

# **CITY OF TACOMA**

## **OFFICE OF THE HEARING EXAMINER**

# **RULES OF PROCEDURE FOR HEARINGS**



**RESOLUTION NO. 39843, Adopted October 17, 2017**

### **Hearing Examiner's Office**

Tacoma Municipal Building  
747 Market Street, Room 720  
Tacoma WA 98402-3768

**Telephone: (253) 591-5195 Facsimile: (253) 591-2003**  
**[hearing.examiner@cityoftacoma.org](mailto:hearing.examiner@cityoftacoma.org)**

## 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.

## TABLE OF CONTENTS

### **Section 1 - Generally Applicable Rules**

<b>1.01</b>	Powers of Hearing Examiner	7
<b>1.02</b>	Ex Parte Communications	7
<b>1.03</b>	Disqualification of Hearing Examiner	8
<b>1.04</b>	Computation of Time	8
<b>1.05</b>	Filing and Service of Documents	8
<b>1.06</b>	Official File	9
<b>1.07</b>	Consolidation	9
<b>1.08</b>	Parties of Record	9
<b>1.08.5</b>	Subpoenas (New Section)	9
<b>1.09</b>	Motions	10
<b>1.10</b>	Hearing Date/Continuance	10
<b>1.11</b>	Evidence	10
<b>1.12</b>	Exhibits	11
<b>1.13</b>	Testimony	11
<b>1.14</b>	Continuation or Reopening Hearing/ Leaving Record Open	11
<b>1.15</b>	Site Visits	12
<b>1.16</b>	Criteria for Decision	12
<b>1.17</b>	Termination of Jurisdiction	12
<b>1.18</b>	Recording	12
<b>1.19</b>	Default/Failure to Communicate-Prosecute	13

## **Section 2 - Rules for Appeal Hearings**

<b>2.01</b>	Matters Subject to Appeal Hearings	14
<b>2.02</b>	Notice of Appeal	14
<b>2.03</b>	Filing Fee	14
<b>2.04</b>	Who May Appeal (Standing)	15
<b>2.05</b>	Clarification or Amendment of Notice of Appeal	15
<b>2.06</b>	Removal to Court	15
<b>2.07</b>	Parties to the Appeal	15
<b>2.08</b>	Intervention	15
<b>2.09</b>	Representative of Party	16
<b>2.10</b>	Dismissal Prior to Hearing	16
<b>2.11</b>	Default/Withdrawal of Appeal/Withdrawal of Decision	16
<b>2.12</b>	Prehearing Conference	17
<b>2.13</b>	Informal Settlement	17
<b>2.14</b>	Limited Public Participation	17
<b>2.15</b>	Format of Hearing	18
<b>2.16</b>	Burden of Proof	18
<b>2.17</b>	Expert Testimony	19
<b>2.18</b>	Hearing on Written Submissions	19
<b>2.19</b>	Hearing Examiner's Decision	19
<b>2.20</b>	Reconsideration	19
<b>2.21</b>	Further Review	19
<b>2.22</b>	Content of Record	20

**Section 3 - Rules for Pre-Decision Hearings**

<b>3.01</b>	Matters Subject to Pre-Decision Hearings	21
<b>3.02</b>	Public Participation	21
<b>3.03</b>	Parties of Record	21
<b>3.04</b>	Interested Persons	22
<b>3.05</b>	Staff Report	22
<b>3.06</b>	Format of Hearing	22
<b>3.07</b>	Testimony for Organizations	22
<b>3.08</b>	Burden of Proof	23
<b>3.09</b>	Hearing Examiner’s Recommendation or Decision	23
<b>3.10</b>	Reconsideration	23
<b>3.11</b>	Appeal of Examiner’s Recommendation or Decision	23
<b>3.12</b>	Content of the Record	24

**Section 4 - Rules for Specific Case Categories**

<b>4.01</b>	Local Improvement District Formation	25
<b>4.02</b>	Approval of Local Improvement District Assessments	25
<b>4.03</b>	Forfeiture Cases	25
<b>4.04</b>	Discrimination Cases	26
<b>4.05</b>	Ethics Violations	26
<b>4.06</b>	Whistleblower Cases	27

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<sup>1</sup>**

(a) All submissions made in advance of hearing, or otherwise required, shall be filed with the Hearing Examiner's Office, Tacoma Municipal Building, 747 Market Street, Room 720. Filing shall be complete only upon receipt and confirmation from the Hearing Examiner's Office. Filings may be made by hard copy or by electronic scan, and service thereof made by personal delivery, facsimile transmission, mail, or e-mail; however, in the case of e-mail to the Hearing Examiner's Office, parties must request and receive confirmation of receipt of the filing from the Hearing Examiner's Office in order to be timely. E-mail filings must be sent to [hearing.examiner@cityoftacoma.org](mailto:hearing.examiner@cityoftacoma.org). In some

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<sup>1</sup> This rule does not apply to initial filings of appeals which are governed separately.



instances electronic document may be too large to be filed by e-mail. When that is the case, parties will have to make alternative arrangements to file by another method.

(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 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, unless the Hearing Examiner orders a different time period for submissions, 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, unless the Hearing Examiner orders a different time period for responding.

### **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. 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.

## **2.04 Who May Appeal (Standing)**

(a) Any person aggrieved or adversely affected by a decision may file a Notice of Appeal. A person is aggrieved or adversely affected when: (1) the decision has prejudiced or is likely to prejudice that person; (2) the person's interests are among those required to be considered in rendering the decision; and (3) a determination in favor of the person would substantially eliminate or redress the prejudice. The term "person" includes individuals and collective entities, such as associations or corporations.

## **2.05 Clarification or Amendment of Notice of Appeal**

(a) If the Notice of Appeal is unclear or does not sufficiently explain the basis for the appeal, the Examiner may require that the appellant clarify the appeal to correct the deficiency.

(b) 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 Removal to Court**

Where authorized by statute, a case before the Hearing Examiner may be removed to a court of competent jurisdiction. (*See* Rules 4.03[b] and 4.04[b] below.)

## **2.07 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). The City and all parties resisting the appeal shall be designated as respondents. All parties, including the City, may be represented by counsel.

## **2.08 Intervention**

Upon a showing of a significant interest not otherwise adequately represented, 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.



## **2.09 Representative of Party**

(a) An individual may represent himself or herself. Except in special cases under Section Four of these rules, an individual may be represented by any agent who is fully informed in the matter. In special cases under Section Four of these rules, an individual, if represented by another, may only be represented by legal counsel. The foregoing notwithstanding, in ethics cases, City employees who are represented by a Union may have the Union serve as the employee's representative. This rule shall not prevent an individual from using a non-lawyer as a translator, so long as the only service performed is translation.

(b) Where the party is other than an individual, a representative shall be designated. 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.

## **2.10 Dismissal Prior to Hearing**

An appeal may be dismissed prior to hearing if the Examiner determines that:

- (a) The appeal was not timely filed;
- (b) The appeal is based on grounds or seeks relief outside the authority of the Examiner;
- (c) The appellant lacks standing to bring the appeal (*See* Rule 2.04); or
- (d) The appeal is without merit on its face, patently frivolous, or brought merely for purposes of delay.

## **2.11 Default/ Withdrawal of Appeal/Withdrawal of Decision**

(a) If an appellant fails to appear at a regularly scheduled prehearing conference or 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.

(b) 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.

(c) 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.

## **2.12 Prehearing Conference**

(a) When it will assist the orderly and efficient disposition of the appeal, the Examiner may schedule and hold a prehearing conference. A prehearing conference may, among other things, consider:

- (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; and/or
- (6) Scheduling, Motions and other procedural matters.

(b) Prehearing conferences may be held in person or by telephone conference call.

(c) Based on the discussion and agreements at the prehearing conference, the Examiner shall issue a 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.

## **2.13 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.

## **2.14 Limited Public Participation**

Unless specifically required by law to be closed, appeal hearings are open to attendance by 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, subject to limitation by general application of the Rules of Evidence.

## **2.15 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 include at least the following:

- (a) An introductory outline of the procedure by the Examiner;
- (b) Any preliminary matters;
- (c) Opportunity for opening statements;
- (d) Presentation of the appellant(s), including any witnesses;
- (e) Opportunity for cross-examination of appellant(s) and witnesses;
- (f) Presentation of the City, including any witnesses;
- (g) Opportunity for cross-examination of City staff and witnesses;
- (h) Presentation by the other respondent(s), including any witnesses;
- (i) Opportunity for cross-examination of respondent(s) and witnesses;
- (j) Questions by the Examiner;
- (k) Rebuttal evidence, if any; and
- (l) Closing arguments;

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

## **2.16 Burden of Proof**

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

## **2.17 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.

## **2.18 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.

## **2.19 Hearing Examiner's Decision**

(a) The Examiner shall issue a decision and provide a copy thereof to each party, either electronically or in writing.

(b) 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.

## **2.20 Reconsideration**

(a) 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 within 14 calendar days of the issuance of the Examiner's decision. 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.

(b) When a permitted request for reconsideration is timely filed, the time for seeking further review of the decision shall not commence until the date the Examiner's ruling on the request for reconsideration was transmitted to the parties.

## **2.21 Further Review**

Except as noted immediately below, the Examiner's decision after an appeal hearing is the final decision of the City. Further review typically must be sought in court. Request for review by a court may be brought by any party to the appeal below.

- (a) Appeals of determinations as specified in TMC 1.23.050.B.18, 19 and 21 shall be made to the Tacoma Municipal Court.
- (b) Appeals of decisions relating to shoreline permits shall be made to the State Shorelines Hearings Board, pursuant to the provisions of Chapter 90.58 RCW.
- (c) Requests for review of other decisions shall be addressed to the Superior Court for the state of Washington.
- (d) Any petition for judicial review shall be filed with the court and served on all parties of record. For purposes of this rule, service on representatives may not necessarily constitute service on parties.
- (e) 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.

## **2.22 Content of Record**

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

- (a) All Notices of Appeal and any amendments;
- (b) The Staff Report and all accompanying documents;
- (c) All pleadings, briefs and memoranda of the parties;
- (d) All documentary or physical evidence admitted;
- (e) The electronic recording of the proceedings; and
- (f) 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 audio recording. If a person desires a written transcript, he or she shall arrange for transcription and pay the cost thereof.

## Section 3

## **RULES FOR PRE-DECISION HEARINGS**

### **3.01 Matters Subject to Pre-Decision Hearings**

Pre-decision hearings are held on the following matters:

- (a) Applications for rezoning of property,
- (b) Formation of Local Improvement Districts,
- (c) Approval of Local Improvement District assessments,
- (d) Dangerous sidewalk proceedings,
- (e) Petitions for street and alley vacations,
- (f) Appeals of administrative determinations of the City Council, and
- (g) Appeals of a decision of the City Council to remove a member of a City board, commission, committee, task force, or other multi-member body from office.

In all of these matters the Examiner makes a recommendation to the City Council and the Council makes the final decision. Although hearings on preliminary plats are conducted similarly to other pre-decision hearings in that public testimony is taken, the Examiner's decision on a request for preliminary plat approval is the final decision of the City.

### **3.02 Public Participation**

At pre-decision 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 hearing, the responsible City Department shall forward its 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 for approval, approval with conditions, or denial.

### **3.06 Format of Hearing**

The pre-decision 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:

- (a) An introductory outline of the procedure by the Examiner;
- (b) Presentation by the City summarizing the Staff Report and providing any additional exhibits or testimony the staff believes should be brought to the Examiner's attention;
- (c) Testimony by the applicant(s) or petitioner(s) and their witnesses;
- (d) 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;
- (e) Questions by the Examiner;
- (f) Rebuttal testimony (if any); and
- (g) Closing statements by applicant(s) or petitioner(s) and staff.

### **3.07 Testimony for Organizations**

Whenever the view of any formal or informal organization is 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 by a preponderance of the evidence that the request is consistent with applicable legal standards.

### **3.09 Hearing Examiner's Recommendation or Decision**

(a) The Examiner's recommendation or decision shall be in writing and shall contain findings of fact and conclusions of law supporting the recommendation or decision. A copy thereof shall be provided to each party of record either electronically or in writing.

(b) The Examiner's recommendation or decision may recommend approving the application or petition with or without conditions, recommend remanding the matter to the City for further process or investigation, or recommend denying the proposal.

### **3.10 Reconsideration**

(a) 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 within 14 calendar days of the issuance of the Examiner's recommendation. 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.

(b) When a permitted request for reconsideration is filed, the time for appealing to the City Council shall not commence until the date the Examiner's ruling on the request was transmitted to the parties of record.

### **3.11 Appeal of Examiner's Recommendation or Decision**

Appeal of those matters in which the Examiner enters a recommendation to the City Council shall be made to the City Council within 14 calendar days after the Examiner's recommendation is transmitted to the parties of record and in the manner set forth in TMC, Chapter 1.70. Only those persons having standing under the ordinance governing the application, or as otherwise provided by law, may appeal the Examiner's recommendation to the City Council. Such appeals are heard on the record made before the Examiner.

### **3.12 Content of the Record**

The record of a pre-decision hearing shall include at least the following:



- (a) The application or petition;
- (b) The Staff Report and any attachments;
- (c) All documentary and physical evidence received and admitted;
- (d) All pleadings, briefs, or memoranda submitted by a party of record;
- (e) The electronic recording of the proceedings; and
- (f) The Examiner's findings and conclusions and the recommendation or 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 audio recording. If a person desires a written transcript, he or she shall arrange for transcription and pay the cost thereof.

## Section 4

### **RULES FOR SPECIAL CASES**

#### **4.01 Formation of Local Improvement Districts**

The formation of Local Improvement Districts shall be the subject of a quasi-legislative hearing at which public testimony will be taken. Based on the evidence presented, the Examiner shall determine whether the District should be formed in accordance with the requirements set forth in RCW Chapter 35.43, *TMC* Chapter 10.04, and adopted City policies.

#### **4.02 Approval of Local Improvement Assessments**

A hearing will be held at which persons with standing may contest the proposed assessment roll presented by the Department of Public Works or the Department of Public Utilities. The assessment roll, as presented, shall be presumed to be legally correct. A party contesting a proposed assessment shall have the burden of establishing, by a preponderance of the evidence, that the method of assessment was founded on a “fundamentally wrong basis” and does not properly reflect the special benefits resulting from the improvements constructed.

#### **4.03 Forfeiture Cases**

- (a) Forfeiture cases involve review of the seizure of money or personal property pursuant to the Uniform Controlled Substances Act (UCSA), Chapter 69.50 RCW. An adjudicative proceeding is commenced by a notice in writing from a person claiming ownership or right of possession.
- (b) Any person asserting a claim or right under the UCSA may remove the matter to a court of competent jurisdiction by following the procedures of RCW 69.50.505(5).
- (c) In a forfeiture hearing, the City has the burden of showing by a preponderance of the evidence that a substantial connection exists between the money or property seized and activities prohibited by the UCSA.
- (d) If challenged, the claimant must establish standing to make a claim before the City is put to its burden of proof.
- (e) Hearing procedures will conform with the requirements of State Administrative Procedure Act (APA), Chapter 34.05 RCW. To the extent that any of the foregoing rules conflict with the APA, the APA shall govern.

(f) The Hearing Examiner shall enter a written decision declaring the forfeiture of seized property or ordering its return to the claimant. The Examiner shall have the authority to award costs as appropriate.

#### **4.04 Discrimination Cases**

(a) Discrimination cases involve the review of claims of unlawful discriminatory practices under the Human Rights Commission (Commission) provisions of the City code, *TMC*, Chapter 1.29. Complaints are referred to the Commission for a determination of whether sufficient evidence exists to support a reasonable cause finding that an unlawful discriminatory act has occurred or is occurring. If a reasonable cause finding is made and conciliation efforts fail, an adjudicatory proceeding is commenced by a reference for hearing by the Commission.

(b) In a housing discrimination case, any party may elect to have the claim of discrimination decided in a civil action in Pierce County Superior Court, in lieu of an administrative proceeding.

(c) Before the Hearing Examiner, the case in support of the reasonable cause finding shall be presented by the City Attorney's office. The person complained against (respondent) shall have the right to file an answer to the charge, to submit written and oral testimony and to examine and cross examine witnesses. The charging party may also submit witnesses and exhibits in support of is or her position and otherwise be fully heard.

(d) In a discrimination hearing, there are shifting burdens of proof which are governed by applicable case law.

(e) Hearing procedures will conform with the requirements of the APA. To the extent these rules conflict with the APA, the APA shall govern.

(f) The Hearing Examiner shall enter a written decision. If the Examiner finds that the respondent has engaged or is engaging in an unlawful discriminatory practice, the Examiner shall issue an order requiring the respondent to cease and desist and to take such action as is necessary to effectuate the purposes of *TMC*, Chapter 1.29. An order to take action shall be required to be performed within 30 days of notice of the entry of the order. Other sanctions may include: damages, injunctive relief and civil penalties. Further review shall be governed by *TMC* 1.29.150.

#### **4.05 Ethics Violations**

(a) Ethics violation cases involve review of asserted violations of the Code of Ethics set forth in *TMC*, Chapter 1.46. The City Manager or the Director of Public Utilities shall refer reported violations to a designated investigator for an initial threshold determination

as to whether a violation has occurred. The designated investigator shall conduct an investigation of a complaint involving any City officer or employee (other than a Covered Official, as defined in *TMC* 1.46.020), shall complete the investigation and prepare written findings and conclusions, and shall recommended a disposition within 60 days of the date the complaint was received by the City, unless an extension is granted in writing by either the City Manager or the Director of Public Utilities. A copy of the investigator's written findings, conclusions, and recommended disposition shall be provided to the City Manager or the Director of Public Utilities, as appropriate. Thereafter, within five business days of receipt of the investigator's written findings, conclusions, and recommended disposition, the City Manager or the Director of Public Utilities, as appropriate, shall cause to be prepared a written disposition of the complaint.

(b) The City officer or employee (other than a Covered Official) complained against may, within ten business days following the date of the disposition, finding a violation of this Code of Ethics, request in writing a formal hearing before the Hearing Examiner. In the event a formal hearing is requested, the Hearing Examiner shall conduct the hearing process in a manner consistent with the procedures set forth in Chapter 1.23 *TMC* and as such chapter may be hereinafter amended. If the person complained against is represented by a Union, the Union may serve as the employee's representative.

(c) The Hearing Examiner shall, based upon a preponderance of the evidence, make written findings and conclusions and enter a recommended determination and order, which may include civil penalties, discipline or removal from office and other sanctions as set forth in *TMC* 1.46.050. Further review shall be governed by the provisions of that section.

#### **4.06 Whistleblower Cases**

(a) Whistleblower cases involve the adjudication of claims by whistleblowers that they have been retaliated against for reporting improper governmental action. If a whistleblower's supervisor or other superior does not satisfactorily resolve a complaint about retaliation, the employee may commence a proceeding before the Hearing Examiner by filing a written notice with the Examiner specifying the alleged retaliatory action and the relief requested.

(b) The City Manager or the Director of Utilities, as appropriate, shall investigate the matter and respond in writing to the Hearing Examiner. After receiving a copy of this response, the employee may request a hearing before the Hearing Examiner to establish that a retaliatory action occurred and to obtain appropriate relief.

(c) Hearing procedures will conform with the requirements of the APA. To the extent these rules conflict with the APA, the APA shall govern.

(d) The employee must prove by a preponderance of the evidence that he or she suffered retaliation as a result of reporting improper governmental action. The Hearing Examiner shall make written findings and conclusions and enter a decision. The decision may

include such relief as is available to the prevailing party under state law and City ordinance. Review of a decision of the Hearing Examiner shall be sought in Superior Court.

(e) The detailed basis for whistleblower cases, including the time requirements for actions taken in such cases, is set forth in the document entitled: "Policy and Procedures for Reporting Improper Governmental Action and Protecting Employees Against Retaliation" issued by the City Manager and Director of Public Utilities in December 1992.