

# Planning Commission Protocols: Open Public Meetings, Public Records, & Appearance of Fairness Doctrine

Drew Pollom, Assistant City Attorney



OGDEN  
MURPHY  
WALLACE  
ATTORNEYS

Tukwila Planning Commission

# Presentation Overview:

- The Origin and Role of the Tukwila Planning Commission
  - Chapter 35.63 RCW
  - Tukwila Municipal Code (TMC) Chapter 2.36
- Meetings 101
  - Robert's Rules of Order
- Open Public Meetings Act (OPMA) Requirements
  - Chapter 42.30 RCW
- Public Records Act (PRA) Requirements/Retention
  - Chapter 42.56 RCW
- Appearance of Fairness Doctrine requirements
  - Chapter 42.36 RCW



## Planning Commissions- Chapter 35.63 RCW

- The commission shall elect its own chair and create and fill such other offices as it may determine it requires. - RCW 35.63.040.
- The commission shall hold at least one regular meeting in each month for not less than nine months in each year. - RCW 35.63.040



# Planning Commissions-TMC Chapter 2.36

- Pursuant to the authority conferred by RCW 35A.63, the Tukwila Planning Commission (“Commission”) is hereby established to serve in an advisory capacity to the Mayor and City Council on matters relating to land use, comprehensive planning and zoning. - TMC §2.36.010
- Members of the Commission shall meet and organize by selecting from the members of the Commission a Chair and a Vice-chair to serve for one year as outlined in the bylaws. It shall be the duty of the Chair to preside at all meetings. The Vice-chair shall perform this duty in the absence of the Chair. If neither the Chair nor the Vice-Chair is present, a member chosen by agreement of the attending members shall act as Chair. - TMC §2.36.030



# Planning Commission Objectives

1. To influence in a positive manner the major planning efforts and projects that will affect the city.
2. To advocate consistency and integration among plans which provide a future image and direction for the city as well as the means for meeting more immediate needs.
3. To ensure that effective citizen participation, including opportunities for timely public involvement, are part of the City's planning processes.
4. To represent a whole-city viewpoint when evaluating proposed plans, projects and issues.
5. To make recommendations which recognize the City's needs and government's constraints as well as identified citizen viewpoints.
6. To fairly judge the merits of quasi-judicial applications such as shoreline conditional use permits



# Conducting a Meeting-Rules of Procedure for the Tukwila Planning Commission

- The Chair shall preside at all meetings and adhere to the duties of the presiding officer prescribed in Robert's Rules of Order Newly Revised. - Art. III, Section C.
- At all Commission meetings, the presence of the majority of the currently seated members constitutes a quorum. A quorum is required for the Commission to take any action. - Art. VI, Section B.
- The current edition of Robert's Rules of Order Newly Revised shall provide the basis for meeting structure and official decisions shall be made by motion and vote of the Commission. - Art. VI, Section C.



# Dos and Don'ts

- **Do only one person may speak at any given time.** When a motion is on the floor, Robert's Rules outline a speaker order, allowing the mover of a motion to speak first, so that the group understands the basic premise of the motion. The mover is also the last to speak, so that the group has an opportunity to consider rebuttals to arguments opposing the motion.
- **Don't have more than one subject in front of the group..** Each item to be considered is proposed as a motion which usually requires a "second" before being put to a vote. Once a motion is made and seconded, the chair places the question before the Commission by restating the motion.
- **Do allow each item presented for consideration is entitled to a full and free debate.** Each person speaks once, until everyone else has had an opportunity to speak.
- **Don't talk over each other.** Each speaker must be recognized by the chair prior to speaking. Each speaker should make clear his or her intent by stating, "I wish to speak for/against the motion" prior to stating an argument.



# Common Motions

- **Main Motions:** The most important are main motions, which bring before the commission, for its action, any particular subject. Main motions cannot be made when any other motions are before the group
- **Amendment.** Used to "fine tune" a motion to make it more acceptable to the group. The amendment must be related to the main motion's intent and cannot be phrased in a way that would defeat the main motion. Two amendments may be on the floor at one time: the first amendment modifies the main motion, and the second amendment must relate to the first amendment. When an amendment is on the floor, only the amendment may be debated. The amendments are voted on in the reverse order in which they were made, as each amendment changes to some degree the intent of the main motion. As each amendment is voted on, an additional primary or secondary amendment may be introduced. An amendment is debatable, and requires a second and a majority vote.
- **Postpone indefinitely.** This motion effectively kills a motion, because, if adopted, a two-thirds vote is subsequently required to take the matter up again.





# Sample Motions for Action on a Land Use Permit

- To act in agreement with the recommendations and conditions (if any) in the staff report:
  - I move to **approve (with conditions)/deny** project number LXX-XXX based on the findings and conclusions (and conditions) contained in the staff report dated Month, Day Year.
- To act in agreement with the recommendations in the staff report but to add/modify/delete any condition or finding, first make a motion to address the specific issue (condition or finding), then deliberate and vote on the revised condition language (and findings if necessary):
  - I make a motion to **amend the findings** contained in the staff report page XX to (read as follows, add an additional sentence) \_\_\_\_\_ based on the testimony provided during the hearing and/or provide other reason for the proposed change.



# Sample Motions for Action on a Land Use Permit- Continued

- Then the final motion at the end of deliberations and discussions should be:
  - I move to **approve** project number LXX-XXX based on the findings and conclusions contained in the staff report dated Month, Day Year **as amended** during the PC/BAR deliberations.
- To act against the recommendations in the staff report:
  - I move to **remand the project** back to staff to prepare revised findings and conclusions for project number LXX-XXX based on the testimony provided and the findings of the PC/BAR and postpone the issue until (date certain).

Or:

- I move to **approve (with conditions)/deny** project number LXX-XXX based on the testimony provided during the hearing and the findings of the PC/BAR.



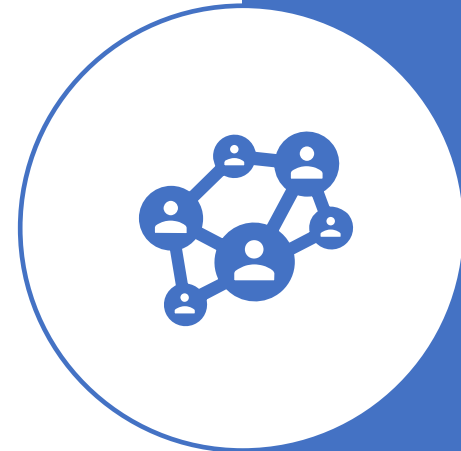
# Open Public Meetings Act (OPMA) Chapter 42.30 RCW

## Legislative Declaration

- “The people, in delegating authority, do not give public servants the right to decide what is good for the people to know and what is not good for them to know.”
- “The people insist on remaining informed so they may retain control over the instruments they have created.”

## Rules

- Meetings declared open and public.
- All Meetings of the Governing Body Shall be Open and Public – Gavel to Gavel
- All Persons Shall be Permitted to Attend any Meeting of the Governing Body, Except as Otherwise Provided by Law
- The Purpose of the OPMA is to Allow the Public to View the “Decision-making Process”



# Open Meetings

## Important Definitions:

- **Meetings** – All meetings under State Statute are considered Regular Meetings if codified at a regular date, place, and time. Any other meeting is considered a Special Meeting. **Meetings are considered to occur when a quorum of the Membership takes “Action.”**
- **Action** – Means the Transaction of Official Business
  - Public Testimony; All Deliberations; Discussions; Considerations; Reviews; Evaluations
  - Final Actions – the OPMA is in Effect Whether or Not “Final” Action is Taken



- Regular Business Meetings
- Study sessions, workshops, retreats, etc.
- Special Meetings
- Executive Sessions
- Attendance at Others' Meetings
- Attendance at Social Events
- Serial Meetings

## Types of Meetings



# Serial Meetings

- Serial meetings, or rolling meetings, occur when a quorum of councilmembers take “action” (which includes discussion) on city business.
- These would be covered by the OPMA.
- This can happen with emails, text messages, phone calls, in-person meetings, etc.
- A quorum of members does not need to be on the same email chain or phone call – successive discussions creating a “tree” would be inappropriate.
- The only way it is permissible is if one member emails the other members for the purpose of providing relevant information and those other members merely “passively receive” the information and no discussion follows either directly in response or in other communication lines.



# *An example of a “Serial Meeting”: West v. City of Seattle*

- May 2018: Seattle City Council voted 9-0 to adopt a head tax
- June 2018: Seattle City Council voted 7-2 at a Special Meeting to repeal the head tax. No apparent public discussion had occurred among the Councilmembers, to explain the repeal, before the vote.
- Some evidence suggested that the two deputy mayors talked with individual councilmembers about the prospect of repealing the Head Tax. It was alleged that the Councilmembers made decisions through these communications and did not deliberate in the open on their decision to repeal the head tax.
- Lawsuits were settled for \$3,500 and \$35,000.



# Open Meetings

## Use of Social Media

- When conducting city business using social media, use disclaimers (or link)
- Clearly distinguish your personal view from official City / entire Commission position on a topic
- Avoid a quorum of the Commission discussing city business using the same social media platform or post





# HB 1329 Updates to the OPMA

- Location of Meetings: all meetings of a governing body of a public agency be held in a physical location where the public can attend, with two exceptions.
- Remote Attendance by Members of the Governing Body: while the meeting must be held in a physical location and must allow the public to attend in-person (absent an emergency), any or all members of the governing body can choose to attend the in-person meeting remotely.
- Public Comment: offering the public the opportunity to comment at regular meetings of a governing body of a public agency where final action is taken is now a requirement.
  - RCW 32.30.020(3): “Final Action” means a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance.



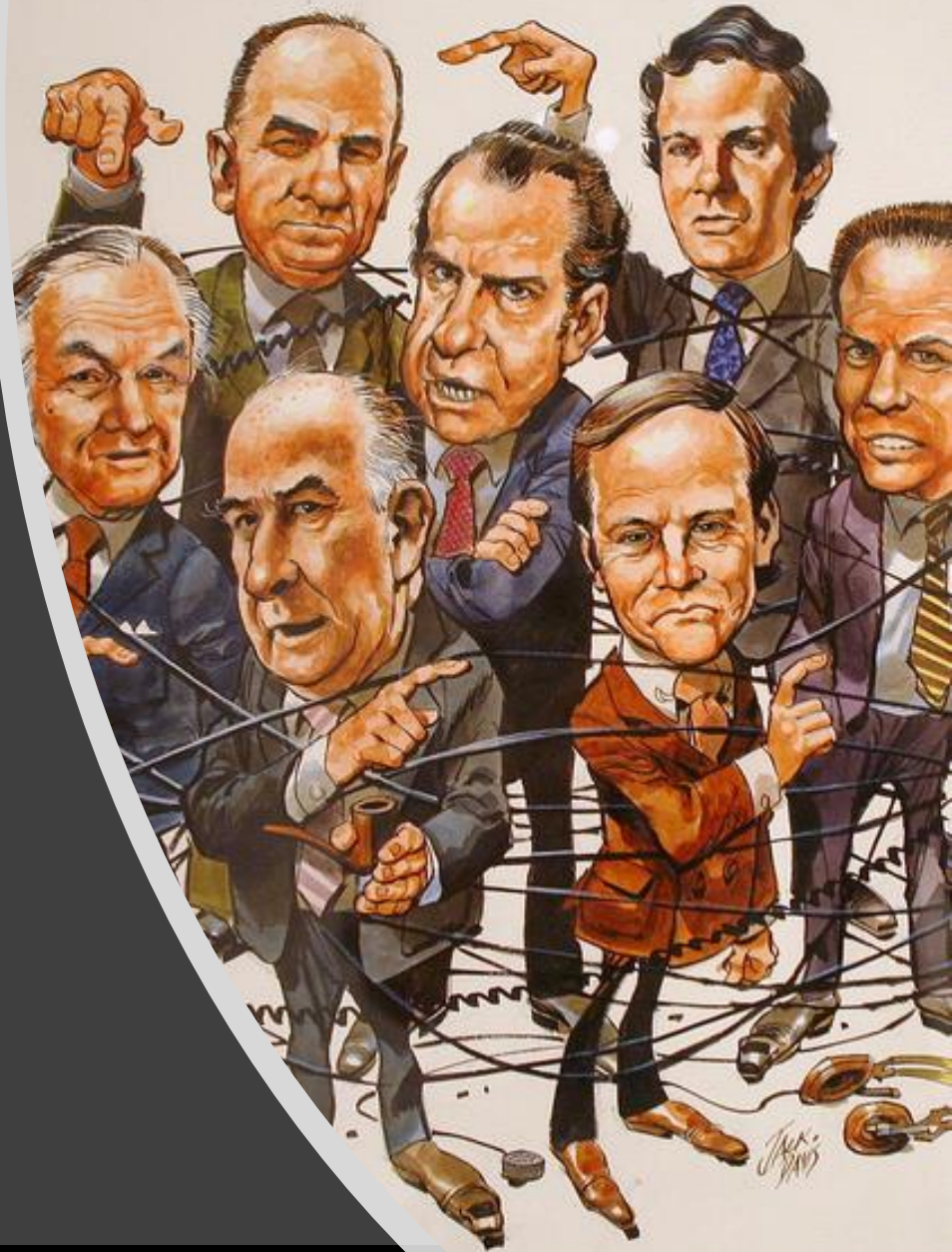
# Public Comment

- Public Meetings v. Public Hearings
  - **Public Meetings**: public comment only taken at or before regular meeting which final action is taken or is otherwise required by state law
  - **Public Hearings**: public comment taken before a significant decision is made in order to provide due process or when a specific statute or regulation requires one.
- Purpose: one-way communication for members of public to provide testimony to governing body on the record.

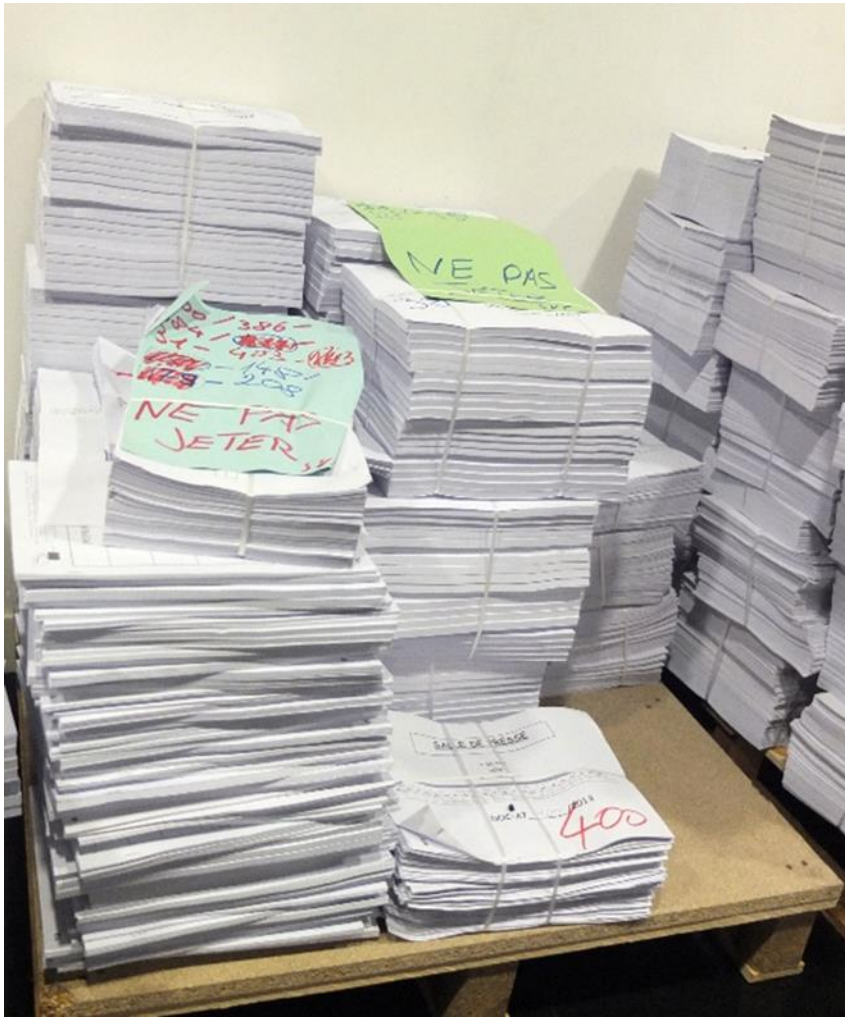


# Public Records Act Chapter 42.56 RCW

- PRA is “a strongly worded mandate for broad disclosure of public records.” *Hearst v. Hoppe*, 90 Wn. 2d 123 (1978).
- Requires all agencies to disclose public records unless an exemption applies.
- Imposes fines for non-compliance.
- Act requires strict compliance



# What does the PRA require agencies to do?



- Appoint a Public Records Officer
- Adopt rules of procedure that address production, proper keeping, and fullest and timely assistance in response
- Publish procedures describing certain agency organization, operations, rules, and other items listed in PRA
- Publish PRA fee schedules
- Provide for a review
- Procedure for any denial of records
- Publish information related to where requests must be submitted

# What does the PRA apply to?

## “AGENCY”

An “agency” is defined as all state agencies and all local agencies (and all their employees and appointed officials) in Washington. RCW 42.56.010(1).

A “public record” is “any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used or retained by any state or local agency regardless of physical form and characteristics.” RCW 42.56.010(3).

# Searching and Providing Records

- Searches
  - Agency must conduct adequate search – consider all forms, all locations, all possible search terms, all possible forms of records
  - Search criteria; time taken to produce records, and areas searched must all be documented
- Installments
  - Records can and should be provided in installments if the request is very large or time-consuming



# Statutory Exemptions



- Exemptions
  - Not all records, or parts of records, are disclosable – depends on the information contained in the record and if a legal exemption applies
  - Exemptions are narrowly construed
  - An Exemption Log must be prepared and given to requestor noting legal reason record/part of record was redacted
- Privacy:
  - There is no general “privacy” exemption in the PRA
    - Privacy is considered invaded only if (1) highly offensive to the reasonable person and (2) not of legitimate concern to the public



# Duty to Preserve Records

## Legal Penalties, Including Fines and Imprisonment

**RCW 40.16.010 Injury to public record.** Every person who shall willfully and unlawfully remove, alter, mutilate, destroy, conceal, or obliterate a record, map, book, paper, document, or other thing filed or deposited in a public office, or with any public officer, by authority of law, is guilty of a class C felony and shall be punished by imprisonment in a state correctional facility for not more than five years, or by a fine of not more than one thousand dollars, or by both.





# Enforcement and Penalties

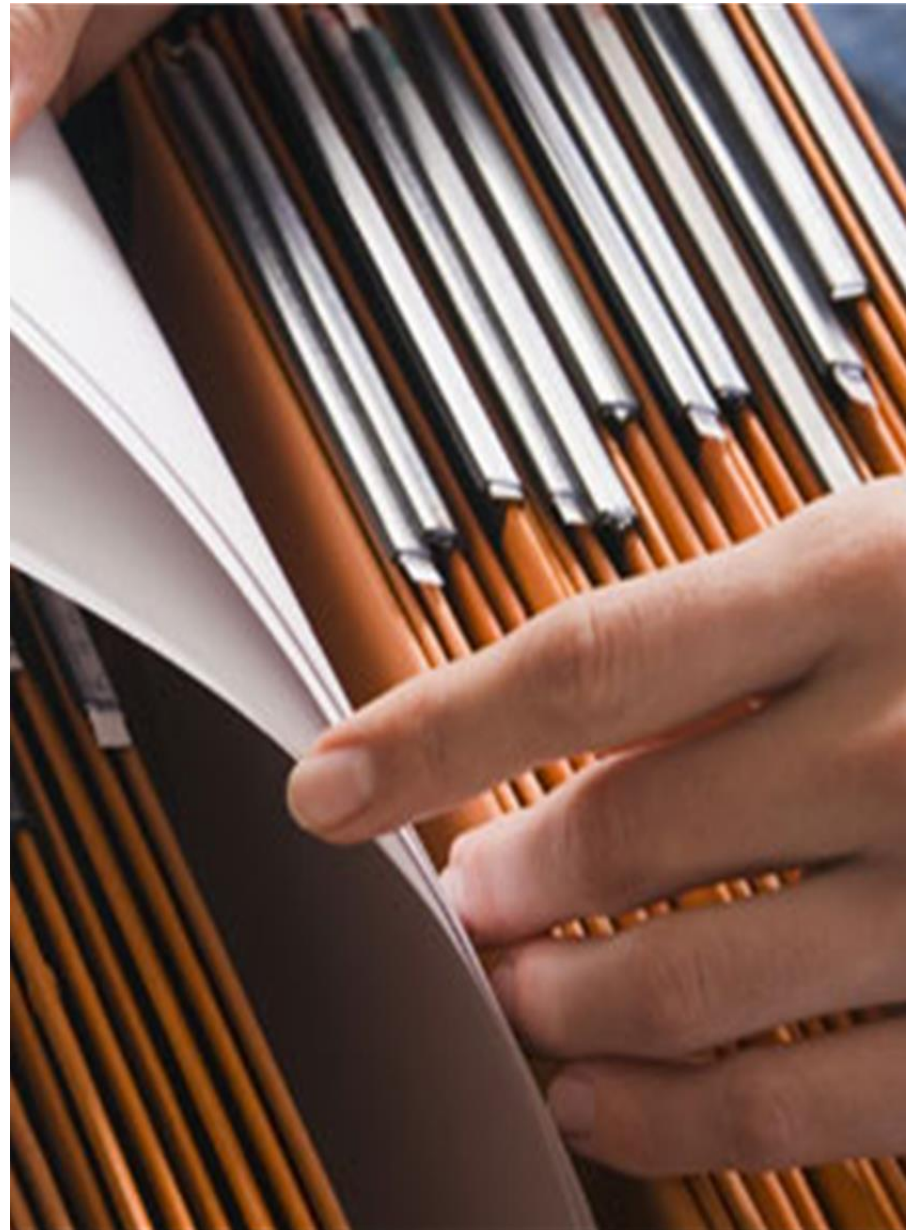


RCW 42.56.550(4) Judicial review of agency actions.

- Requestors – Awarded Attorney Fees
- Discretion of the court to award such person an amount not-to-exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

# Records Retention

- Maintenance of Records:  
<https://www.sos.wa.gov/archives/recordsmanagement/managing-city-records.aspx>
- Local Gov't Common Records Retention Schedule (CORE)
- Records in Native File Format
- Records Born Electronically
- As noted earlier, there can be criminal liability for willful destruction or alteration



# Duty to Produce Records

- **Business Records (Public) vs. Personal Records (Private)**
  - When Creating a Record as a Member vs. as an Individual
  - Records Kept on City Equipment vs. Personal Equipment
  - Business Records Received or Sent Outside of City Resources
- **What Do You Need to Keep?**
  - Primary Records vs. Secondary Records
  - Cc'd Copies That You Do Not Proliferate as a New Record
  - Transitory Records – Have No Retention Value
  - What About Everything Else?
  - Commission Archive

# Appearance of Fairness Doctrine: Chapter 42.36 RCW

## Legal Standard

- Would a reasonable person
- Apprised of the totality of a member's personal interest or involvement
- Be reasonably justified in thinking
- That the involvement might affect the member's judgment?

*Swift v. Island Co.*,  
87 Wn. 348 (1976)

# Distinctions between Decisions

## Legislative Decisions

- Prospective: Make Law to Achieve Broad Policy Objectives
- Set Direction and Policy; Dynamic Behavioral/Conduct Changes
- Limited Procedural Safeguards

## Quasi-Judicial Decisions

- Retrospective: Conform Conduct to Existing Law
- Contested Case Setting with Identified Parties
- Procedural and Substantive Due Process Safeguards

# Appearance of Fairness Doctrine

## Applies to Quasi-judicial Actions

- Acting like a judge
- Making judicial-like decisions

## Quasi-judicial Characteristics

- Retrospective
- Includes specific parties
- Applies existing law to facts and situations
- Determines rights, duties or privileges

# Appearance of Fairness Doctrine

Rule: No *ex parte* contacts with opponents or proponents during pendency of quasi-judicial action

Remedy: (1) Disclose the substance of communication, (2) Offer an opportunity for rebuttal & objection

## Consequences of AFD Violations:

- Action Taken Will be Void
- Civil Damages May be Available
- Abuse/misuse of authority
- Delay of decision/action

# QUESTIONS?

