such items "stick to the criteria." Yet it is very much the case that persons often have supportable, good-faith differences about what the criteria mean and whether evidence pertains to the criteria.

  - **Receive evidence:** Council receives most evidence in written or oral form. Evidence sometimes includes illustrations such as pictures or graphs, or physical items such as samples of building siding.

  - **Decide between conflicting evidence:** when items of evidence conflict with each other, decide which of the conflicting evidence the Councilor accepts.

  - **Interpret vague or ambiguous laws:** when the language of City ordinances is unclear, or capable of several meanings, interpret what the law means

  - **Decide cases fairly:** fairness requires the following components:

    - <u>Decision free from bias</u>: if a Councilor cannot decide a case fairly and impartially as to all the parties, the Councilor may not be able to hear the case;

    - <u>Lack of self-interest</u>: Councilors must not participate in decisions in which they stand to gain or lose money;

- Disclosure of ex parte contacts: if a Councilor has been given evidence before the hearing, and the evidence has not been otherwise disclosed to the parties, the Councilor should disclose the contact before the hearing begins. For example, if a citizen mails a Councilor a letter directly before a land use hearing, and the letter pertains to the hearing, the Councilor should disclose that the communication occurred and what was communicated.

c. **Process after the hearing**

- In a quasi-judicial proceeding there is typically at least one opportunity for the losing side to assert to a law court that the Council made a legal error.
- Occasionally, evaluating facts under a law, at a hearing, reveals a situation where Council may desire to clarify or change the law or underlying public policy. Changing the law is a quasi-legislative process, requiring less formal procedures than judicially-processed decisions.

Public hearings are structured to facilitate the Councilor's role:

a. **Mayor calls item off the agenda:** this informs all attendees that a particular agenda item is coming on for hearing.

b. **Special rules, if any:** if special rules apply to the hearing, they are announced early in the process. The City Attorney often assists Council with this.

c. **Mayor calls for declarations or challenges:** in this phase the Mayor polls the Councilors to declare any: 1) ex parte contacts or information gained outside the hearing, and 2) bias or conflicts of interest. The Mayor typically gives members of the public an opportunity to challenge a Councilor's qualification to hear and decide a case, or the jurisdiction of the Council as a whole to hear and decide a case.

d. **Professional staff information:** a member of City staff may orally present information and analysis to the Council.

e. **Public testimony:** while details vary somewhat between different case types, persons generally testify in the following sequence:

(1) the party with the burden of proving its case (e.g. an applicant for a land use permit);

(2) those in support of the party with the burden of proof;

(3) those opposed to the party with the burden of proof; and

(4) rebuttal testimony of the party with the burden of proof. This testimony is typically limited to the issues and evidence raised by opponents.

f. **Staff recommendation:** staff may assist the Council with further analysis of the evidence. Staff may also supply professional recommendations based on all the evidence and arguments.

g. **Council discussion:** Councilors may wish to confer and clarify their understanding of what they have received.

h. **Close of hearing, consideration, and decision:** when the Council is satisfied it has received and understood the case, the Mayor will close the hearing and the Council will consider the case, ultimately deciding the case by one or more motions.