

PROPOSED BY: Consent

INTRODUCTION DATE: _____

RESOLUTION NO. _____

**REPLACEMENT OF THE BUSINESS RULES
OF THE WHATCOM COUNTY HEARING EXAMINER**

WHEREAS, Resolution 86-41 approved and established the Business Rules of the Whatcom County Hearing Examiner in 1986; and

WHEREAS, Whatcom County Council recently adopted Ordinance 2018-032 that amended the Whatcom County Code (WCC) Title 2 Administration and Personnel; Title 9 Public Peace, Morals and Welfare; Title 16 Environment; Title 20 Zoning; Title 21 Land Division Regulations; Title 23 Shoreline Management Program; and Title 24 Health; and created a new Title 22 Land Use and Development Procedures in order to consolidate and clarify the Whatcom County permit review procedures; and

WHEREAS, Ordinance 2018-032 included some substantive changes to the appeal procedures of final decisions of the hearing examiner; and

WHEREAS, the 1986 Business Rules of the Whatcom County Hearing Examiner may now be inconsistent with Title 2, Title 9, Title 16, Title 20, Title 21, Title 23, Title 24, and/or the new Title 22;

NOW, THEREFORE, BE IT RESOLVED by the Whatcom County Council that the Business Rules of the Whatcom County Hearing Examiner are replaced as indicated in Exhibit A to this resolution.

APPROVED this _____ day of _____, 2019.

ATTEST:

WHATCOM COUNTY COUNCIL
WHATCOM COUNTY, WASHINGTON

Dana Brown-Davis, Clerk of the Council

Rud Browne, Council Chair

APPROVED AS TO FORM:

Karen Frakes, Civil Deputy Prosecutor

EXHIBIT A

BUSINESS RULES OF THE WHATCOM COUNTY HEARING EXAMINER

ARTICLE 1 – RULES OF GENERAL APPLICATION

1.1 These rules are supplementary to the provisions of the ordinances of Whatcom County as they relate to the procedures of the Hearing Examiner.

1.2 Nothing herein shall be construed to give or grant to the Hearing Examiner the power or authority to alter or change the Zoning Ordinance, including the Zoning Map, that authority being fully reserved to the Whatcom County Council.

1.3 The Hearing Examiner shall maintain for public inspection a file containing the various records of his or her actions, findings, and determinations.

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

1.5 In order to ensure the appearance of fairness, ex parte communications shall be proscribed as follows:

A. No person, nor his or her agent, employee, or representative, who is interested in a particular petition or application which is designated for a public hearing shall communicate ex parte, directly or indirectly, with the Hearing Examiner concerning the merits of that or a factually related petition or application. This rule shall not prohibit ex parte communications concerning procedural matters only.

B. The Hearing Examiner shall not communicate ex parte directly or indirectly, with any person, nor with his or her agent, employee or representative, interested in a particular application which is designated for a public hearing with regards to the merits of that or a factually related petition or application. This rule shall not prohibit ex parte communications concerning procedural matters.

C. If a substantial prohibited or ex parte communication is made to or by the Hearing Examiner, such communication shall be publicly disclosed. If necessary for a fair hearing, the Hearing Examiner shall, at his or her discretion, abstain from participating in any further consideration of the matter. Any party of record may request that the Hearing Examiner abstain from participation in the public hearing, and if the Hearing Examiner, at his or her discretion, feels it is necessary for a fair hearing, a substitute Hearing Examiner shall conduct the public hearing.

D. In cases where the designated Hearing Examiner may have a conflict of interest or foreknowledge that may give the appearance of unfairness, he or she shall

disclose this fact to the respective parties. Upon his or her own motion or objection by either party, the case shall be continued until the appointment of a substitute Hearing Examiner.

1.6 The Whatcom County Prosecuting Attorney shall act as legal counsel to the Office of the Hearing Examiner and shall be consulted in cases where the powers of the Hearing Examiner are not clearly defined.

1.7 At the discretion of the Hearing Examiner, testimony taken at a public hearing may be taken under oath.

1.8 Computation of any period of time described by these rules shall be in calendar days and begin with the first calendar day following the initiation of such period of time. When the last calendar day of the period is a Saturday, Sunday, or National or State holiday, the period shall run until the end of the next business day.

1.9 At the discretion of the Hearing Examiner, a representative of the Whatcom County Prosecuting Attorney shall be present at public hearings or meetings to advise on matters of law and procedure.

1.10 Relevant material and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, and unduly repetitious evidence may be excluded. The rules of evidence applicable in Washington State Superior Court will not be strictly applied. Specific rules of evidence may be applied at the discretion of the Hearing Examiner for the purpose of facilitating fair and expeditious hearings.

1.11 Hearings shall be electronically recorded and such recordings shall be a part of the official case record. Copies of any written materials in the record may be obtained by any interested person upon payment of the cost of reproduction of such materials.

1.12 Definitions.

The following definitions shall apply, unless context or subject matter otherwise requires:

- A. "Appellant" means the person who files an appeal of a final administrative decision to the Hearing Examiner.
- B. "Applicant" means any person applying for a permit or other regulatory approval.
- C. "Comprehensive Plan" means all development principles and standards adopted by the Whatcom County Council as objectives and goals for the Comprehensive Plan for the County in effect at the time of submission of a petition or application.
- D. "Council" means the Whatcom County Council.
- E. "Examiner" means the Hearing Examiner.
- F. "Person" means an individual, partnership, corporation, association, organization, cooperative, municipal corporation, or government agency.
- G. "Record" means the written and oral information, exhibits, reports, testimony, and other evidence submitted and accepted by the Hearing Examiner. Certified electronic recordings or transcripts of the hearing are part of the record.

- H. "Staff Report means a document prepared by Whatcom County staff pursuant to WCC 22.05.100(2) or other actions or appeals for the purpose of review by the Hearing Examiner in a particular case.
- I. "Standing" is the status required for a person to bring an action before the Hearing Examiner. Standing in Whatcom County conforms to RCW 36.70C.060 and is conferred upon:
 - (1) The applicant and the owner of property to which the land use decision is directed;
 - (2) Another person aggrieved or adversely affected by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. A person is aggrieved or adversely affected within the meaning of this section only when all of the following conditions are present:
 - (a) The land use decision has prejudiced or is likely to prejudice that person;
 - (b) That person's asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision;
 - (c) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision; and
 - (d) The petitioner has exhausted his or her administrative remedies to the extent required by law.

ARTICLE 2 – HEARING PROCEDURES

PREHEARING

2.1 The Record

Original planning case files of the Whatcom County Planning Department are kept at the Planning Department. In each case before the Hearing Examiner, Whatcom County Planning staff shall forward to the Hearing Examiner's Office an index of the planning file along with copies of all relevant evidence. All evidence forwarded by Planning shall be placed in the record. It shall be the practice of staff to include all evidence that might be relevant to the decision. It shall be the practice of staff to refrain from sending originals and irrelevant/cumulative evidence. The Hearing Examiner and parties with standing may request that any evidence named in the index be included in the record in addition to that Staff has provided.

2.2 Notice

All parties with standing in the case shall receive notice of hearings, decisions, and recommendations from the Hearing Examiner. Persons without standing may also receive notice of hearings, decisions, and recommendations from the Hearing Examiner by submitting their names and addresses to the Hearing Examiner with a request for such notice.

2.3 Staff Reports

Whatcom County Planning staff shall create a Staff Report for each case. A Staff Report shall be submitted to the Hearing Examiner at least 14 days prior to the hearing. Staff Reports may be supplemented with legal briefing. The Hearing Examiner may request legal briefing.

2.4 Prehearing Motions

Parties with standing may file prehearing motions. The Hearing Examiner may allow oral argument on such motions prior to the hearing, allow oral argument at the hearing, or rule on the motion based upon the pleadings without oral argument, as appropriate and at his/her discretion.

A. Purely Legal Issues

Where there are no material facts in dispute, issues of law may be decided by a Summary Judgment motion. With the agreement of the parties, the motion may be decided without a hearing, based upon the record and briefing alone. A briefing schedule shall be set or approved by the Hearing Examiner. At the Hearing Examiner's discretion, superior court rules regarding summary judgment may be used as a guide; strict compliance with CR 56 is not required.

2.5 Briefs

Parties with standing may file briefs. Briefs of an applicant or appellant shall be filed at least 21 days prior to any hearing. Briefs of respondent shall be filed at least 7 days prior to such hearing. The Hearing Examiner may request briefing from parties with standing.

A. Applicant's Brief

An applicant should file a brief if legal issues are anticipated.

B. Appellant's Brief

An appellant must file a brief identifying the issues on appeal. Failure to timely file a brief identifying the issues shall result in dismissal of the appeal. An appeal dismissed under this rule may be reinstated at the discretion of the Hearing Examiner for good cause shown. Pro se appellant briefs shall include substantially the following content: Statement of Facts, Statement of Issues, Explanation of Position, Legal Authority, and Ruling Requested.

2.6 Prehearing Conference

Prior to commencement of a public hearing the Hearing Examiner may order a pre-hearing conference for purposes of marking potential documents and exhibits and resolving questions or procedure.

2.7 Site Inspection

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

HEARING

2.8 Format

The format for a public hearing will be of an informal nature, yet designed such that the evidence and facts relevant to a particular proceeding will be readily and efficiently available to the Hearing Examiner. A public hearing shall include, but need not be limited to, the following elements: a brief introductory statement by the Hearing Examiner; introduction of the official file; a report by the departmental staff; a summary of the recommendations of the departments; testimony by the applicant or petitioner; testimony in support; testimony of opposing parties; opportunity for cross examination and rebuttal; and opportunity for questions by the Hearing Examiner.

2.9 Presentation of the Case

Every party shall have the right of notice, cross examination, rebuttal, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing. The Hearing Examiner may impose reasonable limitations on the number of witnesses heard and on the nature and length of their testimony. Cross examination shall be permitted as necessary for a full disclosure of the facts, but may be limited at the discretion of the Examiner.

2.10 Continuances

A continuance may be ordered in any case for good cause shown at the discretion of the Hearing Examiner. Continuances shall be governed by the following provisions:

- A. Continuance of a public hearing shall be to a date and time certain.
- B. If a continuance is granted at a public hearing, no further notice is required. Continuances requested prior to hearing shall be announced at the time and place set for the hearing and said announcement shall constitute proper notice of the continuance to all parties.
- C. If a continuance is granted outside of a public hearing, notice shall be provided to all parties with standing and others who have requested notice not less than five (5) days prior to the newly scheduled hearing. Said notice shall include the date, time, place, and nature of the subsequent hearing.
- D. Where the Hearing Examiner determines that additional information is necessary to form a complete record, the record may be left open for a period of time set by the Hearing Examiner for receipt of only those items specified by the Hearing Examiner.
- E. The applicant may request a continuance of the hearing at any time. Any person with standing may request a continuance at the hearing. Continuances should be granted by the Hearing Examiner, unless it appears that the request is for the purpose of delay only, or there is prejudice to the opposing party. No more than two continuances shall be granted without a showing of just cause.
- F. If a continuance requested by an applicant will result in a hearing date beyond a date specified by the applicable ordinance for a final decision, the applicant shall provide the Hearing Examiner with a written waiver of

that deadline. The Hearing Examiner may deny a request for continuance by a person with standing, other than the applicant, if the applicant will be prejudiced by a delay of decision beyond the date set by the ordinance.

2.11 Post-hearing Evidence

At any time prior to the filing of the recommendation or decision, the Hearing Examiner may reopen the proceeding to receive further evidence. All persons with standing shall be given notice of the consideration of such evidence and granted an opportunity to review such evidence and file rebuttal arguments.

2.12 Burden of Proof and Evidence Rules

Evidence submitted prior to or at a hearing shall be governed by the following:

- A. In each proceeding, the petitioner, applicant, or proponent of an individual petition or application shall have the burden of proof.
- B. The hearing generally will not be conducted according to technical rules relating to evidence and procedure. Any relevant evidence shall be admitted if it is of the type which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. Laws regarding privilege shall apply.
- C. 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. The Hearing Examiner may take judicial notice of facts and may take notice of general, technical, or scientific facts within his or her specialized knowledge. When any recommendation or decision of the Hearing 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 dispute such fact shall be granted to any party with standing. The Hearing Examiner shall not take judicial notice of disputed facts that are at the center of a proceeding.
- E. If additional evidence is submitted after the public hearing, it will be considered only upon a showing of significance, relevance, and good cause for delay in submission. All parties with standing will be given notice of the consideration of such evidence and granted an opportunity to review such evidence and file rebuttal arguments. This provision shall not apply to evidence requested by the Hearing Examiner under Rule 2.5D above.

2.13 Representation at Hearings

Persons with standing may appear on their own behalf or may be represented by counsel or other agent. In the event that those opposing an application retain legal counsel to represent them at the hearing, such legal counsel shall notify the appellant, applicant, or his/her agent or attorney that s/he has been so retained and will be present to object. Such notice shall be delivered to the office of the Hearing Examiner

and to the applicant or his/her agent or attorney at least seven (7) days prior to the scheduled hearing. If such notices are not given, then the applicant, his/her agent, or her/his attorney shall have the option of postponing the hearing to the next available hearing date.

2.14 Authorization to Act as Agent or Counsel at Hearings

Any person appearing on behalf of any party with standing as agent or counsel shall provide to the Hearing Examiner a written authorization from that party prior to the hearing.

ARTICLE 3 – DISMISSAL OF APPLICATIONS

3.1 Applications may be dismissed by the Hearing Examiner for the following reasons:

- A. By written request for dismissal by the applicant.
- B. For failure of an applicant or his/her authorized representative to appear at the time and place scheduled for the hearing of the application.
 - 1. The Hearing Examiner shall notify in writing the applicant in those cases which are dismissed due to the applicant's failure to appear.
 - 2. The applicant may, within seven (7) days of the date of notice of dismissal, apply for reinstatement of the application. In such cases, the applicant must file a written request for reinstatement. Reinstatement shall be at the discretion of the Hearing Examiner for good cause shown. The applicant shall also be responsible for the payment of any costs associated with the provision of required notice for hearing on the reinstated application.
- C. Upon the filing of applications found to contain false information or incomplete or erroneous property owner's names and addresses.
- D. Where the Hearing Examiner finds that proper notice, as required by the applicable ordinance, has not been given.
- E. Pursuant to other applicable laws, including those found in other Articles of these Hearing Examiner's Business Rules.

ARTICLE 4 – PROCEDURES FOR APPEAL OF ADMINISTRATIVE DECISIONS

4.1 Appeals from administrative decisions may be brought before the Hearing Examiner as provided for by WCC Title 22 and other applicable law—including these business rules. In the case of conflicting code language, Title 22 shall control.

4.2 The Hearing Examiner shall, upon receipt of the appeal, transmit to the administrative official involved and the prosecuting attorney a copy of the appeal for

review.

4.3 Records from the Whatcom County Planning Department shall be provided as specified in section 2.1 of these business rules.

4.4 Upon receipt of a properly completed appeal form, the Hearing Examiner shall assign a case number and place it on the calendar of the Examiner for hearing within requisite time provisions. Appeals shall be assigned for hearing in the order in which they are received. Appeals may be filed with an accompanying application for variance, conditional use permit, or other permit where applicable.

4.5 Filing of an application for appeal shall stay all proceedings in furtherance of the action(s) appealed from unless the Hearing Examiner finds that a stay of decision would cause an undue hardship or danger to persons or property.

4.6 The Hearing Examiner shall, unless the parties with standing have mutually agreed to waive the applicable time limit, render a decision within prescribed time limits with written finding of fact based upon the record.

4.7 The format of the hearing shall be that as set forth elsewhere in these Rules.

4.8 An appellant's appeal may be dismissed for failure to prosecute. It shall be the appellant's responsibility to schedule the appeal with the Hearing Examiner's office. The Hearing Examiner may dismiss an appellant's appeal for:

- appellant's failure to schedule a hearing date within the required time period without good cause, or
- failure to file an appellant's brief identifying the issues within the required time period without good cause, or
- failure to pursue the appeal within a reasonable time without good cause—a delay of one year or more by the appellant shall be presumptively unreasonable.

ARTICLE 5 – FINAL AND RECOMMENDED DECISIONS AND APPEALS THEREFROM

5.1 All decisions of the Hearing Examiner shall include written findings of fact and shall state the reasons for the decision of the Hearing Examiner. If conditions are attached to any application granted by the Hearing Examiner, such conditions shall be referred to in the notice of decision and embodied in the findings of fact. Decisions shall be rendered within the time required by ordinance, unless the applicant has agreed in writing or at the hearing to waive the applicable time limit.

5.2 The decision shall be based upon a consideration of the whole record and supported by reliable, probative, and substantial evidence.

5.3 In those cases where the Hearing Examiner's decision is final (as opposed to recommended), a notice of decision shall be issued to parties with standing, pertinent administrative officials, and all persons who requested said notice in writing. Any of these persons may receive a copy of the Hearing Examiner's decision upon request and upon payment of the costs of reproduction. Provision of a copy of the decision shall constitute notice of decision.

5.4 Unless otherwise specified by the Hearing Examiner or other applicable law, a final decision of the Hearing Examiner authorizing a proposal shall expire if the applicant fails to execute the approval within one (1) year of the date of the decision. An extension of the expiration date may be granted by the Hearing Examiner where the applicant has made a written request for an extension at least thirty (30) days prior to the expiration date. The Hearing Examiner may, at the Examiner's discretion, order that a public hearing be held on the request.

5.5 In cases of final decisions, a request for reconsideration may be filed in writing by an applicant or any opponent of record within three (3) days of the date of decision. The request must be based upon error or omission in the content of the decision. The Hearing Examiner may affirm or modify the decision at the Examiner's discretion, and shall modify the decision if the law so requires. Where the Hearing Examiner determines that the grounds cited for reconsideration do not warrant modification of the decision, he or she shall provide the requesting party with written notice of such determination.

5.6 Appeal of Hearing Examiner Decision

A person aggrieved by a final decision of the Hearing Examiner may appeal to the Whatcom County Superior Court, as provided in RCW 36.70C.040. Such an appeal must be made within twenty-one (21) days of the date of that final decision. Appeals under Title 23, the Shoreline Management Program, must be appealed pursuant to RCW 90.58.180.

5.7 Appeal of Examiner Decision Under Title 23 - The Shoreline Management Program

A person aggrieved by a final decision of the Hearing Examiner issued pursuant to Title 23 - The Shoreline Management Program must appeal to the Shoreline Hearings Board per RCW 90.58:

RCW 90.58.180(1) Any person aggrieved by the granting, denying, or rescinding of a permit on shorelines of the state pursuant to RCW 90.58.140 may seek review from the shorelines hearings board by filing a petition for review within twenty-one days of the date of filing of the decision as defined in RCW 90.58.140(6).