

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF REPEALING METRO)	ORDINANCE NO. 23-1499
CODE CHAPTER 2.05 (PROCEDURE FOR)	
CONTESTED CASES) AND REPLACING IT)	Introduced by Chief Operating Officer
WITH A NEW, UPDATED METRO CODE)	Marissa Madrigal in concurrence with
CHAPTER 2.05 (CONTESTED CASES)	Council President Lynn Peterson
PROCEDURES))	

WHEREAS, Metro Code Chapter 2.05 (Procedure for Contested Cases) prescribes the procedures and requirements for the notice and hearings when a party seeks a contested case hearing; and

WHEREAS, a contested case hearing opportunity exists when Metro makes a decision that affects individual legal rights, duties, or privileges of specific parties. This includes Metro decisions regarding licenses, franchises, permits, or the imposition of civil penalties; and

WHEREAS, several Metro code chapters authorize a person or entity to seek a “contested case” hearing based on a Metro decision that affects that person or entity’s rights; and

WHEREAS, although the availability to contest a Metro decision applies to a broad range of Metro decisions, it is rarely exercised and has primarily been used with respect to solid waste license and franchise decisions and enforcement of solid waste authorizations; and

WHEREAS, current Metro Code Chapter 2.05 (Contested Cases) was originally adopted in 1979 by the former Metropolitan Service District Board, with only limited change or updating since that original adoption nearly 45 years ago; and

WHEREAS, some Metro Code chapters and sections that were established in the 1970s and 1980s—before Metro had an independent charter and home rule authority—were modeled after existing state statutes involving similar circumstances; and

WHEREAS, Metro’s Procedures for Contested Cases Chapter 2.05 was modeled almost exclusively on the state of Oregon’s contested case procedures found in ORS Chapter 183; and

WHEREAS, procedures established for use by Oregon state government do not often easily transfer to local government practices, which can create a local government procedure that is unclear, cumbersome, or, in the worst instances, nearly impractical to implement; and

WHEREAS, as but one example of this disconnect between state and local governments, Metro’s Contested Case chapter code language generally substitutes the term “Metro Council” for state “agency” (which is defined as a state board, commission, department or division thereof), even though “state agencies” and “Metro Council” serve different roles, with different responsibilities and considerations; and

WHEREAS, many of the procedures established in Metro Code Chapter 2.05 (Contested Case Procedures) are unclear, cumbersome, and difficult to implement. This makes it burdensome for Metro staff and hearings officers to effectuate, while also creating barriers and confusion for individuals and entities seeking a contested case hearing based on a Metro decision or imposition of civil penalty; and

WHEREAS, in December 2022 Metro Council adopted Resolution No. 22-5293, which among other things requires that Metro Code be written using plain and inclusive language best practices; and

WHEREAS, the newly proposed Chapter 2.05 incorporates plain and inclusive language best practices as required; and

WHEREAS, Metro Code Chapter 2.05 (Procedures for Contested Cases) should be repealed and replaced with a new Contested Case Procedures chapter that more closely aligns Metro's contested case hearing and appeal procedures with local government practices, and which also incorporates plain and inclusive language best practices; now therefore,

THE METRO COUNCIL ORDAINS AS FOLLOWS:

1. Metro Code Chapter 2.05 (Procedures for Contested Cases) is repealed in its entirety.
2. A new Metro Code Chapter 2.05 (Contested Cases Procedures) is established as set forth in the attached Exhibit A.
3. The Metro Attorney is authorized to take any action reasonably necessary to correct and update any code chapter or code section reference to implement this ordinance.
4. Any contested case hearing that is requested before the effective date of this ordinance will continue to be governed by the contested case procedures established at the party request a contested case, including any appeals related to that contested case hearing.

ADOPTED by the Metro Council this 19th day of October 2023.



Lynn Peterson, Council President

Attest:



Connor Ayers, Recording Secretary

Approved as to Form:



Carrie MacLaren, Metro Attorney

EXHIBIT A
Ordinance No. 23-1499

CHAPTER 2.05

CONTESTED CASES PROCEDURES

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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.

IN CONSIDERATION OF

- ORDINANCE NO. 23-1499, FOR THE PURPOSE OF REPEALING METRO CODE CHAPTER 2.05 (PROCEDURE FOR CONTESTED CASES) AND REPLACING IT WITH A NEW, UPDATED METRO CODE CHAPTER 2.05 (CONTESTED CASES PROCEDURES)
- ORDINANCE NO. 23-1500, FOR THE PURPOSE OF REPEALING METRO CODE CHAPTER 2.03 (CIVIL PENALTIES) AND REPLACING IT WITH A NEW METRO CODE CHAPTER 2.03 (CIVIL PENALTIES), AND AMENDING CERTAIN METRO CODE CHAPTERS TO ALIGN WITH THE NEW CHAPTER 2.03
- ORDINANCE NO. 23-1501, FOR THE PURPOSE OF AMENDING METRO CODE CHAPTER 5.09 (ILLEGAL DISPOSAL) TO ALIGN IT WITH THE NEW METRO CODE CHAPTER 2.05 (CONTESTED CASES PROCEDURES) AND INCORPORATE PLAIN LANGUAGE BEST PRACTICES

Date: September 18, 2023
Department: Office of Metro Attorney
Meeting Date: October 5, 2023

Prepared by: Shane Abma
Presented by: Shane Abma
Length: 20 minutes

[NOTE: Ordinance Nos. 23-1499, 23-1500 and 23-1501 are companion ordinances governing code chapters that impose civil penalties, as well as the hearing procedures and requirements to appeal those penalties or illegal disposal citations in a contested case hearing. These ordinances will, collectively, align these code chapters so that they are consistent with one another. The staff reports for all three are identical.]

ISSUE STATEMENT

Certain Metro Code chapters established by the former Metropolitan Service District Board of Directors were modeled on existing state laws and procedures. In many cases, these chapters include processes and procedures that either are not applicable at the local government level, are ambiguous, are difficult to follow and understand, or—at worst—are nearly impossible to implement. This includes Metro’s *Procedures for Contested Cases* and *Civil Penalties* chapters (Chapters 2.05 and 2.03 respectively), which were originally adopted in 1977 and 1979 respectively and which have had minimal revisions in the last 45 years.

Metro should repeal these code chapters and replace them with new, updated code chapters that govern the same areas of law, but which:

- Better reflect best practices for local government processes;
- Reduce confusion for staff and those upon whom Metro has imposed civil penalties;

- Create a more streamlined, understandable, and workable hearing procedure for those seeking a contested case hearing or wishing to challenge an illegal disposal citation;
- Improve readability and implementation;
- Incorporate plain and inclusive language best practices.

In addition, Metro's "Illegal Disposal" chapter (5.09) should be updated to align with the new Civil Penalties and Contested Case Procedures chapters. Currently there is a separate hearings procedure for Illegal Disposal citations as opposed to any other kind of contested case hearing, which is confusing. Moreover, the Illegal Disposal hearing procedures reference certain state law criminal procedures that are not applicable to a local government administrative hearing.

ACTION REQUESTED

OMA requests that Metro Council adopt:

- Ordinance No. 23-1499 (establishing a new Contested Case Procedures chapter);
- Ordinance No. 23-1500 (establishing a new Civil Penalties chapter); and
- Ordinance No. 23-1501 (related to Illegal Disposal citations and appeals).

IDENTIFIED POLICY OUTCOMES

- 1) Apply best practices for imposing civil penalties related to violations of Metro Code, franchises, licenses, permits, orders, and other Metro regulations.
- 2) Remove procedures that are impractical and difficult to implement.
- 3) Ensure consistency and coordination among the various Metro code chapters that impose civil penalties and authorize appeals of those penalties.
- 4) Streamline and simplify the process for appealing civil penalties or other enforcement measures in contested case proceedings.
- 5) Improve the readability of these code chapters by applying plain language and inclusive language best practices as required by Resolution No. 22-5293.

POLICY OPTIONS FOR COUNCIL TO CONSIDER

Metro Council has several polity options to consider.

- Adopt this ordinance and its companion ordinances. This will remove impractical modeling of state law procedures, improve these code chapters for ease of readability, align these code chapters for consistency, and improve Metro's hearing processes and procedures.
- Do not adopt these ordinances. A failure to adopt these ordinances will continue to create uncertainty and a lack of clarity for Metro staff, as well as individuals and entities that seek to challenge Metro decisions that affect rights or impose civil penalties.
- Direct OMA to update only those sections of current code that are incorrect or impossible to implement, without repealing and replacing these code chapters in their entirety.
- Adopt only some of the ordinances to update certain code chapters but not all of them.

STAFF RECOMMENDATIONS

OMA recommends that Metro Council adopt Ordinance Nos. 23-1499, 23-1500, and 23-1501 to establish new Metro Code chapters relating to Contested Case Procedures and Civil Penalties and update the Illegal Disposal chapter to ensure consistency and coordination among the various Metro code chapters that both impose civil penalties and authorize appeals of those penalties.

STRATEGIC CONTEXT & FRAMING COUNCIL DISCUSSION

The Office of Metro Attorney seeks a Metro Code that is easy to read and understand and does not contain language that harms, excludes, or discriminates people. Moreover, regular code updates help ensure the Metro Code remains current with clear and concise language, that Metro's many code chapters are consistent and coordinated, and that Metro is employing best practices with respect to regulations, how to enforce them, and how best to provide due process to contest enforcement.

OMA recognizes that reviewing and updating the Metro Code is not an easy task. It can be cumbersome. It requires a great deal of staff time to draft new code language, ordinances, and staff reports, while also ensuring that proposed code changes are coordinated with other chapters and do not have unintended consequences. However, a failure to regularly update and review Metro Code carries several risks, including:

- Creating barriers to information people need.
 - Reducing the number of people that can understand the Code, and therefore follow it correctly.
 - Reducing Metro's efforts to be transparent.
 - Having code chapters that are inconsistent with one another.
 - Having code chapters that contain cross-reference errors, citation errors, outdated definitions, and sections that are no longer operative.
- *Known Opposition/Support/Community Feedback*
There is no known opposition. However, because of the administrative nature of these code chapters and because changes were not made to the right to contest violations related to solid waste franchises and licenses, OMA did not perform external outreach related to these changes.
 - *Legal Antecedents*
There are no specific legal antecedents other than current Metro Code language.
 - *Anticipated Effects*
The Metro Code will be easier to read and understand. These code chapters will allow for more streamlined, workable hearings and procedures, and these code chapters will be consistent with one another.
 - *Financial Implications (current year and ongoing)*
There are no *direct* financial implications, but code language that is easy to understand reduces the likelihood that individuals may need to consult Metro staff or third-party professionals (such as lawyers and accountants) to understand Metro Code, and that Metro staff may need to answer calls or correspond to further explain Metro Code. This *indirectly* reduces financial costs.

BACKGROUND

Metro Code Chapter 2.03 (Civil Penalties) authorizes Metro to impose civil penalties for violations of Metro Code, regulations, orders, or rules. This includes violations related to the Zoo, Parks and Nature, Ethics, Taxes, and Solid Waste. Metro Code Chapter 2.05 (Procedures for Contested Cases) establishes a hearings procedure (a “contested case”) for those that wish to challenge Metro’s imposition of civil penalties. Metro’s Contested Case code chapter also allows individuals and entities to challenge a Metro decision that affects the individual legal rights, duties, or privileges of specific parties, including a challenge to a Metro decision regarding a solid waste license or franchise.

These two chapters were originally adopted in the late 1970s by the former Metropolitan Service District Board, with only limited change or updating since those original adoptions nearly 45 years ago. Because Metro was at that time a somewhat new government entity unlike any other in the state, it was not uncommon for Metro staff to model new code language on analogous state statutory schemes. This had the advantage of having ready-made code language, and Metro could, if needed, rely on case law interpreting that state statutory language if there were questions regarding Metro’s similar code language. Such was the case with Metro’s Civil Penalties and Contested Case chapters, both of which were modeled after state statutory schemes (primarily ORS Chapter 183).

Unfortunately, procedures established for use by Oregon state government do not often easily transfer to local government practices. This can create a local government procedure that is unclear, cumbersome, or, in the worst instances, nearly impractical to implement. This is the case with Metro’s Civil Penalties and Contested Case Procedures chapters. For example, in ORS Chapter 183, “agency” is defined as a state board, commission, department or division thereof. In certain instances, Metro’s code language simply substitutes the words “state agency” for “Metro Council,” even though state “agencies” and “Metro Council” serve different purposes with different responsibilities and considerations.

While it may make sense to have a hearings officer serve a “proposed order” on a “state agency” for review given the state agency’s expertise, this would, for example, make no sense in the context of a hearings officer serving a proposed order for a Parks violation on the Metro Council for review. This example highlights the unworkable nature of simply substituting state law terms into Metro Code chapters because they are not always analogous to local government practices.

A similar issue exists with Metro’s Illegal Disposal code chapter 5.09. That chapter sets forth the process to issue citations for illegal disposal (sometimes called “illegal dumping”) and the hearings procedures that follow when individuals challenge those citations. Two problems arise with the Illegal Disposal chapter. First, it contains different evidentiary, discovery, and notice rules than those found in Metro’s Contested Case chapter, as well as a different hearings procedure generally. This creates confusion.

Second, it refers to certain state criminal statutes that are not applicable to a local government administrative hearing and which are, at times, nearly impractical to

implement. For example, current Metro Code Chapter 5.09 language for “prehearing discovery” disclosures references state criminal arraignment statutes, and it simply replaces the term “district attorney” with “Metro Attorney” and criminal “defendant” with “cited person.” This is impractical and, at times, impossible to implement.

Metro’s Civil Penalties and Contested Case Procedures chapters are rarely used by Metro staff (other than an occasional solid waste regulatory violation challenge). This has artificially suppressed the problems associated with these code chapters because they are infrequently on display. However, some Metro departments are considering increased enforcement of their regulations, which could lead to an increased use of these chapters.

In addition, Metro has observed a significant increase in illegal disposal activities within the region. This rise in illegal disposal incidents has resulted in an increasing number of illegal disposal citations and, not surprisingly, a subsequent increase in requests for hearings to contest these citations. The proliferation of illegal disposal practices underscores the need for a comprehensive update to Metro’s regulatory illegal disposal code chapter.

For these reasons—and because Metro Council requires that Metro Code be written in plain language and reviewed periodically for updates—it is both timely and necessary for Metro to update these three code chapters and ensure consistency among them.

[NOTE: Metro’s Supportive Housing Services Income Taxes are not governed by Metro’s civil penalties or contested case chapters. Assessed penalties and any appeals related to income taxes are administered by the City of Portland’s tax appeals board as Metro’s contracted income tax administrator.]

ATTACHMENTS

Attachment 1 summarizes the proposed changes to Metro Code chapters 2.03 (Civil Penalties), 2.05 (Contested Case Procedures), and 5.09 (Illegal Disposal).

ATTACHMENT 1
Ordinance Nos. 23-1499, 23-1500, and 23-1501

Summary of Changes to Code Chapters at Issue

A. Contested Case Procedures (Chapter 2.05)

Metro's Contested Case Procedures Chapter was originally adopted in 1977 and has changed little since that time. It is modeled on the State of Oregon's Contested Case Procedures (ORS 183), but several procedures are not best practices (or even practical) for a local government. Following is a summary of the proposed changes to current code language.

- General plain language review to remove "shalls," passive voice, nominalizations, lengthy sentences and paragraphs, etc.
- Removes Metro Council as a hearings body generally, and specifically as a review body from a hearings officer's determination. There are several reasons for this change.
 - The current Contested Case Procedures chapter was modeled after the state of Oregon's procedures found in ORS Chapter 183. In the case of the state's proceedings, an "agency" can review a proposed order. An "agency" is defined as a Commission, Board, or Department of the state. When drafting Metro's original procedures in 1977, the term "agency" was just replaced with "Metro Council." However, "state agencies" and "Metro Council" serve different roles, with different responsibilities and considerations, so simply substituting those terms does not make practical sense.
 - Current code language states that either Council *or* a hearings officer will conduct hearings, but it does not say who determines *which* entity should apply. The language is ambiguous and confusing.
 - Current code language states that a hearings officer will send a "Proposed Order" to the Council and authorizes the Council to consider this at its next meeting and to possibly allow new evidence. This practice places an unnecessary time burden on the Council, and it does not align with local government administrative hearing best practices. Other than land use decisions, elected local government bodies generally do not act as appeals bodies for code enforcement decisions. It is better practice to have an independent hearings officer review code enforcement decisions.
 - It is not practical to have Council adopt findings of fact and conclusions of law if Council is not the body that received evidence in the underling case.
- The proposed code update also removes the Chief Operating Officer from decision-making for contested cases and rests those decisions squarely with an independent hearings officer (for many of the same reasons as removing Council).

- Clarifies when a contested case exists. A broad reading of current code arguably allows for a contested case in decisions that do not necessarily affect a person's rights or privileges. The update makes clear that contested case opportunities do not exist for:
 - Breaches of contract
 - Denial of grant requests
 - Imposition of a condition, rule, law, or requirement of *general applicability* (as opposed to a decision affecting a single individual or business)
- Standardizes the number of days in which to request a contested case hearing (current Metro code has different timelines for different kinds of hearings).
- Streamlines, simplifies, and clarifies the procedures that a hearings officer will follow during the contested case hearing. This includes the order of testimony, evidentiary rules, discovery requests, etc.
- Removes repeated opportunities to request a reconsideration of a hearings officer's order. These are rarely requested and even more rarely granted. Current code language was also not clear regarding whom at Metro could grant a reconsideration petition. (There were a few instances in current code in which it is not clear who is responsible for making a particular decision.)
- Removes "proposed orders" being submitted to Metro Council prior to a "Final Order" adoption by the hearings officer. This process was modeled after state contested case hearings in which a proposed order is sent to a commission or board for review. However, as noted above, the Metro Council does act in the same manner as does a state commission or board, so this process has less value than at the state level and adds an unnecessary step.
- Removes *personnel discharges* from possible contested case hearings. Metro does not currently perform these by contested case hearings, and it is unclear why these were referenced in this chapter.
- Updates evidentiary rules to better reflect best practices, clarify what is allowed, and better align with generally followed local government administrative hearings.
- Updates notice requirements to better reflect modern practices (for example including email as an option if an email address is known).
- Changes the appointment of the hearings officer from a list of prospective hearings officers provided by Council to one provided by the Metro Attorney's Office. (OMA is unaware of the Metro Council having provided a list of prospective hearings officers in the past). Retains the authority of the COO to *appoint* the hearings officer from the prospective list of qualified officers.
- Creates a new section of "Hearings Officer Duties" to clarify and codify the hearings officer's role.

- Breaks lengthy code sections into shorter sections with better headings to improve ease of reading.
- Clarifies what kind of pre-hearing discovery is allowed.

B. Civil Penalties (Chapter 2.03)

Metro's Civil Penalties Chapter was originally adopted in 1977 and has changed little since that time. It is modeled on the State of Oregon's Civil Penalties chapter. Following are the proposed changes to current code practice.

- General plain language review to remove "shalls," passive voice, nominalizations, lengthy sentences and paragraphs, etc.
- Updated definitions section to reflect current meanings.
- Removed the specific references to penalty amounts for violations of Zoo, Solid Waste, and Parks and Nature regulations, and instead added them to the appropriate sections in those department code chapters.
- Updated the notice requirements when Metro assesses a civil penalty (included email for example, if applicable).

C. Illegal Disposal (Chapter 5.09)

- General plain language review to remove "shalls," passive voice, nominalizations, lengthy sentences and paragraphs, etc.
- Breaks lengthy code sections into smaller sections with more precise headings for ease of readability.
- Rearranges the order of some code sections to better reflect how the process works chronologically.
- Updates the procedures regarding "service of citation" to align with new Contested Case and Civil Penalty code chapters sections on service of notice.
 - For example, personal delivery, US Mail, electronic mail, etc.
- Updates terms to align with other Metro Code chapters.
- Removes cumbersome, unworkable hearings procedures. Instead, refers to Metro's new, updated Contested Case Chapter 2.05 for a more stream-lined, workable hearings procedure to contest illegal disposal citations.
- Updates the term "conditionally exempt generator" to "very small quantity generator" to reflect changes to that term in state and federal law with respect to hazardous waste.
- Moves one specific prohibition on delivering unsorted material from this code chapter to Metro's solid waste flow control chapter (5.05) where it better aligns.

- Changes the term civil “fines” to civil “penalties” throughout to better align with Metro’s Civil Penalties code chapter terminology and to avoid confusion as to these terms. (A “fine” is just one subset of a possible “penalty.”)
- Removes unnecessary up-front cost burdens on cited individuals pending resolution of their appeal.
- Slightly alters certain items required in the citation form to improve notice and reduce the burden on the cited individual.
- Removes the prohibition on Metro being represented by an attorney simply because the cited person chooses not to be represented by an attorney.
- Aligns the requirements necessary to request an illegal disposal citation hearing with those for contested case and civil penalties. (i.e. a written statement explaining why the citation is improper and on what grounds.)
- Removes references to state criminal law for prehearing discovery (which is impractical for a local government civil hearing), and instead creates an explicit list of prehearing discovery material that Metro will provide to the cited person.
- Aligns the evidentiary rules with those for Metro’s Contested Case Procedures chapter.
- Removes option to seek a reconsideration by the hearings officer of the officer’s determination after a final order. This was removed because it is rarely requested and even more rarely granted. It tends to simply slow down a final order from being issued. Absent new evidence, it has little value.