

## **CHAPTER 2.05**

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### **2.05.010 Purpose**

The purposes of this chapter are to give clear guidelines to persons involved in a contested case, to provide an understanding of what participants can expect, and to provide for thorough, fair, and timely hearings.

### **2.05.020 Definitions**

**Ex Parte Communication** means a direct or indirect communication about a contested case pending before the hearings officer, which is between the hearings officer and a party to the contested case or the party's representative, and which occurs outside of a public hearing.

**Hearings Officer** means a person appointed by the Chief Operating Officer to hear and determine a contested case.

**In Camera Review** means a review by the hearings officer of a document or exhibit that is not available for public review.

**Party** means:

- (a) Metro.
- (b) Any person requesting and entitled to a contested case hearing under Metro Code.
- (c) Any person requesting to participate at the hearing as a party or a limited party which the hearings officer determines (i) has an interest in the result of the proceeding or represents a public interest in the result, and (ii) that the identified interest is not already adequately represented by one of the current parties.

**Received** means the date and time Metro or the hearings officer records a document as received by the hearings officer or Metro, as applicable. A document delivered to the hearings officer or Metro after regularly scheduled business hours or on a Saturday, Sunday, or official Metro holiday or closure is deemed received on the next business day at the start of business hours.

### **2.05.030 Jurisdiction for Contested Cases**

- (a) Whenever a person has the right to a contested case hearing from any Metro decision or determination as provided in Metro Code generally or Section 2.05.040(a) specifically, the contested case hearing will follow the procedures set forth in this chapter.
- (b) No person has the right to a contested case hearing unless that right is expressly provided for in Metro Code. If Metro Code does not expressly provide for a contested case hearing, then the appropriate review is a writ of review in Multnomah County Circuit Court as set forth in ORS Chapter 34.

### **2.05.040 Contested Case Applicability**

- (a) A contested case is a quasi-judicial administrative action that exists when:

- (1) Individual legal rights or duties of specific parties are required by Metro Code, Oregon statute, the Oregon Constitution, or the United States 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 duty of a person;
  - (3) Metro refuses to issue, renew, modify, or amend any license, franchise, or permit required to pursue any activity governed or regulated by Metro;
  - (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;
  - (5) Metro imposes a civil penalty; or
  - (6) Metro issues an Illegal Disposal citation pursuant to Metro Code Chapter 5.09.
- (b) A contested case does not exist when:
- (1) Metro approves or denies a grant application or Metro amends or revokes a grant;
  - (2) Metro finds a breach of contract, including a designated facility agreement authorized under Metro Code Title V;
  - (3) Metro imposes a condition, law, rule, or requirement of general applicability on a class of facilities, licensees, franchisees, or permittees; or
  - (4) Metro Code specifically authorizes a department director or other Metro staff member to hear appeals regarding decisions affecting the rights or duties of a person or entity.

#### **2.05.050 Notice of Opportunity for Hearing; Service of Notice**

- (a) Metro must give notice to a party when that party has the right to seek a contested case hearing. The notice must 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 under which Metro will hold the hearing;
  - (3) A reference to the applicable Metro Code sections, ordinances, or rules involved;
  - (4) A short and plain statement of the matters asserted, charged, or proposed;
  - (5) A statement that an attorney may represent the party at the hearing; and

- (6) When applicable, a statement that if the party desires a hearing, the party must notify Metro in writing within 30 calendar days of receiving Metro's notice of right to a contested case hearing.
- (b) Metro may give the notice required under subsection (a) by any method or combination of methods which, under the circumstances, is reasonably likely to apprise the party of the hearing. When Metro provides notice by United States Postal Service mail, then three days are added to the 30-day deadline set forth in subsection (a). The following notice methods satisfy the notice requirements of this section:
  - (1) Personal delivery;
  - (2) Mailing the notice by United States Postal Service mail, postage prepaid, and addressed to the residence or business address of the party or parties;
  - (3) Any method authorized by the Oregon Rules of Civil Procedure for the service of summons; or
  - (4) Electronic mail to the last known electronic mail address on file if Metro is giving notice to a person or entity currently regulated, licensed, franchised, or otherwise permitted by Metro.

#### **2.05.060 Hearings Officer Appointment; Qualifications**

- (a) The Chief Operating Officer appoints the hearings officer from a list of at least three prospective, qualified hearings officers recommended by the Metro Attorney. The Chief Operating Officer may appoint more than one hearings officer at any given time depending on the circumstances and frequency of contested case hearings. The Chief Operating Officer may appoint a hearings officer for a specific hearing (or hearings), or for a specific duration of time.
- (b) The hearings officer must be a member in good standing of the Oregon State Bar.
- (c) The hearings officer must be independent of all Metro departments. However, for administrative purposes, the officer may be established as part of the Finance and Regulatory Services Department or Office of the Metro Attorney.

#### **2.05.070 Hearings Officer Duties**

- (a) The hearings officer conducts impartial administrative hearings and renders decisions when a person or entity contests Metro's decision to:
  - (1) Suspend, fail to renew, or revoke a right or duty previously conferred by Metro as authorized under Metro Code, or
  - (2) Refuse to grant a franchise, license, or other regulatory instrument pursuant to Metro Code Title V.

- (b) The hearings officer will coordinate with applicable Metro staff on scheduling and other administrative matters related to the hearing.

#### **2.05.080 Initiation of Hearing Request**

- (a) Unless otherwise specified in Metro Code, a party must file a request for a contested case hearing within 30 days after the date of the Metro decision or determination. The party must direct the request to the Metro staff position identified on the relevant Metro determination or citation. If no staff position is identified, the party should direct the request to the Metro Attorney's Office.
- (b) The request must be in writing and contain a statement of grounds upon which the party contends that the decision or determination is invalid, unauthorized, or otherwise improper.
- (c) The request must include a current address and contact information for the requesting party, including a phone number and, if applicable, an electronic email address for future correspondence.

#### **2.05.090 Scheduling a Hearing; Notice**

- (a) Upon Metro's receipt of a request for a contested case hearing, Metro will notify the hearings officer of the request to assist in scheduling the hearing.
- (b) The hearings officer, in coordination with applicable Metro staff, will specify a time, date, and place for a public hearing on the matters alleged in the request.
- (c) The date set for hearing may not be less than 30 days nor more than 180 days after the date that Metro receives the hearing request. However, the hearings officer may specify a date for hearing less than 30 days after the request is received if it appears there may exist an immediate and serious hazard to the public health, safety, or welfare or to the life, health, safety, welfare, or property of any person.
- (d) The hearings officer will give each party notice of the time, date, and location of the hearing in the same manner authorized for notice under 2.05.050(b).
- (e) The hearings officer may postpone, continue, set over, or reschedule any hearing with the consent of all parties; or, upon the hearings officer's discretion, on the motion of any party for good cause shown.
- (f) Notwithstanding an earlier request for an in-person hearing, the hearings officer may determine the matter without an in-person hearing upon consent of all parties and a review of written materials, if any, submitted by the parties. Any party seeking a determination without an in-person hearing must request this option at least five business days before the scheduled hearing.

### **2.05.100 Rights of Parties in Contested Cases**

- (a) After the request for a hearing but at least 15 business days before the contested case hearing begins, Metro must provide the following information in writing to all parties:
  - (1) A general description of the hearing procedure, including the order of presentation of evidence and what kinds of evidence are admissible. Before the hearing begins, the hearings officer may provide further information regarding the officer's preferred hearing procedures, including the order of presentation of evidence.
  - (2) Whether Metro will record the proceeding, the manner of recording, and its availability to the parties.
  - (3) That an attorney may represent any party, including Metro.
  - (4) A description of the appeal process from the final order.
- (b) A failure to give notice of any item specified in subsection (a) does not invalidate any order unless upon an appeal from or review of the order a court finds that the failure affects the substantial rights of the complaining party. In the event of such a finding, the court will remand the matter to Metro for a reopening of the hearing and may direct Metro as to what steps Metro must take to remedy the prejudice to the rights of the complaining party.

### **2.05.110 Hearings Procedures**

- (a) The hearings officer will conduct and control the hearing.
- (b) The hearings officer has authority to administer oaths and take testimony of witnesses.
- (c) By agreement of all parties, the hearing may be conducted using technology such as telephone or video conferencing equipment. If setting a hearing by telephone or video conference, the hearings officer will set the date and time by which the parties must exchange documents, exhibits, and witness lists.
- (d) Unless precluded by law, informal disposition of any proceeding may be made, with or without a hearing, by stipulation, consent order, agreed settlement, or default.
- (e) As set forth in subsection 2.05.090(f) and with the consent of all parties, the hearings officer may determine the matter without a hearing upon a review of written materials, if any, submitted by the parties.
- (f) Parties may elect to be represented by legal counsel and to respond to and present evidence and argument on all issues involved.
- (g) At the discretion of the hearings officer, the hearing will proceed as follows:
  - (1) Metro staff or case file report, if any.

- (2) Statement and evidence by Metro staff in support of Metro's action.
- (3) Statement and evidence of affected persons disputing Metro's action.
- (4) Rebuttal testimony.
- (h) The hearings officer, Metro's attorney of record or Metro staff as applicable, and the affected parties (or their attorneys if represented) have the right of direct examination of any witness. The hearings officer may ask follow-up questions of any witness as appropriate.
- (i) Each party may seek to cross-examine a witness by directing proposed cross-examination questions to the hearings officer. The hearings officer has discretion whether to allow any or all cross-examination questions.
- (j) Each party has the right to submit rebuttal evidence.
- (k) The hearings officer may continue the hearing for a reasonable period at the hearing officer's discretion.
- (l) The hearings officer may set reasonable time limits for oral presentation and may exclude or limit cumulative, repetitious, or immaterial testimony.
- (m) Parties must mark exhibits and the markings must identify the person offering the exhibits. Metro will preserve the exhibits as part of the record of the proceedings for a period of not less than five years.
- (n) A verbatim oral, written, or mechanical record must be made of all the proceedings. The verbatim record need not be transcribed unless necessary for judicial review.
- (o) After the hearing concludes, the hearings officer will close the record, and new evidence is not admissible thereafter.
- (p) Notwithstanding subsection (o), upon proper showing, the hearings officer may reopen the hearing to receive new evidence that a party could not have introduced earlier, and which is otherwise admissible under Section 2.05.160.

### **2.05.115 Subpoenas**

- (a) In response to a request by a party, or upon the hearings officer's own motion, the hearings officer may issue subpoenas in accordance with the following provisions of this section, or if not addressed in this section, with the Oregon Rules of Civil Procedure.
- (b) A party requesting a subpoena must demonstrate to the hearings officer that the potential witness has evidence of general relevance and probative value, that the evidence sought is reasonable in scope, and that it would otherwise be difficult or impossible to obtain the evidence sought by means other than a subpoena. The hearings officer may make available a form with the information required to make this showing.

- (c) Witnesses appearing pursuant to a subpoena, other than the parties or officers or employees of Metro, are eligible to receive fees and mileage as prescribed by law for witnesses in civil actions. Unless a witness expressly declines payment for fees and mileage, the witness' obligation to appear is contingent on the payment of fees and mileage.
- (d) If a person fails to comply with an issued subpoena, or if any party or witness refuses to testify on any matters on which the party or witness may be lawfully interrogated, then the hearings officer or the party requesting the subpoena may apply to a Multnomah County Circuit Court judge to compel obedience by proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from the circuit court or a refusal to testify.

#### **2.05.120 Burden of Proof**

Metro has the burden of proving the alleged violation by a preponderance of the evidence.

#### **2.05.130 Record of Hearing**

The contested case hearing record consists of:

- (a) All pleadings, motions, and intermediate rulings;
- (b) Evidence received or considered;
- (c) Stipulations;
- (d) A statement of matters officially noticed;
- (e) Questions and offers of proof, objections, and rulings thereon;
- (f) A statement of any ex parte communication on a fact in issue made to the hearings officer during the pendency of the proceedings;
- (g) Any proposed, intermediate, or final order prepared by the hearings officer.

#### **2.05.140 Service of Documents on All Parties**

- (a) A party must serve on all other parties all documents, written correspondence, or other material filed with or submitted to the hearings officer. Service is required within five days of when the materials are filed or submitted to the hearings officer, but not less than three days before a scheduled hearing.
- (b) Any document filed with or submitted to the hearings officer must contain a statement of proof of service on all parties.

#### **2.05.150 Discovery**

- (a) On petition of any party and a showing of the general relevance of the documents or things sought, the hearings officer has discretion to enter an order directing any



party to produce and make available to the petitioning party to inspect and copy any document or to inspect and copy any things that are in the possession of a party.

- (b) The hearings officer may not enter an order requiring a party to produce any document or thing that is privileged under the rules of privilege recognized by law or which is exempt from disclosure under the Oregon Public Records Law. However, the hearings officer may request an in-camera review of the document.
- (c) The hearings officer may allow a party to take a deposition, but only upon a showing that relevant information cannot be obtained otherwise and that the requesting party would suffer extreme prejudice if not allowed to take a deposition before the hearing. If the hearings officer allows a deposition, the deposition must be in the manner prescribed by Oregon law for depositions in civil actions.

#### **2.05.160 Evidentiary Rules During a Contested Case Hearing**

- (a) The hearings officer may admit evidence of a type commonly relied upon by a reasonably prudent person in the conduct of that person's serious affairs.
- (b) Irrelevant, immaterial, or unduly repetitious evidence is not allowed.
- (c) The hearings officer will receive all offered evidence not objected to, subject to the hearing officer's power to exclude irrelevant, immaterial, or unduly repetitious matter.
- (d) The hearings officer may receive evidence objected to and then rule on its admissibility or exclusion at the time the hearings officer issues a final order.
- (e) The burden of presenting evidence to support a fact or position rests on the proponent of the fact or position.
- (f) The hearings officer may not consider information or evidence not offered and made a part of the record. However, the hearings officer may take notice of judicially cognizable facts and may take official notice of general, technical, or scientific facts within the specialized knowledge of the hearings officer or Metro employees. The hearings officer must notify parties of officially noticed material and must afford the parties an opportunity to contest the officially noticed facts.

#### **2.05.170 Ex Parte Communications to the Hearings Officer**

The hearings officer must 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. Upon request, a party must be given a reasonable opportunity to rebut any ex parte communications.

### **2.05.180 Orders When No Hearing Requested or For Failure to Appear**

- (a) When a party has been given an opportunity to request a hearing and fails to do so within the specified time, no further action is required of Metro and Metro's action is upheld.
- (b) If a party that requested a hearing fails to appear at the specified time and place of the hearing, then the hearings officer may enter an order that upholds or denies Metro's action based on any written materials submitted at the time of the scheduled hearing. The hearings officer may allow Metro to submit further additional evidence at the scheduled hearing time to support a prima facie case.
- (c) The order supporting Metro action must set forth the material on which the hearings officer based the officer's action.

### **2.05.190 Final Order; Notification; Review**

- (a) After due consideration of the evidence and arguments, the hearings officer will determine whether Metro has proven the violation alleged and enter an order as follows:
  - (1) If the hearings officer determines that Metro has not proven the violation, the hearings officer will enter a final order dismissing the action.
  - (2) If the hearings officer determines that Metro has proven the violation, the hearings officer will enter an appropriate final order.
- (b) A final order must be in writing.
- (c) A final order must include the following:
  - (1) Rulings on admissibility of offered evidence.
  - (2) Findings of fact. The findings of fact must consist of a concise statement of the underlying facts supporting the findings as to each contested issue of fact, each stipulated fact, and as to each ultimate fact required to support the hearings officer's order.
  - (3) Conclusions of law. The conclusions of law will apply the controlling law to the facts found and legal results arising from those facts.
  - (4) Civil Penalties. If applicable, the amount of any civil penalties and costs owed, and instructions regarding payment.
- (d) Within 30 calendar days of the hearing, the hearings officer must serve a copy of the final order on all parties to a contested case and their attorneys of record if any. The hearings officer may serve a copy by electronic mail, regular mail, or personal delivery.
- (e) The hearings officer must notify all parties of their right to judicial review of the final order as set forth in ORS Chapter 34 (Writ of Review).

- (f) Upon a showing of due diligence, the hearings officer may at any time set aside, modify, vacate, or stay any final order, or re-open any proceeding for additional hearing when necessary to prevent a clear and manifest injustice to a party or other person adversely affected by the order.

#### **2.05.200 Nature of Determination; Judicial Review**

- (a) The hearings officer's determination is a quasi-judicial decision and is not appealable to the Metro Council or any other Metro staff person.
- (b) Appeals from any hearings officer determination under this chapter is by writ of review to the Circuit Court of Multnomah County, Oregon, as provided in ORS 34.010—34.100.

#### **2.05.210 Authority to Adopt Administrative Rules**

- (a) The Chief Operating Officer may adopt or amend administrative rules to implement any provision of this chapter, including adopting procedures and forms. Any rule adopted or amended under this subsection has the same legal force and effect as any other chapter provision.
- (b) In adopting administrative rules, the Chief Operating Officer will follow the administrative rule adoption procedures set forth in Metro Code Chapter 5.08, unless Metro Council adopts an agency-wide administrative rulemaking process, in which case the agency-wide process applies. [Ord. 23-1499.]