

CITY OF TUMWATER
OFFICE OF THE HEARING EXAMINER

RULES OF PROCEDURE
FOR HEARINGS

Adopted March 29, 2019

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INTRODUCTION

These Rules of Procedure are established pursuant to the Tumwater Municipal Code (TMC), Chapter 2.58, to help secure the fair and efficient conduct of matters subject to the City's administrative "Hearing Examiner" 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 ("Examiner") has jurisdiction over a variety of matters identified in Chapter 2.58 TMC, and other areas of the municipal code. From the standpoint of procedure, these matters fall into two major categories:

1. Application Hearings; and
2. Administrative Appeals.

Application Hearings are held as a means for assembling information, including public testimony, to be used as the basis for making a decision on an application.

Administrative Appeals are proceedings that seek to overturn or change a decision the City already has made.

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

Appeal hearings, by contrast, involve 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 such hearings. Public testimony, however, is not taken.

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SECTION ONE

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 Examiner's powers shall include the authority to:

1. Administer oaths and affirmations;
2. Issue prehearing orders;
3. Rule on all procedural matters, objections and motions;
4. Admit and exclude evidence;
5. Limit testimony, by time or subject;
6. Question witnesses and request additional information;
7. Hold prehearing conferences, when necessary;
8. Regulate the course of hearings and the conduct of participants; and
9. 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.

1. 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.
2. 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.
3. 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 or motion 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 or other quasi-judicial officer can be disqualified.

1. 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.

2. 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 nor Sunday, nor a legal holiday. Legal holidays are described in RCW 1.16.050. Lack of observance of time periods for filing and service of documents as set forth in these rules will operate against the party that failed to observe the same.

1.05 Filing and Service of Documents

1. All written submissions, exhibits, or other forms of evidence submitted in advance of a hearing shall be filed with the City Clerk at: 555 Israel Road SW, Tumwater, WA 98501. Filing shall be complete only upon receipt from the City Clerk. Facsimile submissions are prohibited.

2. Documents required to be served on other participants may be delivered personally; sent by mail; or sent by email with consent of all involved parties. In the case of mail, service shall be deemed complete upon deposit and indication of mailing (such as through proof of

receipt). In the case of email, a reply email confirming receipt shall satisfy this requirement so long as all involved parties have agreed to email receipt of documents.

3. 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 the court. Such decisions, recommendations or appeals shall be served on the parties themselves.

1.06 Official File

All written submissions shall be maintained in the official file, to be maintained by the City Clerk. 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

1. Multiple appeals of the same administrative decision and multiple appeals concerning different aspects of a single project shall be consolidated for hearing. Except where a Determination of Significance (DNS) was issued, review of compliance with the State Environmental Policy Act (SEPA) shall be consolidated with any decision on the underlying application.
2. 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.
3. A consolidated matter may involve both an application hearing and an appeal hearing. 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

1. In 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) who are granted intervention status.
2. In application 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.

1.09 Motions

For an appeal hearing, 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.

1. Written motions shall be filed in accordance with the Examiner's prehearing order, and copies thereof shall be served on other known participants according to Rule 1.05. Such motions shall state the reason(s) for the request and specify the relief sought.
2. Parties of record shall have an opportunity to respond to written motions no later than five calendar days after receipt.

1.10 Hearing Date/Continuance

Hearings shall normally be held at the time and place specified in the notice or prehearing order. 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

1. Evidence, including hearsay evidence, is 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.
2. The Examiner may exclude evidence that is irrelevant, unreliable, immaterial, or unduly repetitious.
3. The Examiner shall exclude evidence that is privileged or excludable on constitutional or statutory grounds.
4. 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

1. Documents, photographs, drawings and physical evidence may be offered as exhibits and each will be assigned an exhibit number. Exhibits admitted into the record will be retained, by the City, until

after a decision is rendered and all appeal proceedings, if any have been concluded.

2. The Staff Report, if any, and all documents associated with the Staff Report shall be admitted.
3. Documentary evidence may be offered in the form of copies or excerpts.
4. 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.

1.13 Testimony

1. All oral testimony shall be taken under oath or affirmation.
2. 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.

1.14 Continuation or Reopening Hearing/Leaving Record Open

1. 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. If the Examiner specifies the date for continuance at the initial hearing, or through a post-hearing order provided to all parties, no further notice is required.
2. 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 at an application or appeal hearing. When this occurs, the record closes when the Examiner receives such information from the Clerk.
3. 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. The purpose of a site visit is to assist the Examiner in understanding the evidence presented at the hearing. The observations made by the Examiner at such an inspection are not evidence.

1.16 Criteria for Decision

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

1.17 Clarification

Clerical mistakes in decisions, orders, or recommendations and errors therein arising from oversight or omission may be corrected by the Examiner at any time or on the motion of a party of record.

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.

SECTION TWO

RULES FOR APPEAL HEARINGS

2.01 Matters Subject to Appeal Hearings

Appeal hearings shall be held on all matters within the jurisdiction of the Hearing Examiner as set forth in Chapters 2.58 and 14.08 TMC, or other sections of the municipal code.

2.02 Notice of Appeal

An appeal to the Hearing Examiner is generally initiated by filing a Notice of Appeal with the City Clerk, or as otherwise dictated by the municipal code. Unless otherwise provided by the municipal code, 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. A specific reference to state law (by RCW cite), City code (by TMC cite), and/or policy document, that supports the grounds for appeal.
4. The requested relief, such as reversal or modification of the decision.
5. The signature, mailing address and telephone number of the appellant and any representative of the appellant.

2.03 Filing Fee

1. The Notice of Appeal shall be accompanied by any filing fee required by City resolution or other provision of the municipal code. 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 expired.
2. As authorized by law, indigence may support a waiver of the filing fee.

2.04 Who May Appeal

Any person aggrieved by a decision may file a Notice of Appeal. A person is aggrieved when the person's interests are among those required to be considered in rendering the decision. The term "person" includes individuals and collective entities, such as associations or corporations.

2.05 Amendment of Notice of Appeal

1. If the Notice of Appeal is unclear or does not sufficiently explain the basis for the appeal as set forth in Rule 2.02, the Examiner may require that the appellant clarify the appeal to correct the deficiency. In addition, the Examiner may request that an opening brief be submitted by the appellant.
2. After the initial filing, a Notice of Appeal may be amended to add new grounds, so long as the opportunity of other parties for a fair hearing is not prejudiced by the amendment.

2.06 Parties to an Appeal

The parties to an appeal are the appellant(s), the City, the applicant(s) if different from the appellant(s), and any intervenor(s) granted intervenor status. All parties, including the City, may be represented by counsel.

2.07 Intervention

The Examiner may permit an individual or entity who has not filed a timely appeal to intervene, either as an appellant or as a respondent. In ruling on an intervention request the Examiner shall ensure that the intervention will not interfere with the orderly and prompt conduct of the proceedings or otherwise prejudice the rights of any of the original parties. Conditions may be imposed upon the intervenor's participation, including precluding the intervenor from expanding the issues in the appeal.

2.08 Representative of Party

1. An individual may represent himself or herself, or may be represented by counsel. This rule shall not prevent an individual from using a non-lawyer as a translator, so long as the only service performed is translation.
2. Where the party is other than an individual, a representative shall be designated. This person shall speak on behalf of the party. The

representative shall speak for and otherwise exercise the rights of the party. Any authorized person may serve as a representative for an association, corporation or other collective entity.

2.09 Dismissal Prior to Hearing

An appeal may be dismissed upon motion prior to hearing if:

1. The appeal was not timely filed;
2. The appeal is based on grounds or seeks relief outside the authority of the Examiner;
3. The appellant lacks authority or grounds to bring the appeal (see Rule 2.04);
4. The appeal is without merit on its face, patently frivolous, or brought merely for purposes of delay; or
5. The Notice of Appeal fails to sufficiently explain the basis for the appeal.

2.10 Default/ Withdrawal of Appeal/Withdrawal of Decision

1. If an appellant fails to appear at a scheduled hearing, an order shall be entered dismissing the appeal for default. A default order shall be final unless, within seven days of service, good cause to vacate the order is shown by the party against whom it was entered.
2. An appellant may request withdrawal of the appeal. Such a request shall be granted if made before the appellant has completed presentation of his or her case. Thereafter, the granting of the request is discretionary.
3. When the decision or action being appealed is withdrawn by the City, the appeal shall be dismissed as moot and the appellant(s) shall be entitled to return of any filing fee paid.

2.11 Prehearing Conference or Prehearing Order

1. When it will assist the orderly and efficient disposition of the appeal, the Examiner may schedule and hold a prehearing conference or issue a prehearing order. A prehearing conference or prehearing order may, among other things, address:
 1. Settlement of the appeal;
 2. Simplification, definition or limitation of issues;
 3. The possibility of obtaining stipulations relating to undisputed facts, the admission of documents or other matters which will avoid unnecessary proof;

4. Identification of witnesses and documentary or other evidence to be presented at hearing;
 5. The conduct of reasonable discovery prior to hearing;
 6. The need for briefing on legal issues and the timing for submission of such briefs; and
 7. Other procedural matters.
2. Prehearing conferences may be held by telephone conference call.
 3. Based on the discussion and agreements at the prehearing conference, the Examiner shall issue a subsequent prehearing order which shall govern subsequent proceedings. If the case is settled at such a conference, the Examiner shall enter an order reciting the terms of the settlement and dismissing the appeal.

2.12 Informal Settlement

Nothing in these rules shall be construed to limit the right of any party to attempt informal settlement of an appeal at any time.

2.13 Limited Public Participation

Unless specifically required by law to be closed, appeal hearings are open to the public. However, testimony or other evidence is generally not allowed from individuals or entities that are not parties, unless they are called as witnesses by a party or by the Examiner. Appellants have the right to organize their appeals as they see fit, including the selection of the witnesses they wish to present.

2.14 Format of Hearing

The appeal hearing will be informal in nature, but organized so that testimony and other evidence can be presented efficiently. An appeal hearing shall generally include the following:

1. An introductory outline of the procedure by the Examiner;
2. Any preliminary matters;
3. Opportunity for opening statements;
4. Presentation of the appeal by the appellant(s), including any witnesses;
5. Opportunity for cross-examination of appellant(s) and witnesses;
6. Presentation of the City, including any witnesses;
7. Opportunity for cross-examination of City staff and witnesses;
8. Presentation by the other respondent(s), including any witnesses.
9. Opportunity for cross-examination of respondent(s) and witnesses;

10. Questions by the Examiner;
11. Rebuttal evidence if any; and
12. Closing arguments.

The Examiner may change the order of presentation at his or her discretion.

2.15 Burden of Proof

Unless otherwise provided by law, the appellant(s) have the burden to establish that the matter fails to conform with applicable legal standards and the administrative decision should be reversed.

2.16 Expert Testimony

In general, expert opinion prepared for a specific case shall be received only from witnesses appearing in person and available for cross examination. Unless the parties otherwise agree, affidavits, declarations or letters containing such opinion shall be excluded.

2.17 Hearing on Written Submissions

When the parties so agree, an appeal may be submitted entirely on written submissions. If this option is selected, the Examiner shall establish a schedule for initial and responsive submissions. The record shall close when this schedule is completed.

2.18 Hearing Examiner's Decision

The Examiner's decision may affirm, modify, remand or reverse the administrative decision(s) being reviewed. When an administrative decision is modified, the Examiner may attach reasonable conditions found necessary to make the action consistent with applicable approval criteria.

The Examiner shall strive to produce all decisions within ten (10) working days of the record closing. The date the decision is "issued," however, for purposes of the Land Use Petition Act, shall be three (3) days after the City mails the decision or provides notice that the Examiner's decision is publicly available, as dictated by RCW 36.70C.040.

2.19 Reconsideration

Any party feeling that the decision of the Examiner is based on errors of procedure, fact or law may make a written request for reconsideration pursuant to TMC 2.58.135. This request shall set forth the alleged errors,

and the Examiner may, after review of the record, take such further action as is deemed appropriate, which may include the issuance of a revised decision.

2.20 Further Review

The Examiner's decision after an appeal hearing is the final decision of the City and further review must be sought pursuant to TMC 2.58.150.

Pursuant to TMC 2.58.180, any court action to challenge the decision of the Examiner shall be commenced within 21 days of the date the decision of the Examiner was transmitted to the parties, unless otherwise provided by statute.

2.21 Content of Record

The record of an appeal hearing conducted by the Examiner shall include at least the following:

1. All Notices of Appeal and any amendments;
2. The Staff Report, if any, and all accompanying documents;
3. All pleadings, briefs and memoranda of the parties;
4. All documentary or physical evidence admitted;
5. The electronic recording of the proceedings; and
6. The Hearing Examiner's findings, conclusion and decision(s), together with any other rulings made in the matter.

Any person who desires a copy of the electronic recordings of the proceedings must pay the cost of reproducing the tapes. If a person desires a written transcript from the electronic recording, he or she shall arrange for transcription and pay the cost thereof.

Section 3

RULES FOR APPLICATION HEARINGS

3.01 Matters Subject to Application Hearings

The Examiner shall hold Application Hearings on matters indicated pursuant to TMC 14.08.030, and as otherwise indicated in the municipal code.

3.02 Public Participation

At application hearings members of the public are invited to express their views and to offer factual testimony and exhibits. Public testimony may be presented orally, in writing, or both. Written public testimony may be submitted either in advance or at the hearing. The Examiner shall have the discretion to provide an opportunity for written responses by other participants.

3.03 Parties of Record

The initial parties of record are the applicant(s) and the City. Anyone who participates in the hearing by oral testimony or written submission shall by such action become a party of record.

3.04 Interested Persons

Interested persons are those individuals or organizations indicating a desire to be informed of the result of the hearing by signing an attendance sheet at the hearing or otherwise requesting notice, but who do not give testimony.

3.05 Staff Report

At least seven days prior to the application hearing, the City Clerk shall submit the City's Staff Report to the Examiner. The Report shall coordinate and assemble the comments and recommendations of other City departments, other governmental agencies and utility providers having an interest in the matter and shall summarize the factors involved and make a recommendation (if any) for approval, approval with conditions, or denial.

The City's Staff Report on a land use application should include the following, if relevant to the application:

- a. A list of the names and addresses of the owner and applicant of the subject property and his/her property interest in the property that is the subject of the hearing.
- b. A brief summary of the requested action and the citation of the ordinance controlling the request.
- c. A common description of the subject property and a reference to the legal description of the subject property.
- d. A summary of the Comprehensive Plan designation and zoning designation of the subject property; the current development of the subject property and the adjoining properties; topographical information; geological and soils information; information on the vegetation on the property; and any other relevant scientific, environmental or engineering information.
- e. A history of the requested action and a history and vicinity map of the development in the surrounding properties.
- f. A summary of the reports or recommendations of any other agencies consulted.
- g. Appropriate maps of the subject property.
- h. The result of the determination pursuant to the State Environmental Policy Act.
- i. Staff's recommendations (if any).

3.06 Format of Hearing

The application hearing shall be informal in nature, but organized so that testimony and evidence can be presented efficiently. The hearing shall include at least the following elements:

1. An introductory outline of the procedure by the Examiner.
2. Presentation by the appropriate City department summarizing the Staff Report and providing any additional exhibits or testimony the staff believes should be brought to the Examiner's attention.

3. Testimony by the applicant(s) or petitioner(s) and their witnesses.
4. Testimony from the public, including any questions for staff, the applicant(s) or witnesses for the staff or applicant(s). Any public participant may make all or part of his or her presentation through witnesses.
5. Questions by the Examiner.
6. Rebuttal testimony (if any).
7. Closing statements by applicant(s) or petitioner(s) and staff.

3.07 Testimony for Organizations

Whenever the view of any formal or informal organization are to be presented, the organization shall designate a representative with authority to coordinate the presentation and to speak for the group. Any communications with the organization by the Examiner or any party of record shall be through the designated representative.

3.08 Burden of Proof

The burden of proof shall be on the applicant or petitioner to establish that the request is consistent with applicable legal standards.

3.09 Hearing Examiner's Decision

1. The Examiner's decision shall be in writing and shall contain findings of fact and conclusions of law supporting the result reached. A copy thereof shall be provided to each party of record.
2. The Examiner's decision may approve the application or petition with or without conditions, remand the matter to the City for further investigation, or deny the proposal.
3. The Examiner shall strive to produce all decisions within ten (10) working days of the record closing. The date the decision is "issued," however, for purposes of the Land Use Petition Act, shall be three (3) days after the City mails the decision or provides notice that the Examiner's decision is publicly available, as dictated by RCW 36.70C.040.

3.10 Reconsideration

Any aggrieved individual or entity having standing under the ordinance governing the matter or as otherwise provided by law may file a written request for reconsideration pursuant to TMC 2.58.135. The request shall set forth the alleged errors of procedure, fact or law, and the Examiner may, after review of the record, take such further action as is deemed appropriate, which may include the issuance of a revised recommendation.

3.11 Appeal of Examiner's Decision

Appeal of the Examiner's decision is governed by TMC 2.58.150 et seq. Only those persons having standing under the ordinance governing the application, or as otherwise provided by law, may appeal the Examiner's decision to the Superior Court. Such appeals are heard on the record made before the Examiner.

3.12 Content of the Record

The record of an application hearing shall include at least the following:

1. The application or petition;
2. The Staff Report and any attachments;
3. All documentary and physical evidence received and admitted;
4. All pleadings, briefs, or memoranda submitted by a party of record;
5. The electronic recording of the proceedings; and
6. The Examiner's findings and conclusions and the decision made, together with any other rulings made in the matter.

Any person who desires a copy of the electronic recording must pay the cost of reproducing the tapes. If a person desires a written transcript of the electronic recording, he or she shall arrange for transcription and pay the cost thereof.