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Via Electronic Mail
Stacy Posegate
Department of Justice

RE: ODAV Ad Hoc Exclusion of Designated Alternates for Aurora Airport Master Plan
Public Advisory Committee Meetings

Dear Stacy:

As you know, a client of this firm requested that I serve as their designated alternate for the 2/11/25 Master Plan Public Advisory Committee (PAC) meeting. This is to reiterate that request. It was a time sensitive request because the relevant PAC meeting is this evening at 5 pm and is probably the last PAC meeting, the last opportunity to influence the outcome of a process vitally important to our clients.

To recap, this firm's request to serve as a PAC Member's alternate was made to ODAV's Tony Beach on **February 3, 2025**. On February 4, 2025, Mr Beach responded to that request: "we don't designate PAC members or alternates for specific meetings," which is inaccurate. ODAV has allowed designation of alternates as well as complete substitutions for particular PAC meetings as well as on longer terms. On February 4, 2025, I corresponded with you requesting that you advise Mr. Beach that he may not exclude the undersigned from serving in a delegate role, where the exclusion has no basis other than Mr. Beach's personal preferences about the messenger and anticipated message. I explained to you that such exclusion is inappropriate and unconstitutional. You corresponded with me today stating that excluding in this manner "is in the agency's discretion", explaining that ODAV has "chosen not to allow additional members this late in the game" and asked me "Can you help me to understand why this is unconstitutional"? This is that explanation.

I would think that you understand that ODAV is not permitted to make standardless, ad hoc decisions about who can participate in public meetings or government led policy discussions. While government entities may impose reasonable, content-neutral rules for participation, such rules must be clearly defined, consistently applied, and not subject to arbitrary enforcement. No "clearly defined" content neutral rules are at issue here, there is no consistent application of Mr. Beach's discretion to pick and choose who he allows to serve as an alternate, instead his choices are, with all due respect, wholly and impermissibly arbitrary.

The federal First Amendment guarantees the right to free speech and the ability to petition the government for redress of grievances. Government officials, acting in their official

capacity, as Mr. Beach, cannot exclude persons from policy discussions merely because they personally dislike the speaker or their anticipated message. Doing so constitutes unlawful viewpoint discrimination, which is presumptively unconstitutional. Please note that in Oregon, the constitution is more protective than the federal First Amendment. In this regard, Article I, Section 8 of the Oregon Constitution states that “No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.” Accordingly, both federal and state precedents are relevant. The United States Supreme Court has consistently ruled that government officials cannot deny participation in public discussions based on personal opposition to a speaker’s viewpoint (*Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972)). Oregon courts have consistently struck down governmental actions that impose content-based restrictions (*State v. Robertson*, 293 Or 402 (1982); *State v. Henry*, 302 Or 510 (1987)). Given these precedents, ODAV’s actions are indefensible under federal and Oregon law.

ODAV has organized PAC public meetings and created a designated public forum for discourse about the Aurora Airport Master Plan. Only PAC members are guaranteed opportunities to speak in that forum without time limits and are the only ones who have the opportunity to vote in the process that ODAV established, when ODAV allows voting. General public comments are allowed but are limited to 3 minutes or less and ODAV may or may not get to them. The “general public” is not allowed more than one opportunity if any to speak. Therefore, being relegated to speaking on behalf of a PAC member during the general public comment period is a disadvantage and harms the interest of that PAC member. Moreover, ODAV gives the testimony of PAC members significant weight that is not assigned to the general public. Which again harms the interests of PAC members who designate alternatives to speak on their behalf when Mr. Beach deems such person unworthy of serving as an alternate. Only PAC members are allowed to speak to ODAV and its consultants during PAC meetings. In fact, ODAV will not talk to anyone about the master plan outside of the PAC process. The only way to have any hope of influencing the outcome of the master plan process is as a PAC member, speaking during the PAC-member part of PAC meetings.

Excluding individuals from these discussions because they or their message are personally disliked undermines the core democratic function of public discourse and constitutes impermissible censorship.

Moreover, ODAV’s arbitrary exercise of discretion violates the Oregon Public Meetings Law (ORS 192.610-192.690). Oregon’s Public Meetings Law guarantees open governance and public participation in meetings of government advisory bodies, such as the PAC. While agencies may establish reasonable, content-neutral rules for participation, they cannot impose standardless, ad hoc restrictions that selectively exclude individuals based on their identity or viewpoint, as here.

The U.S. District Court for the District of Oregon has directly addressed the issue of excluding individuals from public meetings. In *Walsh v. Enge* (2015), the court ruled that a City of Portland policy allowing exclusions even based on past behavior or anticipated disruptions


was unconstitutional because it effectively silenced dissenting voices. While the undersigned has never been disruptive, ODAV's exclusion of a designated PAC alternate based on personal disagreement violates fundamental public participation rights while allowing others to participate as alternates or substitutes freely.

Concerning the ad hoc nature of Mr. Beach's case-by-case refusals, the United States Supreme Court does not tolerate standardless governmental limits on who can or cannot participate in public discourse. Thus, in *City of Lakewood v. Plain Dealer Publishing Co.* (1988), the Supreme Court ruled that standardless discretion is unconstitutional when it allows government officials to make ad hoc decisions about who can or cannot speak. The Court held that regulations must have "narrow, objective, and definite standards" to prevent viewpoint discrimination.

ODAV's arbitrary restrictions on who can and cannot be a designated alternate are also unlawful prior restraints on participation in public meetings. Per *Walsh v. Enge* (D. Or. 2015) the U.S. District Court for the District of Oregon struck down Portland's policy of prospectively banning individuals from attending public meetings based on past behavior or anticipated disruptions. While there is no issue of disruption as the undersigned has never been disruptive or participated in misconduct, even exclusion's on that basis is not allowed unless justified by actual, documented misconduct, not by a general dislike of a person or their viewpoints. Similarly, in *Minnesota Voters Alliance v. Mansky* (2018), the Supreme Court invalidated a Minnesota law banning political attire in polling places because the ban lacked clear standards and was enforced arbitrarily.

Given these robust protections, Mr. Beach's ad hoc exclusion of some people and allowance of others as PAC member designated alternates based on personal dislike of the speaker or message is unlawful.

Very truly yours,

A handwritten signature in black ink, appearing to read "Wendie L. Kellington". The signature is fluid and cursive, with the first name "Wendie" being more prominent.

Wendie L. Kellington

WLK:wlk
CC: Clients