

CHAPTER 2.05

PROCEDURE FOR CONTESTED CASES

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2.05.005 Contested Case Defined, Notice of Opportunity for Hearing, Service

- (a) A contested case exists whenever:
- (1) Individual legal rights, duties or privileges of specific parties are required by statute or Constitution to be determined only after a hearing at which specific parties are entitled to appear and be heard;
  - (2) Metro has discretion to suspend or revoke a right or privilege of a person; or
  - (3) There is a proceeding regarding a license, franchise or permit required to pursue any activity governed or regulated by Metro; or
  - (4) There is a proceeding in which Metro has directed by ordinance, rule or otherwise that the proceeding be conducted in accordance with contested case procedures.

(b) A contested case does not exist when a Metro action rests solely on the results of a test or inspection.

(c) Metro shall give notice to all parties in a contested case. The notice shall include:

- (1) A statement of the party's right to request a hearing, or a statement of the time and place of the hearing;
- (2) A statement of the authority and jurisdiction under which the hearing is to be held;
- (3) A reference to the particular sections of the statutes, ordinances or rules involved;
- (4) A short and plain statement of the matters asserted, charged or proposed;
- (5) A statement that the party may be represented by counsel at the hearing; and
- (6) When applicable, a statement that if the party desires a hearing, Metro must be notified within a specified number of days.

(d) Unless the Council provides otherwise, the number of days within which Metro must be notified that the party desires a hearing shall be as follows:

- (1) Within 30 days of the date of mailing of notice; or
- (2) Within 60 days of the notification of refusal to issue a license, franchise or permit required to pursue any activity governed or regulated by Metro, if the refusal is based on grounds other than the results of a test or inspection; or
- (3) Within 90 days of an immediate suspension or refusal to renew a license or franchise pursuant to Section 2.05.010 of these rules; or
- (4) In the case of a personnel discharge, within 14 days of the employee's receipt of the Notice of discharge.

(e) The notice shall be served personally or by registered or certified mail.

(f) Metro may provide that notice in addition to that required by this section be given for specific types of contested case.

(Rule No. 79-3. Amended by Rule No. 81-5 and Ordinance No. 82-137, Sec. 2; Ordinance No. 02-967, Sec. 1.)

#### 2.05.007 Rights of Parties in Contested Cases

(a) The following information shall be given to the parties before commencement of a contested case hearing:

- (1) If a party is not represented by an attorney, a general description of the hearing procedure.
- (2) Whether a record will be made of the proceeding and the manner of making the record and its availability to the parties.
- (3) Whether an attorney will represent Metro in the matters to be heard and whether the parties ordinarily and customarily are represented by an attorney.
- (4) The title and function of the person presiding at the hearing with respect to the decision process, including, but not limited to, the manner in which the testimony and evidence taken by the person presiding at the hearing are reviewed, the effect of that person's determination, who makes the final determination on behalf of Metro, whether the person presiding at the hearing is or is not an employee, officer, or other representative of Metro and whether that person has the authority to make a final independent determination.
- (5) Whether there exists an opportunity after the hearing and prior to the final determination or order of the agency to review and object to any proposed Findings of Fact, Conclusions of Law, summary of evidence or recommendations of the officer presiding at the hearing.
- (6) A description of the appeal process from the determination or order of Metro.

(b) The information required in subsection (a) may be given in writing or orally before the commencement of the hearing.

(Rule No. 79-3. Amended by Rule No. 81-5 and Ordinance No. 82-137, Sec. 2; Ordinance No. 02-967, Sec. 1.)

2.05.010 Immediate Suspension or Refusal to Renew a License or Permit, Notice of Opportunity for Hearing, Service

(a) If Metro finds there is a serious danger to the public health or safety, it may suspend or refuse to renew a license or permit immediately.

(b) Metro shall give notice to the party upon immediate suspension or refusal to renew a license or permit. The notice shall include:

- (1) A statement of the party's right to hearing.
- (2) A statement of the authority and jurisdiction under which the hearing is to be held.
- (3) A reference to the particular sections of the statutes, ordinances and rules involved.
- (4) A short and plain statement of the matters asserted, charged or proposed.
- (5) A statement that the party may be represented by counsel at the hearing.
- (6) A statement that if the party demands a hearing Metro must be notified within 30 days of date of the notice.
- (7) A statement giving the reason or reasons for the immediate action.
- (8) The effective date of the suspension or refusal to renew the license or permit.

(c) The notice shall be served personally or by registered or certified mail.

(Rule No. 79-3. Amended by Ordinance No. 02-967, Sec. 1.)

2.05.015 Orders When No Hearing Requested or Failure to Appear

(a) When a party has been given an opportunity and fails to request a hearing within the specified time or fails to appear at the specified time and place of the hearing, Metro may enter an order which supports Metro action or an order denying the petition upon which the hearing was to be held.

(b) The order supporting Metro action shall set forth the material on which the action is based or the material shall be attached to and made a part of the order.

(Rule No. 79-3. Amended by Ordinance No. 02-967, Sec. 1.)

#### 2.05.025 Hearing

(a) The hearing shall be conducted by, and shall be under the control of, the Council President or a hearings officer. Contested case hearings on amendments to the regional Urban Growth Boundary shall be before a hearings officer. The Council may from time to time approve and provide to the Chief Operating Officer a list of prospective hearings officers from which hearings officers may be appointed by the Chief Operating Officer. Unless the hearing is to be held before the Council, the hearings officer in a contested case shall be a member of the Oregon State Bar.

(b) In the case of a hearing on a personnel discharge, the employee shall be given the opportunity to select the hearings officer from a list of at least three prospective hearings officers approved by the Council.

(c) At the discretion of the Council President or the hearings officer, the hearing shall be conducted in the following order:

- (1) Staff report, if any.
- (2) Statement and evidence by Metro in support of its action, or by the petitioner in support of a petition.
- (3) Statement and evidence of affected persons disputing Metro action or petition.
- (4) Rebuttal testimony.

(d) The hearings officer, a Council member, the Chief Operating Officer or his/her designee, the Metro Attorney, and the affected parties shall have the right to question any witnesses. Cross-examination by parties shall be by submission of written questions to the Council President or hearings officer; provided, however, that cross-examination by parties may be oral, at the discretion of the Council President or hearings officer, if such questioning will not disrupt the proceedings.

(e) The hearing may be continued for a reasonable period as determined by the Council President or hearings officer.

(f) The Council President or hearings officer may set reasonable time limits for oral presentation and may exclude or limit cumulative, repetitious or immaterial testimony.

(g) Exhibits shall be marked and the markings shall identify the person offering the exhibits. The exhibits shall be preserved by Metro as part of the record of the proceedings.

(h) A verbatim oral, written, or mechanical record shall be made of all the proceedings. Such verbatim record need not be transcribed unless necessary for Council or judicial review.

(i) Upon conclusion of the hearing, the record shall be closed and new evidence shall not be admissible thereafter; provided, however, that upon proper showing, the Council President or hearings officer may reopen the hearing for receipt of new evidence which could not have been introduced earlier and which is otherwise admissible under Section 2.05.030.

(Rule No. 79.3. Amended by Rule No. 81-5 and Ordinance No. 82-137, Sec. 4; Ordinance No. 02-967, Sec. 1.)

#### 2.05.030 Evidentiary Rules

(a) Evidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs shall be admissible.

(b) Irrelevant, immaterial or unduly repetitious evidence shall be excluded.

(c) All offered evidence, not objected to, will be received by the hearings officer subject to his/her power to exclude irrelevant, immaterial or unduly repetitious matter.

(d) Evidence objected to may be received by the hearings officer with rulings on its admissibility or exclusion to be made at the time a final order is issued.

(e) The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position.

(Rule No. 79-3.)

2.05.035 Proposed Orders in Contested Cases Other than Personnel Discharges

(a) Within 30 days of a hearing before a hearings officer in a contested case other than a personnel discharge, the hearings officer shall prepare and submit a proposed order, together with the record compiled in the hearing, to the Council. The proposed order, including Findings of Fact and Conclusions of Law, shall be served upon the parties.

(b) Within seven (7) days of the release of the proposed order, the Chief Operating Officer shall mail notice to all parties of the date by which written exceptions to the proposed order must be filed. This shall be not less than 14 nor more than 21 days from the date notice of this deadline is mailed, unless otherwise agreed to by all parties. The proposed order and any exceptions received to it shall be forwarded to the Council of Metro for consideration at its next scheduled meeting at least two weeks after the deadline for filing exceptions.

The Council may, by majority vote, decide to consider objections received following the deadline established but must allow at least two weeks between the date the exception is filed and the date the Council reviews it. Only parties may file exceptions, and exceptions may address only issues raised in the hearing. Upon approval of the Council, parties who have filed written exceptions may present oral argument in support of the exceptions, and other parties shall be given the opportunity to orally rebut exceptions made. Oral argument shall be limited to the specific objections raised in the written exceptions.

(c) A party may, in addition to filing written exceptions, file a written request to submit evidence that was not available or offered at the hearing provided for in Code Section 2.05.025. A written request to submit additional evidence must explain why the information was not provided at the hearing and must demonstrate that such evidence meets the standards of Section 2.05.030 and would likely result in a different decision. Upon receipt of a written request to submit additional evidence, the Council shall:

- (1) Refuse the request; or
- (2) Remand the proceeding to the hearings officer for the limited purpose of receiving the new evidence and oral argument and rebuttal argument by the parties on the new evidence; or
- (3) If the nature of the new evidence to be submitted is such that remand would serve no useful purpose,

proceed to hear and consider the evidence and argument and rebuttal from the parties on the evidence.

Requests to submit new evidence must be filed by the deadline for filing written exceptions established pursuant to Section 2.05.035(b), unless circumstances regarding the evidence preclude doing so.

(d) If a new hearing is granted in accordance with subsection (c)(2) of this section, the hearings officer shall within seven (7) days of the hearing serve upon all of the parties and forward to the Council a new proposed order in accordance with the provisions of Code Section 2.05.035(a).

(Rule No. 79-3. Amended by Rule No. 82.5; Ordinance No. 82-137, Sec. 5; Ordinance No. 86-203, Sec. 2 and 3; Ordinance No. 02-967, Sec. 1.)

#### 2.05.042 Ex Parte Communications to the Hearings Officer

The hearings officer shall place on the record a statement of the substance of any written or oral ex parte communication on a fact in issue made to the officer during the pendency of the proceeding. Parties shall, upon request, be given a reasonable opportunity to rebut such ex parte communications.

(Rule No. 81-5. Amended by Ordinance No. 82-137, Sec. 7.)

#### 2.05.043 Ex Parte Communications to the Councilors

Councilors shall place on the record a statement of the substance of any written or oral ex parte communications on a fact in issue made to a Councilor during review of a contested case. Parties shall, upon request, be given a reasonable opportunity to rebut such ex parte communications.

(Rule No. 81-5. Amended by Ordinance No. 82-137, Sec. 8.)

#### 2.05.045 Final Orders in Contested Cases, Notification, Review

(a) Except as provided in subsection (c) of this section, the Council or Chief Operating Officer's decision in a contested case shall be adopted by a final order. Final orders in contested cases shall be in writing and shall include the following:

- (1) Rulings on admissibility of offered evidence.

- (2) Findings of Fact -- those matters which are either agreed upon as fact or which, when disputed, are determined by the fact finder, on substantial evidence, to be fact over contentions to the contrary.
- (3) Conclusion(s) of Law -- applications of the controlling law to the facts found and legal results arising therefrom.
- (4) The action taken by Metro as a result of the Findings of Fact and Conclusions of Law.

(b) Upon receipt of a proposed order and consideration of exceptions, the Council shall adopt the proposed order or revise or replace the findings or conclusions in a proposed order or remand the matter to the hearings officer. No written exceptions need be received on a revised or replaced order except on new evidence presented to the hearings officer on remand. Parties shall be given an opportunity to comment orally to the Council on a revised order.

(c) When the proposed order in a contested case necessitates the adoption of an ordinance, staff shall prepare an ordinance for Council adoption. The ordinance shall incorporate the rulings, findings and conclusions required by subsection (a) or (b) of this section. An ordinance adopted pursuant to this subsection shall, upon adoption, be considered the final order subject to judicial review.

(d) Parties to contested cases and their attorneys of record shall be served a copy of the final order. Parties shall be notified of their right to judicial review of the order.

(e) Final orders in cases other than on Urban Growth Boundary amendments shall be approved by a majority of a quorum of the Council.

(f) Final approval of a petition for an amendment of the Urban Growth Boundary shall be made by the adoption of an ordinance.

(Rule No. 79-3. Amended by Rule No. 81-5; Ordinance No. 82-137, Sec. 9; Ordinance No. 85-190, Sec. 1; Ordinance No. 86-203, Sec. 3; Ordinance No. 02-967, Sec. 1.)

#### 2.05.046 Motions

(a) Unless these rules or applicable statutes or ordinances provide another form of application, a request for an order or

relief from the hearings officer or the Council shall be made by serving and filing a motion in writing for such order or relief.

(b) Parties shall submit all motions without oral argument unless otherwise directed by the hearings officer or the Council. The motion shall show proof of service on all opposing parties in accordance with Code Section 2.05.047.

(Rule No. 81-5.)

#### 2.05.047 Service of Documents on All Parties

All documents, written correspondence or other material filed with or submitted to the hearings officer or the Council shall be served on all parties. Any document filed with or submitted to the hearings officer or the Council shall contain proof of service on all parties.

(Rule No. 81-5.)

#### 2.05.050 Reconsideration, Rehearing

(a) A party may file a petition for reconsideration or rehearing on a final order with Metro within ten (10) days after the order is issued.

(b) The petition shall set forth the specific ground or grounds for requesting the reconsideration or rehearing. The petition may be supported by a written argument.

(c) Metro may grant a reconsideration petition if sufficient reason therefor is made to appear. If the petition is granted, an amended order shall be entered. The Council may allow oral or written argument by the parties on the reconsideration petition.

(d) Metro may grant a rehearing petition if sufficient reason therefor is made to appear. The rehearing may be limited by Metro to specific matters. If a rehearing is held, an amended order shall be entered. Rehearings shall be held before the hearings officer who conducted the original hearing.

(e) If Metro does not act on the petition within the 60th day following the date the petition was filed, the petition shall be deemed denied.

(Rule No. 79-3. Amended by Rule No. 81-5; Ordinance No. 82-137, Sec. 10; Ordinance No. 02-967, Sec. 1.)