

## **RULES OF GENERAL APPLICATION**

### **RULES OF PROCEDURE FOR PROCEEDINGS BEFORE THE LAND USE HEARING EXAMINER OF THE CITY OF EVERETT, WASHINGTON**

Pursuant to Ordinance Number 692-80, as amended, the Land Use Hearing Examiner Ordinance of the City of Everett, Washington, the following constitutes the rules of procedure to be followed in all proceedings governed by the City of Everett Land Use Hearing Examiner.

#### **I. DEFINITIONS**

##### **1.1 Definitions**

"Administrative decision" means a decision issued by a departmental director of the City of Everett. It shall include all State Environmental Policy Act (SEPA) appeals.

"Appellant" means a person, organization, association, or other group who files a complete and timely appeal of an administrative decision of the City of Everett.

"Applicant" means those applying to the City of Everett for approval of land uses that conform to the City's land use ordinances.

"City" means the City of Everett, Washington.

"Code" means the City Code of Everett, Washington.

"Council" means the Everett City Council.

"Departmental Staff" means departments of the City of Everett, Washington.

"Examiner" means the Land Use Hearing Examiner of the City of Everett, Washington.

"Ex parte Communication" means written or oral communications not included in the public record and made outside the public hearing, but shall not include requests for status reports or additional factual information on any matter or proceeding covered by the ordinance.

"Interested Person" means any individual, partnership, corporation, association, or public or private organization of any character, significantly affected by or interested in proceedings before the Examiner and shall include any party in a contested case.

"Party of Record" means:

- a. a person who testifies at the hearing;
- b. the applicant, developer, or any of their agents who appear at the hearing;

- c. persons who submit written arguments dealing with the merits of the case to the Examiner which arguments are considered by the Examiner in rendering his or her decision or recommendation; provided, however, this does not include persons who have merely signed a petition and have not otherwise testified at the hearing or submitted written arguments; or
- d. the City.

All definitions of terms as set forth in Land Use Hearing Examiner Ordinance Number 692-80, as amended, of the City of Everett are hereby adopted as definitions of Rules of General Application.

## II. **EX PARTE COMMUNICATIONS**

### 2.1 Expeditious Proceedings

It is the policy of the Examiner that, to the extent practicable and consistent with requirements of law, public hearings shall be conducted expeditiously. In the conduct of all such proceedings the Examiner and all parties or their agents shall make every effort at each stage of a proceeding to avoid delay.

### 2.2 Ex Parte Communications

- a. No person, nor his or her agent, employee, or representative who is interested in a particular petition or application which is designated for an adjudicatory hearing, shall communicate ex parte, directly or indirectly, with the Examiner concerning the merits of that particular hearing or a factually related petition or application. This rule shall not prohibit ex parte communication concerning procedural matters.
- b. The Examiner shall not communicate ex parte directly or indirectly with any person, nor his or her agent, employee or representative, interested in a particular petition or application which is designated for an adjudicatory hearing, with regard to the merits of that particular hearing, or a factually related petition or application. This rule shall not prohibit ex parte communications concerning procedural matters, nor assistance to the Examiner in viewing the land or buildings involved in the hearings.
- c. If a substantial prohibited ex parte communication is made to or by the Examiner, such communication shall be publicly disclosed and proper discretion shall be exercised by the Examiner on whether to disqualify himself or herself as Examiner for that particular hearing.

### III. NATURE OF PROCEEDINGS

#### 3.1 Frequency

Hearings will normally be scheduled every week. Consistent with the requirements of expedition, hearings may be held on a more frequent basis.

- a. The time frames established in Ordinance Number 692-80, as amended, of the City of Everett shall apply for all hearings before the Examiner.

#### 3.2 Presiding Officials

- a. Hearings and administrative proceedings shall be presided over by a duly qualified Examiner.
- b. Should the Examiner be disqualified for any reason, a Pro Tem Hearing Examiner may be appointed pursuant to EMC 2.23.070.

#### 3.3 Interference

In the performance of his or her adjudicative functions, the Examiner shall not be responsible to, or subject to, the supervision or direction of any elected official, officer, employee, or agent of any municipal department of the City, other than those that are set forth in Ordinance Number 692-80, as amended, of the City of Everett.

#### 3.4 Format

The format for a public hearing will be of an informal nature yet designed in such a way that the evidence and facts relevant to a particular proceeding will become the most readily and efficiently available to the Examiner.

#### 3.5 Conduct of Hearings

The Examiner shall have all the authority and duties as granted to him or her by Ordinance Number 692-80, as amended. Included in the authority and duties that the Examiner shall have is to conduct fair and impartial hearings, take all necessary action to avoid delay in the disposition of proceedings, and to maintain order. He or she shall have all powers necessary to that end, including the following:

- a. to administer oaths and affirmations;
- b. to rule upon offers of proof and receive evidence;
- c. to regulate the course of the hearings and the conduct of the parties and their agents;
- d. to question any party presenting testimony at the hearings;
- e. to hold conferences for settlements, simplification of the issues, or any other proper purpose, including mediation;

- f. to consider and rule upon all procedural and other motions appropriate to the proceedings; and
- g. to make and file decisions, except in the case of rezones in which the Examiner shall make and file a recommendation.

3.6 View Trip

When necessary to a full understanding of the case, the Examiner may inspect the site prior or subsequent to the hearing. Failure to inspect the site will not render the Examiner's recommendation or decision void.

3.7 Record of Hearing

- a. Electronic Recordation. Hearings shall be electronically recorded and such recordings shall be a part of the official case record. Copies of the electronic recordings of a particular proceeding shall be made available to the public on request and the reasonable cost of such copying shall be paid by the requester.
- b. Copies of any written materials in the record may be obtained by any interested person, although that person shall be responsible for paying the cost of reproducing such material.

**IV. COMPUTATION OF TIME**

Computation of any period of time prescribed or allowed by these rules shall begin with the first day following that on which the act or event initiating such period of time shall have occurred. When the last day of the period so computed is a Saturday, Sunday or national or state holiday, the period shall run until the end of the next following business day.

**V. RIGHTS OF PARTICIPANTS**

5.1 Rights of Applicants

Each applicant shall have the right of due notice, due process, cross-examination (rebuttal), presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing. Where the Examiner finds that testimony would be repetitious or irrelevant to the matters before him or her, he or she may impose reasonable limitations on the number of witnesses heard and on the nature and length of their testimony. Cross-examination is permitted as necessary for a full disclosure of the facts.

5.2 Notice Requirements of Hearing and Filings

- a. All notice and time requirements and method of notification shall be governed by the standards as set forth in Ordinance Number 692-80, as amended.
- b. Affidavit of Notice. A notarized affidavit attesting to the written notice of a given public hearing shall be made a part of each official case record.

5.3 Presence of Legal Counsel at Public Hearings or Meetings

- a. All parties participating in the hearings will be allowed to be represented at the hearings by legal counsel or other representatives of their choice. Representation by legal counsel is not required at the hearings; provided, however, if any party of record is to be represented by legal counsel at the hearing, the party shall disclose the name of the attorney to the Examiner's office as soon as it is known but no later than (7) calendar days before the date of the hearing.
- b. At the request and discretion of the Examiner, a representative of the City Attorney's Office may be present at the public hearings or meetings to advise on matters of law and procedure.
- c. Except when a longer time frame is established per EMC 2.23.150, all forms of legal authority, including briefs, staff reports, and other legal memoranda upon which a party of record will be relying or presenting at the hearing, must be submitted to the Examiner's office at least (7) calendar days in advance of the scheduled hearing date. The above mentioned documents shall be available to the public (7) calendar days in advance of the scheduled hearing date.
- d. Any appeal of administrative decisions shall be combined with any appeal of environmental determinations that have been made pursuant to SEPA. These shall be heard at a single consolidated open record hearing consistent with Ordinance 2136-96.
- e. Notwithstanding Section 5.3.c, the filing of the appeal and submittal of legal arguments and the authority supporting them shall be consistent with Ordinance 2136-96, Section 6.

## **VI. CONDUCT OF HEARINGS**

### **6.1 Content of the Record**

The record of a hearing conducted by the Examiner may include, but not be limited to, the following materials:

- a. the application or petition;
- b. the departmental staff reports;
- c. all evidence received or considered, which may include all exhibits and other materials filed;
- d. a statement of all matters officially noticed;
- e. a decision or a recommendation containing the findings and conclusions of the Examiner;
- f. recordings made on electronic equipment; and
- g. an environmental determination made pursuant to the State Environmental Policy Act and the City of Everett's environmental ordinance.

The Examiner shall have discretion over the admission of evidence.

6.2 Development of Record

Unless otherwise ordered by the Examiner, a public hearing shall include, but not be limited to, the following elements: a brief introductory statement by the Examiner; a report by the departmental staff which shall include introduction of the official file; reference to visual aids (maps), and a summary of the recommendation of the Department; testimony by the applicant or petitioner; testimony in support of the application; testimony in opposition to the application; opportunity for cross-examination and rebuttal; and opportunity for questions by the Examiner of all witnesses.

6.3 Legal Counsel

Parties will be allowed to be represented by legal counsel at all stages of the hearings subject to Section 5.3 of these rules.

6.4 Content and Form of Staff Reports

- a. The names and addresses of the owner(s) and applicant(s) of the subject property.
- b. A brief summary of the requested action.
- c. When appropriate, a common description of the subject property and a legal description of the subject property.
- d. When appropriate, a technical data summary of the Comprehensive Plan designations and zoning designations of the subject property; the current developments of the subject property and the adjoining properties; topographical information; geological and soils information; and information relative to the vegetation on the property.
- e. When appropriate, the current access to the property and the proposed access to the subject property.
- f. When appropriate, an analysis of the proposed project and its potential effects on the following elements of the City:
  1. natural features;
  2. character and design, including population figures;
  3. human resources;
  4. housing;
  5. economic developments; socio-economic;
  6. transportation;
  7. community facilities, services, and institutions;

8. government jurisdiction boundaries;
  9. neighborhoods;
  10. data from Comprehensive Plans;
  11. land use regulations; and
  12. any other information deemed appropriate by City staff.
- g. When appropriate, a history of the requested action and a history of the development in the surrounding properties.
  - h. When appropriate, a summary of any other requested land use permits issued for the property and other properties in the area.
  - i. When appropriate, the compatibility and impact of the proposal on existing developments.
  - j. A summary of the reports or recommendations of any other agencies consulted.
  - k. Appropriate maps of the subject property.
  - l. When appropriate, the determination pursuant to the State Environmental Policy Act.
  - m. Departmental staff's conclusions and recommendations.
  - n. Summary of public input or reaction to the proposal.

#### 6.5 Evidence

- a. Burden of proof. In each particular proceeding, the petitioner, applicant, appellant, or the proponent of an individual petition or application shall have the burden of proof. In appeals of administrative decisions, including SEPA appeals, the burden of proof is upon the appellant.
- b. Admissibility. The hearings generally will not be conducted according to technical rules relating to evidence. Any relevant evidence shall be admitted if it is the type which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. The rules of privilege shall be effective to the extent recognized by law. The Examiner shall retain discretion of the admissibility of all evidence. Evidence submitted for all appeals shall be provided consistent with Ordinance 2136-96, Section 6.
- c. Copies. Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original.
- d. Official notice. The Examiner may take official notice of judicially cognizable facts and in addition may take notice of general, technical, or

scientific facts within his or her specialized knowledge. When any recommendation or decision of the Examiner rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such fact shall be granted any affected person making timely motion therefore. The Examiner shall not take notice of disputed adjudicative facts that are at the center of a particular proceeding.

- e. Evidence received subsequent to the hearing. If additional evidence is submitted after the public hearing, it will be considered only upon a showing of significant relevance and good cause for delay in its submission. All parties of record will be given notice of the consideration of such evidence and granted an opportunity to review such evidence and file rebuttal arguments. The evidence to support the appeal must be relevant to the written appeal statement. Other evidence will not be considered.
- f. All parties will be allowed opportunity to make a record of evidence admitted or denied during the course of the hearing. This record shall include offers of proof.

#### 6.6 Continuation of Hearing

- a. Cause. The Examiner may continue or re-open proceedings for any good cause he or she deems reasonable and appropriate, provided an order is entered prior to the filing of the recommendation or decision.
- b. Notification. If the Examiner determines at a hearing that there is good cause to continue such proceedings and specifies the date, time, and place, no further notice is required. When determination for future hearing is made following a hearing on a given matter, all parties of record shall be provided not less than (7) calendar days notice of the date, time, place, and nature of the subsequent hearing. Such notice shall also be published in the City official newspaper.

### VII. WITHDRAWAL OF APPLICATION OR PETITION

#### 7.1 Withdrawal Prior to Service of Official Notice

If a withdrawal request is made before the official notice of public hearing is served, the applicant or petitioner shall notify the Planning Department of the withdrawal request and the withdrawal shall be automatically permitted.

#### 7.2 Withdrawal Made Any Other Time

If a withdrawal request is made at any time other than that mentioned in 7.1, the Examiner shall use discretion in allowing or disallowing the request.

### VIII. RECOMMENDATIONS OR DECISIONS

#### 8.1 Written Recommendations or Decisions

A written report of findings, conclusions, and decisions or recommendations shall be forwarded to the Council and the parties of record after the conclusion of a

public hearing in the manner set forth in Ordinance Number 692-80, as amended. The findings, conclusions, and decisions or recommendations shall indicate how the decision or recommendation carries out the policies and requirements of the land use codes of the City.

## 8.2 Content of Decisions and Recommendations

A decision or recommendation shall include a statement of:

- a. The nature and background of the proceeding.
- b. Findings of fact. The findings shall be a statement of those facts that are the basis of the conclusions and decision of the Examiner. The findings shall be based exclusively on the testimony and evidence presented in the hearing and those matters officially noticed. The findings of fact shall consist of a concise statement of each fact found upon each contested issue of fact. The source of each finding shall be identified.
- c. Conclusions. Whenever practical, the conclusions shall be referenced to specific provisions of the law and regulations or both, together with reasons and precedents relied upon to support the same. The conclusions shall make reference to the effect of the decision or recommendation with reference to the Comprehensive Plan, as well as the effect of both approval and denial on property in the vicinity, business or commercial aspects, if relevant and on the general public.
- d. The appropriate rule, order, or relief. The decision or recommendation shall be based upon a consideration of the whole record and supported by reliable, probative, and substantial evidence.

## 8.3 Procedure for Re-Opening Hearing or Reconsideration

- a. At any time prior to the filing of the recommendation or decision, the Examiner may re-open the proceedings for the reception of further evidence. All parties of record shall be given notice of the consideration of such evidence and granted an opportunity to review such evidence and file rebuttal arguments.
- b. If within (7) calendar days after the public hearing any party of record petitions the Examiner for a re-opening of the hearing, the Examiner shall have discretion to re-open the hearing to consider new testimony or new evidence that was unavailable at the time of the hearing.
- c. Reconsideration. Any party of record may request reconsideration prior to appealing the decision of the Examiner. "Actively participated in the hearing before the Examiner" means oral or written testimony, excluding persons who have merely signed a petition. A written request for reconsideration shall be filed with the Examiner within ten (10) working days after the written decision of the Examiner has been rendered. This request shall set forth the specific errors of facts and/or law relied upon. The Examiner shall act within ten (10) working days after the date of the filing of the request in writing or issue a revised decision or reconvene the public hearing. If an additional hearing is reconvened, notice of said hearing shall be mailed to all parties of record not less than ten (10)

working days prior to the hearing date and the Examiner's written decision shall be rendered within fifteen (15) working days of the conclusion of the hearing.

**IX. APPEALS**

9.1 Appeals

- a. Any party of record aggrieved by Examiner's final decision which constitutes the final decision of the City may file an appeal of the decision to Snohomish County Superior Court. Provided, in the case of appeals from the City's final decision on Shoreline Management Substantial Development Permits, appeals shall be to the Shoreline Hearings Board. All appeals shall be made pursuant to the procedures as set forth in RCW Chapter 36.70.C.
- b. Any transcript of the Examiner's proceedings shall be prepared by the appealing party. Upon completion of the transcript, it shall be submitted to the Land Use Hearing Examiner Office for certification. All costs shall be borne by the appealing party.

**X. SUPERSEDE**

These rules supersede all previously adopted rules.

These rules are adopted this 5th day of February, 1997.

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JAMES M. DRISCOLL  
Hearing Examiner