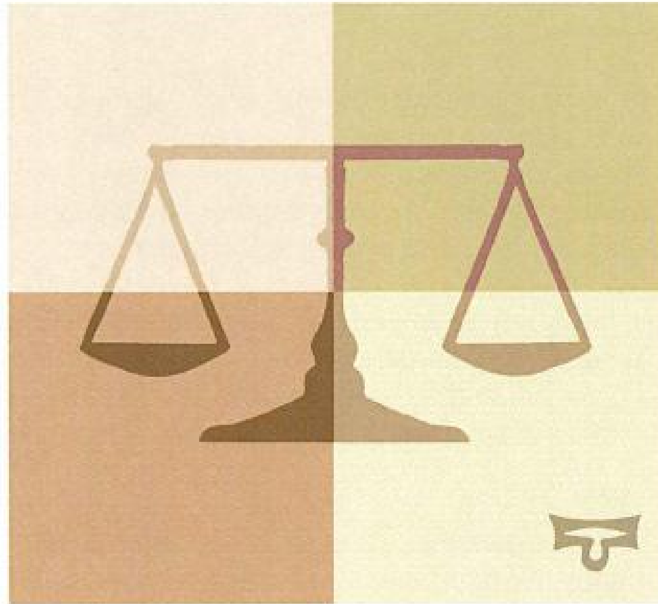
CITY OF TACOMA

OFFICE OF THE HEARING EXAMINER

RULES OF PROCEDURE FOR HEARINGS



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INTRODUCTION

These Rules of Procedure are established pursuant to *Tacoma Municipal Code (TMC)*, Chapter 1.23, to help secure the fair and efficient conduct of matters subject to the City's administrative hearing system. The underlying concern is to ensure that the essentials of due process - notice and opportunity to be heard - are an integral part of every hearing conducted.

The Hearing Examiner has jurisdiction over a wide variety of specific matters identified in *TMC* 1.23.050. From the standpoint of procedure, these fall into two major categories: (1) Pre-Decision Hearings and (2) Administrative Appeals.

Pre-Decision Hearings are held on a relatively limited number of matters as a means for assembling information, including public testimony, to be used as the basis for making a recommendation to the City Council who ultimately renders the City's decision. The most common of these are rezones, street vacations, and the formation of local improvement districts.

Administrative Appeals constitute the majority of hearings. These are proceedings which seek to overturn or change an administrative decision the City already has made. Decisions on most land use applications, including such things as variances, special use permits, and conditional use permits, are made administratively by a City official. Such decisions are final, unless appealed to the Hearing Examiner.

Because of the inherently different functions performed by Pre-Decision Hearings and Administrative Appeals, the procedures for the two differ. The major difference is in the level of public involvement. In Pre-Decision Hearings, testimony from the general public is sought. A feature of each hearing is to solicit the views of any citizens who wish to be heard.

Administrative Appeal hearings, by contrast, are contests between specific identified parties: normally, the appellant, the City and the applicant (if different from the appellant). In appeal hearings, each party is responsible for his or her case and those testifying are usually only those persons called as witnesses by one of the parties. The public is normally allowed to attend, but public testimony is not taken.

The two types of hearings also differ as to the effect of what the Hearing Examiner decides. The Examiner's decision is final in all Administrative Appeal hearings, meaning that any further review must be sought in Superior Court (or for civil penalties and utility disputes, in Municipal Court). The Examiner's decision is also final on preliminary plat applications. But, on all other Pre-Decision Hearings, the Examiner's determination is a recommendation to the City Council and the Council makes the final decision. Persons disagreeing with an Examiner's recommendation may "appeal" it to the City Council (*see TMC* 1.70). Such appeals are limited to and must be based upon the record made before the Examiner.

INTRODUCTION
(continued)

Some proceedings do not fall neatly within either the Pre-Decision Hearing or the Administrative Appeal categories. These are cases relating to local improvement district assessments, forfeitures, discrimination, ethics violations and actions brought under the City's whistle blower policy.

In forfeiture, discrimination, and ethics violation matters, no prior City decision is being appealed. Rather, the City stands roughly in the role of a prosecutor and the hearing is about allegations made against some person. The proceeding, therefore, is not an occasion for public testimony, but is a proceeding among specifically identified parties, each of whom has an opportunity to present a case.

In local improvement district assessment hearings, a preliminary assessment has been made against all properties specially benefited, and a hearing is convened to allow any person with standing with regard to a particular assessment to contest it.

Although in the main, the procedures for Administrative Appeals are applicable to all these special categories, there are some particulars in which different rules apply. In Section Four, an attempt has been made to identify these differences.

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Section 1
GENERALLY APPLICABLE RULES

1.01 Powers of Hearing Examiner

The Hearing Examiner shall have all powers necessary to conduct orderly, efficient and fair hearings. The Hearing Examiner's powers shall include, but not necessarily be limited to the authority:

(a) to administer oaths and affirmations;

(b) to issue subpoenas compelling the attendance of witnesses and the production of documents; and to issue protective orders;

(c) to rule on all procedural matters, objections and motions;

(d) to admit and exclude evidence;

(e) to limit testimony, by time or subject;

(f) to question witnesses and request additional information;

(g) to hold prehearing conferences, either in-person or telephonically;

(h) to regulate the course of hearings and the conduct of participants;

(i) to make orders, recommendations, and decisions, including the imposition of reasonable conditions.

1.02 Ex Parte Communications

Any communication between any participant in a hearing and the Examiner that occurs outside of the hearing and in the absence of the other participants is an ex parte communication.

(a) No interested person or representative shall communicate ex parte directly or indirectly with the Examiner, nor shall the Examiner communicate ex parte directly or indirectly with any interested person or representative, concerning the merits or facts of any matter being heard before the Examiner.

(b) This rule does not prohibit ex parte communications about procedural topics, nor does it apply to written submissions made for the record and available to all participants.

(c) If prohibited ex parte communication is made directly or indirectly to the Examiner, such communication shall be disclosed on the public record. Within 10 days after notice thereof, any interested party desiring to rebut the communication shall be allowed to place a written rebuttal in the record.

1.03 Disqualification of Hearing Examiner

Any person acting as Hearing Examiner is subject to disqualification for bias, prejudice, conflict of interest, or any other cause for which a judge can be disqualified.

(a) Whenever the Examiner believes that his relationship to participants or financial interest in the subject of a hearing create the appearance that the proceedings will not be fair, the Examiner shall either: (1) voluntarily step down from the case, or (2) disclose the relationship or interest on the record, stating a bona fide conviction that the interest or relationship will not interfere with the rendering of an impartial decision.

(b) Any party or interested person may petition for the disqualification of an Examiner promptly after receipt of notice that the individual will preside or, if later, promptly upon discovering grounds for disqualification. The Examiner for whom the disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination.

1.04 Computation of Time

Time Computation. In computing any time period set forth in this chapter, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is neither Saturday or Sunday, nor a legal holiday. Legal holidays are described in RCW 1.16.050. Whenever deadlines are imposed in the schedule of any matter before the Hearing Examiner, the deadline shall be deemed to be by the close of business (5 pm. Pacific Time) on the day specified. Unless otherwise specified herein, references to days shall mean calendar days.

1.05 Filing and Service of Documents

(a) All written submissions made in advance of hearing shall be filed with the Hearing Examiner's Office, Tacoma Municipal Building, 747 Market Street, Room 720. Filing shall be complete only upon receipt. All filings made to the Hearing Examiner shall consist of one original and one "bench copy."

(b) Documents required to be served on other participants may be delivered personally, transmitted by facsimile, sent by mail, or upon the agreement of the parties, by electronic transmission (e.g. scan and e-mail). In the case of mailings, service shall be deemed complete upon deposit in the mail.

(c) Service on the representative of a party shall constitute service upon the party, except for decisions or recommendations of the Examiner, or petitions for review to court. Such decisions, recommendations or appeals shall be served on the parties themselves.

(d) Legal counsel representing parties in all Hearing Examiner proceedings shall file a notice of appearance upon being retained.

1.06 Official File

All written submissions shall be maintained in the official file. The official file shall be available for public inspection and copying during normal business hours, except for any portions thereof which the Examiner has ordered to be confidential.

1.07 Consolidation

(a) Multiple appeals of the same decision and multiple appeals concerning different aspects of a single project shall be consolidated for hearing. Except where a Determination of Significance was issued, review of compliance with State Environmental Policy Act procedures shall be consolidated with any hearing on authorizing the underlying proposal.

(b) The Examiner shall otherwise have discretion to consolidate related matters for hearing whenever the interests of justice and efficient procedure will be served by such action.

(c) When the consolidated matters involve both a pre-decision hearing and an administrative appeal hearing, the pre-decision hearing portion of the proceeding shall normally be held first. This will allow members of the public to testify without a protracted wait. In such a case, the Examiner may determine that evidence given in either portion of the proceeding may apply to the decision in the other portion.

1.08 Parties of Record

(a) In administrative appeals, the parties of record shall be the appellant(s), the City, the applicant(s), if different from the appellant(s), and any intervenor(s).

(b) In pre-decision hearings, the initial parties of record shall be the applicant(s) and the City. Subsequently, any individual or organization that participates in the hearing by oral testimony or written submission shall become a party of record.

1.08.5 Subpoenas

As authorized by *TMC* 1.23.100 and .105, subpoenas may be issued by the Examiner compelling the appearance of witnesses and the production of documents and may be served by any person 18 years of age or over, competent to be a witness, but who is not a

party to the matter for which the subpoena is issued. Provided, that a subpoena may be issued with like effect by the attorney of record of the party to the matter in whose behalf the witness is required to appear and the form of such subpoena in each case may be the same as one issued by the Examiner except that it shall only be subscribed by the signature of such attorney.

Each witness subpoenaed shall be allowed the same fees and mileage as provided by law to be paid witnesses in the courts of records in the state.

Subpoenas issued in the matter before the Examiner may be enforced in the Tacoma Municipal Court in accordance with *TMC* 1.23.105.C.

1.09 Motions

Any application to the Examiner for an order shall be by motion. Unless agreed to by all known participants or made during a hearing, a motion shall be in writing. Known participants include all parties of record at the time the motion is made.

(a) Written motions shall be filed at least eight (8) days in advance of hearing, and copies thereof shall be served on other known participants. Such motions shall state the reasons for the request and specify the relief sought.

(b) Parties of record shall have an opportunity to respond to written motions no later than five days after receipt or at the outset of the hearing, whichever time period is shorter.

1.10 Hearing Date/Continuance

Hearings shall normally be held at the time and place specified in the notice therefor. A scheduled hearing may be continued by the Examiner on his or her own motion or for good cause on motion of a party of record.

1.11 Evidence

(a) Evidence, including hearsay evidence, may be admissible if in the judgment of the Examiner it is the kind of evidence upon which reasonably prudent persons are accustomed to rely in the conduct of their affairs.

(b) The Examiner may exclude evidence that is irrelevant, unreliable, immaterial, or unduly repetitious.

(c) The Examiner shall exclude evidence that is privileged or excludable on constitutional or statutory grounds.

(d) The Examiner may take official notice of enacted provisions of law, of codes or standards adopted by a recognized organization, of matters within his specialized expertise and of notorious or commonly understood facts.

1.12 Exhibits

(a) Documents, photographs, drawings and physical evidence may be offered as exhibits and each will be assigned an exhibit number. Exhibits offered will be retained until after a decision is rendered and all appeal proceedings, if any have been concluded.

(b) The Staff Report, if any, and all documents offered from the official file shall be admitted.

(c) Documentary evidence may be received in the form of copies or excerpts.

(d) The Examiner may order that an exhibit be kept confidential. Any such exhibit shall not be subject to examination, except as the Examiner may permit.

(e) In all proceedings before the Hearing Examiner, parties shall submit their final witness and exhibit lists, together with copies of their exhibits, no later than five (5) days prior to the scheduled hearing date.

1.13 Testimony

(a) All oral testimony shall be taken under oath or affirmation.

(b) The Examiner may impose reasonable limitations on the nature and length of testimony. In so doing the Examiner shall give consideration to (1) the expeditious completion of the hearing; (2) the need to provide parties of record a fair opportunity to present their cases; and (3) accommodating the desires of all members of the public to be heard when public testimony is taken.

(c) Where the rights of the participants will not be prejudiced, testimony of a witness may be taken by deposition or by electronic means, such as telephone or television.

(d) Parts of a hearing may be closed to public observation by the Hearing Examiner under a provision of law expressly authorizing such closure or under a protective order entered by the Examiner. Upon a showing of good cause, the Examiner may exclude a witness from observing parts of the hearing in which the witness is not a participant.

1.14 Continuation or Reopening Hearing/Leaving Record Open

(a) Every effort shall be made to complete the hearing on the scheduled date(s). If, however, testimony cannot be presented in the time available, the hearing may be

continued for completion on another date. When in open hearing the Examiner specifies the date, time and place of the continuation of the hearing, no further notice is required.

(b) The Examiner may hold the record open for the receipt of additional requested information, for legal briefing, or in order to allow participants to respond to matters raised.

(c) After closing the record, the Examiner may reopen the hearing for good cause at any time prior to the issuance of the subject decision(s) or recommendation(s).

1.15 Site Visits

The Examiner may visit the site before or after a hearing. If the Examiner conducts a post-hearing site inspection, the hearing record will not close until the inspection is completed. However, the observations made at such an inspection are not evidence. The purpose of a site visit is to assist the Examiner in understanding the evidence presented at hearing.

1.16 Criteria for Decision

The applicable legal standards shall be the basis for every decision or recommendation by the Examiner.

1.17 Termination of Jurisdiction

The jurisdiction of the Examiner terminates upon the end of the period for appealing or seeking review of the Examiner's decision or recommendation. Notwithstanding the foregoing, clerical mistakes in decisions, orders, or recommendations and errors therein arising from oversight or omission may be corrected by the Examiner at any time on his or her own motion or on the motion of a party of record or if such decision, order, or recommendation is appealed, such mistakes may be so corrected before review is accepted by the reviewing authority.

1.18 Recording

All proceedings before the Examiner shall be electronically recorded and the recordings shall be made a part of the record. Copies of the recordings shall be made available on request and upon payment of the costs of reproduction. The preparation of a written transcript shall be the responsibility of the person desiring the transcript.

1.19 Default/Failure to Communicate-Prosecute

If an applicant, petitioner, or his or her representative fails to appear at hearing, an Order may be entered dismissing the matter or recommending to the City Council, in matters in which the Hearing Examiner's Report is a recommendation to the City Council, dismissal of the matter for default. A default order shall be final unless, within seven (7) days of service, good cause is shown by the party against whom it was entered. A recommendation for entry of a default order shall be final upon concurrence by the City Council.

If after filing an Administrative Appeal, an appellant fails to communicate with the Office of the Hearing Examiner in order to set a hearing date or otherwise advance the appeal for longer than one month's time, the Examiner may either (a) set a hearing date without the concurrence of the appellant by written notice to the appellant's address, or (b) dismiss the appellant's appeal by written notice sent to the appellant's address for failure to prosecute the appeal.

Section 2

RULES FOR APPEAL HEARINGS

2.01 Matters Subject to Appeal Hearings

Administrative Appeal hearings shall be held on all matters within the jurisdiction of the Hearing Examiner, except those listed in Rule 3.01 herein and the formation of local improvement districts.

2.02 Notice of Appeal

(a) An appeal to the Hearing Examiner is initiated by filing a Notice of Appeal. The notice must be in writing and shall contain the following:

(1) A brief statement showing how the appellant is aggrieved or adversely affected.

(2) A statement of the grounds for the appeal, explaining why the appellant believes the administrative decision is wrong.

(3) The requested relief, such as reversal or modification of the decision.

(4) The signature, mailing address, e-mail address, and telephone number of the appellant and any representative of the appellant.

(b) Proceedings before the Examiner in certain special types of cases involving identified parties are initiated by other means. These include approval of local improvement assessments, forfeitures, discrimination cases, and ethics violations, discussed in Section Four.

2.03 Filing Fee

(a) The Notice of Appeal shall be accompanied by any filing fee required by law. Filing of the appeal shall not be complete until both the Notice of Appeal and any required filing fee have been received. For an appeal to be timely, filing must be complete before the appeal period has run.

(b) As authorized by law, indigence may support a waiver of the filing fee.