



Oregon

Kate Brown, Governor

Department of Consumer and Business Services
Building Codes Division

1535 Edgewater Street NW

P.O. Box 14470

Salem, OR 97309-0404

503-378-4133

Fax: 503-378-2322

bcd.oregon.gov

July 24, 2017

City of Portland
c/o Jason Loos
1221 SW 4th Ave Ste 430
Portland OR 97204

RE: Notice of Proposed Civil Penalties, Order of Corrective Action and Final Order on Default

In the Matter of The City of Portland, Oregon
BCD Case C2015-0200

Mr. Loos:

The Director of the Department of Consumer & Business Services is proposing to assess penalties and issue a corrective action. The enclosed documents outline the violations and provide notification of your right to a hearing.

Your options:

1. **Pay the proposed penalty.** Submit your payment to Oregon Building Codes Division, PO Box 14470, Salem, Oregon, 97309. Be sure to reference your case number so the payment is applied correctly.
2. **Request a hearing.** You may use the form provided or send your own letter. Requests for a hearing must be postmarked within 20 days of the date this notice was mailed.
3. **Request a hearing, but attempt to resolve matter informally by settling before the hearing.** You may use the form provided or send your own letter. The request for a hearing must be postmarked within 20 days of the date this notice was mailed. *Informal resolution through settlement may allow for a reduction of the civil penalty to be collected under certain terms and conditions. You can access the advisory board penalty matrix here: <http://www.cbs.state.or.us/external/bcd/enforcement.html>. If a settlement agreement is reached, you will be invoiced for the penalty amount later. If a settlement agreement is not reached, your case will proceed to hearing.*

Be aware that this matter will become final unless you request a hearing within the time required. Once the matter is final, there will be no other opportunities for a settlement with reduced penalties.

Please contact me at the number listed below if you have any questions.

Andrea Simmons
Enforcement Manager
Building Codes Division
503-373-2160

**BEFORE THE DIRECTOR OF THE DEPARTMENT OF CONSUMER AND BUSINESS
SERVICES**

IN THE MATTER OF:

THE CITY OF PORTLAND, OREGON,

RESPONDENT.

**RESPONSE TO NOTICE OF PROPOSED
ASSESSMENT OF CIVIL PENALTIES**

**NOTICE OF PROPOSED ORDER OF
CORRECTIVE ACTION**

NOTICE OF FINAL ORDER ON DEFAULT

BCD CASE NUMBER: C2015-0200

Please select **one** of the following options:

___ 1.) I/we do not wish to contest this matter.

___ Payment enclosed

___ Please mail an invoice with information about payment arrangements

___ 2.) I/we request a hearing.

___ 3.) I/we request a hearing in order to reserve the right to a hearing, but would like to attempt to resolve this matter with an informal settlement.

My contact information (to allow the Division to reach me to discuss a possible settlement):

Phone: _____ - _____ - _____ **or** _____ - _____ - _____

Email: _____

Current mailing address: _____

Printed name

Signature

Date

Mail completed form to: Oregon Building Codes Division
Attn: Enforcement Section
PO Box 14470
Salem OR 97309

Note: As provided in the Notice, requests for hearing must be postmarked within 20 days of the date the Notice was mailed.

BEFORE THE DIRECTOR OF THE DEPARTMENT OF CONSUMER AND BUSINESS SERVICES

IN THE MATTER OF:

**NOTICE OF PROPOSED ASSESSMENT
OF CIVIL PENALTIES**

THE CITY OF PORTLAND, OREGON,

**NOTICE OF PROPOSED ORDER OF
CORRECTIVE ACTION**

NOTICE OF FINAL ORDER ON DEFAULT

RESPONDENT.

BCD CASE C2015-0200

SYNOPSIS

Under Oregon Revised Statutes (ORS) chapter 455, the Director of the Department of Consumer and Business Services, through the department's Building Codes Division (Agency), adopts, enforces, and administers the State Building Code, and regulates the municipalities the Agency has allowed to assume enforcement and administration duties at the local level. On September 11, 2013, the City of Portland (Respondent) enacted ordinance number 186247. That ordinance, among other things, directed the Portland Fire Marshal to amend the Portland Fire Code to require existing nightclubs with an occupant load greater than 100 to install automatic fire sprinkler systems.

This ordinance violates ORS 455.040(1), which prohibits a municipality from enacting or enforcing any ordinance, rule, or regulation relating to the same matters encompassed by the state building code but which provides different requirements from those in the state building code. The state building code encompasses fire sprinkler requirements. Specifically, the Oregon Structural Specialty Code (the OSSC) – which is part of the state building code – contains particular requirements for when and where fire sprinkler systems must be installed, and the requirements in Respondent's ordinance differ from those in the OSSC. Accordingly, Respondent's ordinance is

1 related to the state building code but provides for different requirements for fire sprinkler systems.

2 Moreover, the ordinance also exceeds the scope of Respondent's delegated authority
3 generally, specifically the scope outlined under ORS 455.020, by requiring retrofitting of existing
4 buildings that are in compliance with the regulations in effect at the time they were built. The only
5 authority a municipality has with respect to the State Building Code, per ORS 455.020¹, is authority
6 related to the construction, reconstruction, alteration, and repair of buildings. Nothing in ORS
7 455.020 permits a municipality to use the State Building Code to require retrofitting an existing
8 structure that is not under construction, reconstruction, alteration or repair.

9 Consistent with these statutory provisions, it has also been the long-standing policy of, and
10 interpretation by, the current and multiple prior Directors of the Department of Consumer and
11 Business Services, who have the authority to administrate and enforce this law, that a fundamental
12 principle of both the construction and application of ORS chapter 455 and the State Building Code
13 is that a structure must comply with the codes in force at the time it is built, but cannot be required
14 to be updated as codes change over time, unless that structure later undergoes construction,
15 reconstruction, alteration (including changes in occupancy classification), or repair.

16 To further clarify the law, as well as codify the Agency's longstanding and consistent
17 policies and practice, the 2014 Oregon Structural Specialty Code explains that the State Building
18 Code consists of the combined specialty codes (*see also*, ORS 455.010(7), (8), (9)), regulations, and
19 requirements, in effect at the time of construction – regardless of when the structure was built.

20 Last, and consistent with statute, code provision, and Agency policy and practice, the Office
21 of the Oregon Attorney General issued an Opinion Letter finding, specifically, that a local
22 jurisdiction may not require that a sprinkler system be retrofitted into an existing structure: “[I]f the
23 structure was properly built to the standards of an earlier building code regarding fire-extinguishing
24

25 _____
¹ By virtue of its being a municipality that the Agency has allowed to assume, for four year cycles, the State's building code enforcement and administration program at the local level. ORS 455.150.

1 systems, then the addition of a sprinkler system could not be required.” Attorney General Opinion
2 No. OP-5874, December 10, 1985, page 6.²

3 Thus, by enacting and enforcing an ordinance requiring owners of existing buildings that are
4 compliant with the codes in force when they were built – and that are not under construction,
5 reconstruction, alteration (not even undergoing a change in occupancy), or repair – to retrofit those
6 buildings with additional fire sprinkler systems, Respondent acted unlawfully.

7 **AGGRAVATING FACTORS**

8 In determining the appropriate action to take in response to Respondent’s violations, the
9 Agency could not ignore the numerous aggravating factors in this case. First, not only was the
10 ordinance unlawful on its face, it appears to have been enforced arbitrarily. There is scant evidence
11 regarding how Respondent determined which businesses would be required to comply with its
12 ordinance. On its face, the ordinance requires all nightclubs that are A-2 occupancies, as defined in
13 the building code, to comply with its requirements. At different times, the city estimated or was
14 reported to have estimated that anywhere from 13 to 60 establishments would be affected by the
15 ordinance. However, 14 entities were ultimately identified as being required to comply, and it is
16 unclear how the city selected them.

17 Second, adoption of the unlawful ordinance was done without full transparency. Portland
18 Fire and Rescue mailed letters – which simply indicated that the recipients’ building “may be
19 affected by an upcoming sprinkler ordinance” – to building owners on August 28, 2013, just one
20 week before the first public hearing was held regarding the proposed ordinance. A single property
21 owner appeared at the public hearing, complaining that the notice was insufficient and vague and
22 that his tenant business owners had not been notified at all. Significantly, it was the tenant business
23 owners, not the building owners, who generally paid for the sprinkler system installations.

24 ² See also Attorney General Opinion OP-6311, October 27, 1989 (Noting that a “proposed sprinkler system
25 ‘alternative,’ discussed above, relates to the same matter encompassed by the state building code: namely, sprinkler
systems...Neither the fire marshal, nor a local jurisdiction acting under its fire prevention authority, may enact a rule
superseding the state building code, where the matter to be regulated is covered by the code.... Accordingly, the
‘alternative’ requirement [for a fire sprinkler system] proposed...would be unlawful.”).

1 Third, the illegal ordinance created significant financial burdens for the businesses against
2 which it was arbitrarily enforced. Fire sprinkler retrofitting costs to the tenant business owners
3 ranged from approximately \$11,000.00 to as high as approximately \$100,000.00, and many of these
4 business entities paid between \$40,000.00 and \$80,000.00 to comply with the ordinance, not
5 including ongoing monthly and annual fees such as system monitoring and testing. Thus, several
6 businesses spent tens of thousands of dollars to comply with the ordinance. Some took out
7 substantial loans and at least one shuttered its doors, citing the costs associated with the ordinance
8 as a reason for doing so.

9 Fourth, the Respondent did not enact an unlawful ordinance inadvertently. It enacted the
10 ordinance knowing it was unlawful to do so. In 2013, prior to any hearing on the then proposed
11 ordinance, the City Commissioners' office was notified by the Portland Fire Marshal's Office that
12 "Since these businesses were legally permitted, Portland Fire & Rescue has no authority to require
13 retroactive fire sprinklers in these businesses unless modifications are made that increase occupancy
14 load."

15 Fifth, Respondent made no effort to correct its violation. On January 28, 2015, the Agency
16 notified Respondent in writing, through the Office of the City Attorney, of the violations
17 Respondent appeared to have committed, as well as of the Agency's intent to commence a formal
18 investigation pursuant to ORS 455.770. The investigation was then conducted and completed. At
19 no point before, during, or after the investigation did Respondent elect to repeal or revise the subject
20 ordinance.

21 These violations of Division statutes and rules as described above arise from the following:

- 22 1. Respondent is a city authorized by the Division to administer the state building code under
23 ORS 455.150.
- 24 2. On September 11, 2013, Respondent enacted City of Portland ordinance number 186247
25 (the ordinance).

1 3. The ordinance provides in pertinent part: “The Fire Marshal shall extend the protection
2 afforded by automatic fire sprinklers to occupants of existing buildings used as nightclubs
3 by amending the Portland Fire Code in a form substantially similar to Exhibit A.”

4 4. Exhibit A to the ordinance added a new definition of “Nightclub” to Section 902 of the
5 Portland “Fire Code,”³ which states as follows: “For the purpose of Section 903.7, Nightclub
6 means an A-2 occupancy use under the 2009 International Building Code which (a) has
7 areas for dancing or viewing performers; and (b) serves food or drink. ‘Nightclub’ does not
8 include houses of worship, theaters with fixed seating, banquet halls, or lodge halls.”

9 5. Exhibit A to the ordinance also added Section 903.7, Nightclubs in Existing Buildings, to
10 the Portland Fire Code, and includes the following language: “Existing nightclubs with an
11 occupant load greater than 100 shall be protected by an approved automatic fire sprinkler
12 system designed and installed in accordance with Section 903.3.1.1 and 903.4 [of the
13 Portland Fire Code] as follows:

- 14 1. Throughout the story containing the nightclub; and
- 15 2. Throughout all stories below the story containing the nightclub; and
- 16 3. In the case of a nightclub located below the level of exit discharge, throughout all
17 stories intervening between that story and the level of exit discharge including the
18 level of exit discharge.
- 19 4. Nightclubs with an occupant load of 200 or greater shall comply with this regulation
20 no later than December 31, 2014.
- 21 5. Nightclubs with an occupant load of 101-199 shall comply with this regulation no
22 later than June 30, 2015.”

23
24
25 ³ Although Respondent elected to organize this ordinance, in part, as a definitional section within its “Fire Code,” the ordinance is, in fact, a matter encompassed by the statewide building code. Labelling it a fire code neither alters that fact nor brings it within the purview of the Office of the Oregon State Fire Marshal or any regulations or exemptions of the Oregon State Fire Marshal.

- 1 **6.** On September 11, 2013, Portland Fire & Rescue established Fire Marshal Office policy FIR
2 8.09, which contains the same fire sprinkler requirements as the ordinance.
- 3 **7.** In or about January 2014, the Portland Fire Marshal issued letters to certain building owners
4 to provide “notification” that those buildings “will be affected by a recent Portland Fire
5 Code change (Ordinance Number 186247).”
- 6 **8.** Building and business owners were informed by Respondent, Portland Fire & Rescue
7 representatives, or both, that if they failed to comply with the ordinance, they would be fined
8 and/or the businesses would be closed.
- 9 **9.** Accordingly, approximately nine businesses installed sprinkler systems at some
10 considerable cost.
- 11 **10.** Definitions for terms used in this Notice may be found in ORS 183.310, ORS 455.010, OAR
12 918-001-0005, OAR 918-030-0010, OAR 918-090-0010, and OAR 918-098-1005.
- 13 **11.** ORS 455.020 provides that the state building code is to govern the construction,
14 reconstruction, alteration and repair of structures; it does not authorize the building code to
15 be used to require retrofitting of existing buildings that are not undergoing construction,
16 reconstruction, alteration or repair, except potentially when requiring changes be made to a
17 structure for the correction of unsafe conditions caused by earthquakes
- 18 **12.** Under ORS 455.040(1), the state building code shall be applicable and uniform throughout
19 this state and in all municipalities, and no municipality shall enact or enforce any ordinance,
20 rule or regulation relating to the same matters encompassed by the state building code but
21 which provides different requirements unless authorized by the Director of the Department
22 of Consumer and Business Services.
- 23 **13.** Under ORS 455.010(5), “Municipality” means a city, county or other unit of local
24 government otherwise authorized by law to administer a building code.
- 25 **14.** Under ORS 455.010(8), the “State building code” means the combined specialty codes.

- 1 **15.** Under ORS 455.010(9), the “Structural code” means the specialty code prescribing
2 structural standards for building construction.
- 3 **16.** Under ORS 455.150, a municipality that assumes the administration and enforcement of a
4 building inspection assumes that administration from the Agency, on a cyclical, temporary
5 basis, with its authority derived from that of the Agency.
- 6 **17.** Under OAR 918-460-0010, effective July 1, 2014, the 2014 Oregon Structural Specialty
7 Code is adopted.⁴
- 8 **18.** Under OSSC, § 101.3, the purpose of the OSSC is “to establish the minimum requirements
9 to safeguard the public health, safety and general welfare through structural strength...and
10 safety to life and property from fire and other hazards...”
- 11 **19.** Under OSSC, § 303.3, an A-2 Occupancy is defined as an assembly use intended for food
12 and/or drink consumption including but not limited to: banquet halls; casinos (gaming
13 areas); nightclubs; restaurants, cafeterias, and similar dining facilities; and taverns and bars.⁵
- 14 **20.** Chapter 9 of the OSSC, entitled “Fire Protection Systems,” provides requirements for
15 sprinkler systems.
- 16 **21.** OSSC, § 903.2 specifies where automatic sprinkler systems are required.
- 17 **22.** Under OSSC, § 903.2.1.2, an automatic sprinkler system shall be provided for Group A-2
18 occupancies where one of the following conditions exist: (a) the fire area exceeds 5,000
19 square feet (464.5 m²); (b) the fire area has an occupant load of 100 or more; or (c) the fire
20 area is located on a floor other than a level of exit discharge serving such occupancies.
- 21 **23.** The 2014 OSSC, § 202 clarifies that the State Building Code is the combined specialty
22 codes adopted pursuant to ORS 455 and any code regulation or requirement in effect at the

23 ⁴ The 2010 Oregon Structural Specialty Code was previously adopted effective July 1, 2010, and was in effect at the
24 time the ordinance was adopted. Under OAR 918-460-0010(3), there was a phase-in period for the 2014 Oregon
25 Structural Specialty Code from July 1, 2014 through September 30, 2014 during which time structures could be
 designed to either the 2014 or the 2010 Oregon Structural Specialty Code. Unless the year is specified, the 2014 OSSC
 provisions cited are identical to the 2010 OSSC provisions.

⁵ In the 2010 OSSC, § 303.1, an A-2 Occupancy is defined as an assembly use intended for food and/or drink
 consumption including, but not limited to: banquet halls; night clubs; restaurants, and taverns and bars.

1 time of construction – regardless of when the building or structure was built.

- 2 **24.** Under ORS 455.895(4), the department may impose a civil penalty of not more than
3 \$25,000 against a public body responsible for administering and enforcing a building
4 inspection program.

5 **CONCLUSIONS OF LAW**

- 6 1. The 2014 Oregon Structural Specialty Code is part of the state building code.
- 7 2. Respondent has been authorized to administer the state building code and is therefore a
8 “municipality” with respect to the state building code.
- 9 3. The ordinance is related to the same matters encompassed by the state building code, namely
10 fire sprinkler requirements, which are contained within Chapter 9 of the OSSC.
- 11 4. Chapter 9 of the OSSC, a specialty code that makes up a portion of the state building code,
12 requires all A-2 structures to install fire sprinklers only if they are larger than 5,000 square
13 feet, have an occupant load of 100 or more, or are located on a floor other than the exit floor;
14 Respondent Ordinance 186247 applies only to A-2 structures that are also nightclubs (and
15 have a minimum occupant load), and requires them to install fire sprinklers, regardless of
16 their square footage and regardless of where they are located in a building, throughout the
17 story containing the nightclub, throughout all stories below the story containing the
18 nightclub, and, for nightclubs below the exit level of the building, throughout the exit level
19 and throughout all stories between the nightclub and the exit level. These requirements are
20 different. By enacting the ordinance, which relates to the same matters encompassed by the
21 state building code but which provides different requirements, Respondent violated ORS
22 455.040(1).
- 23 5. By notifying building and/or business owners that they needed to comply with the ordinance
24 and by proposing to assess and/or assessing fines or other penalties against those individuals
25 and entities, Respondent enforced the ordinance. By enforcing the ordinance, which relates

1 to the same matters encompassed by the state building code but which provides different
2 requirements, Respondent violated ORS 455.040(1).

- 3 6. ORS 455.020(1) provides authority for the state building code to govern construction,
4 reconstruction, alteration and repair of structures, but does not authorize requirements to
5 retrofit existing structures that are not undergoing construction, reconstruction, alteration or
6 repair. By enacting and enforcing the ordinance requiring existing nightclubs to be
7 retrofitted with fire sprinkler requirements that were not in place at the time those nightclubs
8 were constructed, reconstructed, altered or repaired, Respondent exceeded statutory
9 authority in violation of ORS 455.020(1).

10 **ORDER**

11 Therefore, for Respondent's continuing violations described above and in light of the numerous
12 aggravating factors involved with them, it is HEREBY ORDERED under ORS 455.895(4) and
13 Oregon Administrative Rule (OAR) 918-001-0036, that the City of Portland is assessed a civil
14 penalty of \$20,000 for violating ORS 455.040(1) and 455.020(1), and it is further HEREBY
15 ORDERED under ORS 455.770(4) that the City of Portland take the corrective action of repealing
16 Ordinance 186247 within six (6) months of the entry of a final order in this matter.

17
18
19 

20 for

Date: 7/21/17

21 Director

22 Department of Consumer and Business Services
23 State of Oregon

24 **NOTICE OF FINAL ORDER**

25 This Notice will become a final order by default if Respondent does any of the following:
fails to request a hearing in writing within 20 days from the date of service of this Notice;

1 withdraws a hearing request; notifies the Division or the administrative law judge that Respondent
2 will not appear at a scheduled hearing; fails to appear at a scheduled hearing; or appears late for a
3 scheduled hearing. If this Notice becomes a final order by default, the Division's file on the matter,
4 including all materials submitted by Respondent, becomes the record for the purpose of establishing
5 a prima facie case.

6 **NOTICE OF RIGHT TO HEARING**

7 Respondent is entitled to a hearing as provided by the Administrative Procedures Act
8 (APA), ORS Chapter 183. Hearings are held in accordance with the APA and the Attorney General
9 Model Rules (OAR, Chapter 137, Division 3). These statutes and rules can be found in the "Legal
10 Resources" section of the Department of Justice Web site.

11 If Respondent requests a hearing, the request must be in writing and postmarked no later
12 than 20 days from the date of service of this Notice. If the Notice was served on Respondent in
13 person, the date of service is the date Respondent received the Notice. If the Notice was served
14 through the mail, the date of service is the day the Notice was mailed, not the day it was received by
15 the Respondent. If a request for hearing is not received within the 20-day period, Respondent's right
16 to a hearing shall be considered waived. Mail hearing requests to Building Codes Division,
17 Enforcement Section, P.O. Box 14470, Salem, Oregon, 97309. If Respondent requests a hearing,
18 Respondent will be notified of the time and place of the hearing.

19 **OFFICE OF ADMINISTRATIVE HEARINGS**

20 Hearings are held in front of an Administrative Law Judge (ALJ) with the Office of
21 Administrative Hearings and the ALJ is not an employee of the Division. A hearing is like an
22 informal trial. At hearing, the Respondent may present evidence, witnesses, and the Respondent's
23 side of all the issues before the ALJ. The hearing is recorded to preserve testimony and to allow
24 appeal of the decision. Witnesses are placed under oath, and the Respondent or the Respondent's
25 attorney may question all witnesses.

1 **LEGAL REPRESENTATION AT HEARING**

2 Respondent may be represented by legal counsel. Division staff or an Assistant Attorney
3 General will represent the Division. If the Division will be represented by an Assistant Attorney
4 General, Respondent will be notified by letter. Respondent may self-represent or may choose to be
5 represented by an attorney.

6 If Respondent is a partnership, corporation, association or organized group, or a
7 governmental authority other than a state agency, Respondent must be represented by an attorney or
8 an authorized representative. An authorized representative is: a member of a participating
9 partnership; an authorized officer or regular employee of a participating corporation, association or
10 organized group; or an authorized officer or employee of a participating governmental authority
11 other than a state agency. *See* ORS 183.457 and OAR 918-001-0030.

12 If Respondent cannot afford an attorney, a legal aid organization may be able to provide
13 assistance. Respondent may contact the Oregon State Bar at 800-452-8260 to find the legal aid
14 office in Respondent's area.

15 If Respondent is represented by counsel, Respondent's attorney shall provide the ALJ and
16 the Division with a "letter of representation" as soon as possible. Hearings are not automatically
17 postponed by the late hiring of an attorney. If Respondent is not represented and decides during the
18 hearing that Respondent needs an attorney, Respondent may ask for a break to request an attorney.

19 **NOTICE TO ACTIVE DUTY SERVICEMEMBERS**

20 Active duty servicemembers have a right to stay proceedings under the Federal
21 Servicemembers Civil Relief Act. Contact the Oregon State Bar at 800-452-8260 or the Oregon
22 Military Department at 800-452-7500 for more information. If Respondent needs help finding legal
23 assistance, visit the United States Armed Forces Legal Assistance Legal Services Locator website at
24 <http://legalassistance.law.af.mil/content/locator.php>.

DISCOVERY

Discovery may be permitted as provided in OAR 137-003-0566 through 137-003-0570, 137-003-0572 and 137-003-0573. Respondent must first ask the agency to provide copies of documents or other information relevant to this proceeding. If Respondent is not satisfied with the response of the agency, Respondent may ask the ALJ or Chief ALJ to order production of the information Respondent seeks in accordance with applicable rules.

Additionally, prior to the hearing, the Division will provide Respondent with a copy of exhibits and a list of witnesses it intends to present during the hearing. The Division will also ask that Respondent provide copies of Respondent's exhibits and names of witnesses Respondent will present during the hearing. This exchange should occur no later than two weeks prior to the hearing.

If Respondent discovers during or at the end of the hearing that there is evidence which was not available to Respondent prior to hearing, Respondent may ask for a postponement. After the hearing if Respondent discovers there is evidence that was not available at the time of the hearing, Respondent may ask to reopen the hearing. In either case, the ALJ has discretion in deciding whether to grant Respondent's request. If Respondent knew about the additional evidence *before* the hearing, and had adequate time to obtain it, Respondent's request may be denied.

PRESENTING EVIDENCE

The Division presents its evidence first. Respondent then presents evidence to prove that the Division's facts are incorrect, or to present other factual or legal defense. A general feeling that the Division is being unfair is not a legal defense; Respondent needs to point to the fact Respondent thinks is missing or incorrect, or law that Respondent think is being incorrectly interpreted or applied. Respondent and the Division's representative will be allowed to present evidence in response to the other party's evidence. The burden of proof is a "preponderance" of the evidence, which means the evidence must show that a fact is more likely true than not.

1 Evidence is generally admissible unless it is irrelevant, immaterial, unduly repetitious or
2 privileged. Either party may object to evidence if it does not meet this standard, or for any other
3 legal reason. "Hearsay evidence" (evidence that a witness did not directly see or hear, but which he
4 or she heard about from someone else) may be admissible.

5 **WITNESSES**

6 Respondent should decide immediately what witnesses will testify on Respondent's behalf.
7 With prior approval from the ALJ, witnesses may testify by telephone. Respondent shall let the
8 Division know if a witness will appear by telephone. Witnesses testifying by telephone must
9 receive copies of all "exhibits" (evidence submitted into the hearing record) that will be discussed at
10 the hearing. Respondent shall ensure that Respondent has correct telephone numbers and that
11 Respondent's witnesses will be available to testify during the scheduled hearing time.

12 Subpoenas are only issued when a witness will not appear voluntarily and when the witness'
13 testimony has a direct bearing on the issues being decided in the hearing. At Respondent's request,
14 the Division may issue a subpoena to compel Respondent's witnesses to appear at hearing. To
15 request a subpoena, Respondent shall notify the Division in writing, along with a statement
16 describing the relevance of the witness' testimony.

17 **PROPOSED ORDERS AND FINAL ORDERS**

18 At the conclusion of the hearing the record is closed (no more evidence can be introduced);
19 the ALJ will review the record and issue a "Proposed Order." Proposed Orders are normally issued
20 within 45 days; the Proposed Order contains "findings of fact," "conclusions of law," and a
21 recommendation. The order is a "Proposed Order" because the Director of the Department of
22 Consumer and Business Services or a licensing board may change or reject a Proposed Order.

23 If either party disagrees with the ALJ's Proposed Order, written exceptions may be
24 submitted. Submitting written exceptions is Respondent's opportunity to express legal or factual
25 disagreements Respondent has with the Proposed Order. Respondent will be notified when

1 exceptions to the Proposed Order must be filed. The Division and the licensing boards do not permit
2 oral argument when considering exceptions.

3 **RECORD**

4 A record will be made of the entire proceeding to preserve the testimony and other evidence
5 for appeal. This may be done by use of a tape or digital recorder or court reporter. The record is
6 generally not transcribed, unless there is an appeal to the court of Appeals. However, Respondent
7 may obtain a copy of the recording upon payment of the costs of making that copy.

8 **RIGHT TO JUDICIAL REVIEW**

9 IF THIS NOTICE BECOMES A FINAL ORDER, Respondent is entitled to judicial review
10 of a final order in this matter. The recording of the hearing, together with evidence admitted at
11 hearing, the Proposed Order, Written Exceptions, and the Final Order constitute the hearing record
12 for appeal purposes. The record is available to Respondent and Respondent's attorney.

13 Judicial review may be obtained by filing a petition for review with the Oregon Court of
14 Appeals within 60 days after a final order is served upon Respondent. See ORS 183.482. If a final
15 order is served on Respondent in person, the date of service is the date Respondent receives the
16 order. If a final order is served through the mail, the date of service is the day the order is mailed,
17 not the day it is received by the Respondent. If Respondent does not file a petition for judicial
18 review within the 60-day time period, Respondent will lose the right to appeal. The phone number
19 for the Oregon Court of Appeals is 503-986-5555.