

Portland City Council Agenda
 Written Testimony - Item 1049/1008

Agenda Item	Name or Organization	Position	Comments	Attachment	Created
1008	Terry Harris	Support with changes	<p>Once again, with less than a week to review them, the Portland City Council is facing hundreds and hundreds of pages code in another batch of revisions to adopt, nominally to “align” the current code with the charter amendments passed by voters two years ago. I have deep concerns about the process, and deep concerns about the condition of the city code after these revisions, and deep concerns about whether the new government will have the time, energy or wherewithal to make corrections to what you all are doing.</p> <p>These comments focus on one chapter, in one title, consisting of less than four pages of text. The focus is primarily because of the particular chapter’s critical importance to the entire new system of government, but also because it illustrates substantial and complex impacts embedded in what appear to be innocuous or benign revisions - a problem throughout this code revision project.</p> <p>Attached here is some section-level review of new Chapter 1.05, which attempts to consolidate the procedures for administrative rulemaking into one chapter applicable across (almost) all bureaus for (almost) all rulemaking occasions. Something this significant deserves a very detailed review. You don’t have time for that. A compounding problem is that you’ve already deleted, or you are in the process of deleting, all of the other rulemakings in the code. You have no choice but to pass something here even if it’s only half-baked.</p> <p>I don’t have time for it either, but here we are:</p>	Yes	11/19/24 5:43 PM

November 19, 2024

To: Mayor Wheeler, members of the Portland City Council
From: Terry J. Harris
Re: Administrative Rulemaking Amendments – Title 1, Chapter 1.05, Portland City Code

Once again, with less than a week to review them, the Portland City Council is facing hundreds and hundreds of pages code in another batch of revisions to adopt, nominally to “align” the current code with the charter amendments passed by voters two years ago. I have deep concerns about the process, and deep concerns about the condition of the city code after these revisions, and deep concerns about whether the new government will have the time, energy or wherewithal to make corrections to what you all are doing.

These comments focus on one chapter, in one title, consisting of less than four pages of text. The focus is primarily because of the particular chapter’s critical importance to the entire new system of government, but also because it illustrates substantial and complex impacts embedded in what appear to be innocuous or benign revisions - a problem throughout this code revision project.

What follows here is section-level review of new Chapter 1.05, which attempts to consolidate the procedures for administrative rulemaking into one chapter applicable across (almost) all bureaus for (almost) all rulemaking occasions. For something this significant, it deserves a very detailed review. You don’t have time for that. A compounding problem is that you’ve already deleted, or you are in the process of deleting, all of the other rulemakings in the code. You have **no choice** but to pass something here even if it’s only half-baked.

I don’t have time for it either, but here we are:

1. The definitions in 1.05.020 are well-meaning but problematic. This is a result of a common drafting conundrum where it is not clear whether the terms in the definition are merely definitional, or they are substantive requirements.

Consider 1.05.020(A):

A. Administrative rule means a binding requirement, regulation, or procedure that is formally adopted by the City Administrator pursuant to rule-making authority granted by the Charter or delegated by the Council. This definition excludes Bureau Policies. An administrative rule must be labeled as or state in its text that it is an “Administrative Rule.”

For example, the term “Bureau Policies” is capitalized but not defined anywhere. Is the implication here that Bureau Policies are “binding,” but just not “formally adopted...” Or, is it the case that Bureau Policies are not binding? Less importantly, but similarly illustrative, isn’t the

“label” of “Administrative Rule” a mere drafting requirement? Or is it such a fundamental requirement that any rulemaking is null and void if there’s no label?

Also, importantly, does “pursuant to rule-making authority granted by the Charter or delegated by the Council” refer to the general powers? Or is it intended to be a specific reference to a specific delegation which helps to define the scope of the specific rule?

Similarly, the distinction between Internal rules and External rules are also well-meaning but may be a distinction not worth the trouble. For one thing, MANY rules will bind BOTH internal and external actors, leaving it up to unfettered discretion of the City Administrator in 1.05.030 to decide between the two types of rules. Besides, the only differences between internal and external rules under this chapter are in (problematic) emergency and temporary rules and (problematic) provisions for “Notice.”

2. The Notice Requirements in Section 1.05.040 are far too narrow. If this chapter is to serve as the common procedure for all rulemaking in all circumstances, then the notice procedure needs to be more robust. The current draft could be considered a bare minimum for notice in both internal and external rulemakings, but it should be stated as such. The City Administrator should be empowered to offer more, and different, notice as rulemaking circumstances may require.

In addition to the minimal list of minimal measures, there should be an underlying standard governing the notice provision as provided in state and federal laws. For example, ORS 183.341 requires state rulemaking provide “a reasonable opportunity for interested persons to be notified of the agency’s intention to adopt, amend or repeal a rule.” There may be times when reasonableness requires more than a bare minimum.

And there may be times when (optional?) Bureau-specific practices could be authorized to improve notice. For example, Bureau-specific opt-in email lists in addition to the City Administrator’s centralized list envisioned in section 1.05.040(A)(1).

This code should not be so limiting that additional measures could not be easily implemented without code amendment. For example, the City should consider a comprehensive “Federal Register” type of e-publication employed by other cities to publish not only notices of rulemakings, but all manner of notices and publications from all agencies, boards, commissions of the city.

Finally, this notice section needs to be distinguished from “Service of Notice” in Chapter 1.08

3. Provisions allowing amendments to rules under Sections 1.05.060(C) and (D) are vague and overly broad. These subsections seem to be intended to provide flexibility to make minor changes, but the drafting isn’t sufficiently specific.

For example, in (C):

C. Make changes to procedural requirements of an administrative rule that do not fundamentally change the substantive content of the administrative rule;

How are “procedural requirements” distinguishable from “substantive content”? And what does “fundamentally” mean in this context?

And for example, in (D)

D. Delete parts of an administrative rule that have become inoperative or that a court of competent jurisdiction determines are invalid;

By “delete parts,” does this mean only “parts” of the rule can be deleted without notice and comment? (And only deletions, not edits?) And the passive phrase “have become inoperative” doesn’t indicate the cause. Like, it should not be the case that a promulgated rule that goes unenforced, for whatever reason, at the priority or discretion of the City Administrator suddenly becomes “inoperative” allowing its deletion without notice or comment.

4. Code section 1.05.070 seems unnecessary at best and problematic as written. First, I understand the context for subsection A, but Administrative Rules, if NOT based upon or supported by an evidentiary record, must be based on something. I think that’s probably captured in the City Administrator’s role in 1.05.030, but maybe that “as necessary or expedient for the conduct of the City” one-sentence standard belongs here as a basis instead?

Meanwhile, although the Section title refers to “Publication of Administrative Rules,” nothing in the section relates to publication. (In fact, Chapter 1.07 discusses publication in some detail.)

5. The process to determine an Effective Date for a rule is confusing. In 1.05.070(B), the effective date is “30 days after the rule’s adoption” unless otherwise specified. Meanwhile, 1.05.040 requires that notice be provided at least “30 calendar days prior to the rule’s *adoption*.” But in 1.05.040(C) the content of that notice requires “the date the rule will *take effect*.” What is NOT clear is (1) what, exactly constitutes “adoption” and (2) how it is known in advance what the date of adoption will be assuming a comment period in which comments can actually be considered.

6. The “Required Content of Administrative Rule” proposed in Section 1.05.080 is so thin as to be pointless. The draft section only requires a statement of intent or purpose. (Though, keep in mind that a “label” that the rule is an “Administrative Rule” is required by 1.05.020(A).) Compare to ORS 183.335(2)(b) which lists items like: the authority for rule; the citation to the section of code being implemented; any principal documents, reports, studies that were relied upon and where they are available; fiscal impacts; equity impacts; advisory committee involvement and recommendations; and the options considered in developing the rule. If this code section for “required content” is actually listing optional content, then it should at least list what might be relevant.

7. The Temporary rulemaking authority in 1.05.090(A) is oddly drafted and somewhat vague.

A temporary **external** rule can be adopted, or all or parts of an existing rule may be **suspended**. But a temporary **internal** rule *that creates new requirements* can be adopted, or all or parts of an existing rule can be **modified or suspended**.

And a temporary **external** rule appears to be only to “implement provisions of a new or amended ordinance” upon the ordinance’s effective date. But a temporary internal rule can be issued “when an administrative rule must be established sooner than the requirements for permanent rules allow” which seems both vague and, unless an emergency, defeating the purpose of notice and comment.

8. The standard for emergency rulemaking -- “avoid serious harm to the public interest” -- does not require that the harm be imminent, or that the harm is unavoidable in the time it takes for proper notice and comment. Unless the emergency rulemaking is connected to an emergency declaration, the City Administrator’s written rationale for emergency rulemaking should include reasoning for the shortened or eliminated public process.

9. Finally, the Chapter itself is misnamed, and made worse by a confusing Section 1.05.010 (Scope and Short Title). This chapter is NOT the “administrative **code**”- it merely provides administrative **procedures** required to promulgate the code. The analogue in both state and federal law is called the “Administrative Procedures Act.” The city code should use the common terminology.

I did not have the time to develop additional detailed comments on how this Chapter interacts with other Chapters. Some questions from my notes that I wanted to explore included:

1. Why is Administrative rulemaking in Title 1, but Administrative appeals in title 3?
2. How will the Portland Policy Document repository be organized and arranged for rules in the new government. (Revisions to Chapter 1.07 seem unfinished.)
3. What does 1.07.080 mean? The section purports to say what is and is not binding.

Portland City Council Meeting
Wednesday, November 20, 2024 - 9:30 a.m.
Verbal Testimony

Agenda Item	Name
1 1008	Terry Harris