

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
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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 policy 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).