

PROPOSED BY: Consent

INTRODUCTION DATE: _____

RESOLUTION NO.

**AMENDING 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; 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WHEREAS, the outdated Business Rules of the Whatcom County Hearing Examiner now conflict with Title 2, Title 9, Title 16, Title 20, Title 21, Title 23, Title 24, the new changes to Title 22;

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

APPROVED this _____ day of _____, 2018.

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 and Whatcom County Ordinance~~ ordinance, including the Official Zoning Map, or development standards 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 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. ~~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, nor shall the Hearing Examiner communicate ex parte, directly or indirectly, with any person, concerning the merits of a pending or prospective matter particular petition or application which is designated for a public hearing that or a factually related petition or application. This rule shall not prohibit ex parte communications concerning procedural matters nor shall it prohibit the Hearing Examiner from requesting additional information for submission at the hearing only.~~
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, nor shall the Hearing Examiner communicate *ex parte*, directly or indirectly, with any person, concerning the merits of a pending or prospective matter particular petition or application which is designated for a public hearing that or a factually related petition or application. This rule shall not prohibit *ex parte* communications concerning procedural matters nor shall it prohibit the Hearing Examiner from requesting additional information for submission at the hearing.
- 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 nor shall it prohibit the Hearing Examiner from requesting additional information for submission at the hearing.~~
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 nor shall it prohibit the Hearing Examiner from requesting additional information for submission at the hearing.
- C. — If a substantial prohibited or *ex parte* communication is made to or by the Hearing Examiner, such communication shall be publicly disclosed, and if necessary for a fair hearing, the Hearing Examiner shall, within at his or her discretion, abstain from participating in any further consideration of the matter. Any party of record with standing may request that the Hearing Examiner abstain from participation in the a public hearing matter, and, if a request is

Comment [RE1]: Conduct at Hearing: Responsibilities of Interested Persons
Parties, witnesses, or observers shall conduct themselves with civility and deal courteously with all who participate in the proceedings. Failure to do so may result in removal from the hearing at the discretion of the Hearing Examiner.

Comment [CES2]: Wouldn't this be true of any of the WCC?

Comment [RE3]: Recommendation making this a separate section.

Comment [CES4]: Doesn't "person" include all these others? And why does it matter only if they're interested in the petition or application? Seems like no one should talk to him about any particular cases.

~~so made~~ 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~~ preside over the matter.

~~1.6 D.~~ For purposes of this rule on *ex parte* communications, "*ex parte* communication" means a written or oral communication not included in the public record and made outside of a public hearing.

~~C. E.~~ In cases where the designated Hearing Examiner may have a conflict of interest or foreknowledge that may give the appearance of unfairness, he shall disclose this fact to the respective parties. Upon objection by either party ~~or the Hearing Examiner's own motion,~~ the Hearing Examiner shall rule upon whether the case ~~shall~~ shall be continued and whether continued until the appointment of a substitute Hearing Examiner shall be appointed.

1.76 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~~ in dispute.

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

1.98 Computation of any period of time ~~prescribed or allowed~~ described by these rules shall be in calendar days and begin with the first calendar business day following ~~that on which the act or event initiating the initiation of~~ such period of time ~~shall have occurred.~~ When the last calendar 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.

1.109 At the request and 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.

1.110 Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, ~~and or~~ unduly repetitious evidence may be excluded, ~~although~~ 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.

1.121 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.

1.132 Definitions.

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

A. 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, ~~and policies for of the Whatcom County~~ Comprehensive Plan ~~for the County which are~~ in effect at the time ~~of submission of~~ a petition or application has been determined to be complete.

Comment [RE5]: All should be under testimony. Such as All testimony before the Hearing Examiner shall be given under oath or affirmation to tell the truth.
An interpreter acting on behalf of any interested person shall take an oath that a true interpretation of the interested person's testimony shall be made.

Comment [RE6]: Such including "by the County"

A.D. "Council" means the Whatcom County Council.

E. ~~_____~~ B. "Examiner" means the Hearing Examiner.

B.F. "Ex parte communication" means a written or oral communication not included in the public record and made outside of a public hearing.

C. ~~C. "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 Hearing Examiner, and shall include any party in a contested case.~~

D. ~~"Party of Record" means any of the following:~~

~~1. The applicant; Persons who testify at a hearing;~~

~~2. The applicant;~~

~~3. 3. Persons submitting written arguments, dealing with the merits of the case, provided that persons who do not qualify as a party of record may receive notice of a decision or recommendation by submitting their names and addresses to the Hearing Examiner with a request for such notice.~~

G. ~~ED. "Person" means an individual, partnership, corporation, association, organization, cooperative, municipal corporation, or government agency.~~

H. ~~"Person with standing" is a person who may 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.~~

~~y "Council" means the Whatcom County Council.~~

~~(3) Whatcom County.~~

Comment [CES7]: Shouldn't this just be if they submit written testimony? Why a stricter standard for written testimony than for oral testimony? Besides, even if they just say they don't like a particular project, they are interested, so shouldn't they be a party of record?

Comment [CES8]: What about other expert staff, who may not have reviewed the project, but can better explain a technical issue (i.e., the engineering lead vs. reviewer)?

Comment [CES9]: The WCC may not specify that a staff report is required.

- I. ~~FE~~ "Applicant" means any person applying for a permit or variance or the appellant in the case of an administrative appeal. "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.
- J. "Staff Report" means a document prepared by Whatcom County staff for the purpose of review by the Hearing Examiner in a particular matter.

Comment [CE510]: The WCC may not specify that a staff report is required.

ARTICLE 2 – HEARING PROCEDURES FOR APPLICATIONS

PRE-HEARING

2.1 Scheduling a Hearing.

(need content)

Comment [RE11]: Add that hearings should be scheduled through county staff with the hearing examiner

Comment [RE12]: Add noticing of Hearing, point to WCC 22 and add affidavit: Affidavit of Notice: An affidavit attesting to the notice given of a hearing (including dates and places of publication, posting on the property if required, and list of addressees) shall be part of each record.

2.2 Notice.

(need content)

2.3 The Record.–

Original planning case files of the Whatcom County Planning and Development Services Department (PDS) are kept at the Planning Department. In each case before the Hearing Examiner, Whatcom County Planning PDS staff shall forward to the Hearing Examiner's Office an index of the planning case file along with copies of all relevant evidence. All evidence forwarded by Planning PDS shall be placed in the record. It shall be the practice of staff to include all evidence that might be relevant to the decision but, it shall be the practice of staff to refrain from sending originals and/or 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.

2.4– —When to Submit Exhibits.

All material the applicant wishes to be admitted as an exhibit by the Hearing Examiner shall be submitted to the Hearing Examiner no later than ten (10) calendar days prior to the hearing, with copies to County Staff, if not previously provided. Material submitted to the Hearing Examiner later than ten (10) calendar days prior to the hearing shall be considered at the discretion of the

Hearing Examiner. Further, any newly submitted material that proposes significant substantive changes to the project shall result in a continuation of the hearing to provide time for additional review if requested by Whatcom County.

2.5 Staff Reports.

~~Whatcom County Planning~~ PDS 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. If the staff report is not submitted within the time frame, the Hearing Examiner may continue the hearing.

2.6 Pre-hearing 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.

2.74 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 respondents shall be filed at least 7 days prior to such hearing. The Hearing Examiner may request briefing from parties with standing.

—Applicant's Brief—

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

—Appellant's Brief—

B. 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.

C. Appellant briefs shall include substantially the following content: Statement of Facts, Statement of Issues, Explanation of Position, Legal Authority, and Ruling Requested.

~~2.14~~ 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 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.

2.28 Pre-hearing Conference.

Comment [RE13]: Applicants should have deadline for material submittal such as: To promote due process and efficiency, all material the applicant wishes to be admitted as an exhibit by the Hearing Examiner shall be submitted to the Hearing Examiner no later than ten (10) calendar days prior to the hearing, with copies to County Staff if not previously provided. Material submitted to the Hearing Examiner later than ten (10) calendar days prior to the hearing shall be considered at the discretion of the Hearing Examiner. Further, any newly submitted material that proposes major substantive changes to the project shall result in a continuation of the hearing to provide time for additional review.

Comment [RE14]: WCC 22 this is 10 days

Comment [RE15]: Is this for appeals only? Time frame not achievable for

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

2.39 Site Inspection.

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

HEARING

2.410 Conduct at Hearing.

~~Parties, witnesses, and observers shall conduct themselves with civility and deal courteously with all who participate in the proceedings. Failure to do so may result in removal at the discretion of the Hearing Examiner.~~

2.11 Format.

~~The format for a 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 Hearing Examiner. A 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 PDS 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.~~

2.128 Presentation of the Case.

Every party shall have the right of due 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 is permitted as necessary for a full disclosure of the facts.

2.58139 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. ~~A.~~ ~~CA~~—A continuance of ~~the a~~ public hearing shall be to a ~~date~~ and time certain.
- B. ~~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. ~~C.~~—If a continuance is granted outside of a public hearing, notice shall be provided to all parties of record 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. ~~D.~~—Where the Hearing Examiner determines that additional information is necessary to form a complete record, the record may be left open for a ~~determinant~~ period of time ~~set~~ by the Hearing Examiner for receipt of only those items specified by the Hearing Examiner.
- E. ~~E.~~—The applicant may request a continuance of the hearing at any time. Any ~~party of record~~ ~~person with standing~~ may request a continuance at the hearing. Continuances ~~shall~~ ~~should~~ be granted ~~by the Hearing Examiner~~, unless it appears ~~to the Hearing Examiner~~ that the request is for the purpose of delay only, ~~or there is substantial prejudice to the opposing party~~. No more than two continuances shall be granted without a substantial showing of just cause.
- F. ~~F.~~—If the granting of a continuance requested by an applicant will set a hearing date that is beyond a date specified by the applicable ordinance for a final decision, the applicant shall provide the Hearing ~~examiner~~ ~~Examiner~~ with a written consent to an extension of that deadline. The Hearing Examiner may deny a request for continuance by a ~~party person of record with standing~~, other than the applicant, if the applicant will be prejudiced by a continuance which ~~will~~ ~~has the effect of~~ ~~delaying~~ a decision beyond the date set by the ordinance.

2. ~~69104~~ Post-hearing Evidence.

- A. At any time prior to the filing of the recommendation or decision, the Hearing Examiner may ~~keep the record open or~~ ~~reopen the proceeding for reception of to receive~~ further evidence. All ~~parties of record~~ ~~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.
- B. ~~If additional evidence is submitted after the hearing, it will be considered only upon a showing of significance, relevance, and good cause for delay in submission. This provision does not apply to evidence specifically requested by the Hearing Examiner.~~

Comment [CES16]: What if in doing this it extends the process beyond a date specified by the applicable ordinance for a final decision?

2. ~~71150~~ Burden of Proof and Evidence Rules.

Comment [RE17]: Good place for preference given to material pre 10 day deadline and post. Hearing Examiner later than seven (7) calendar days prior to the hearing shall be considered at the discretion of the Hearing Examiner.

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

~~A. A.~~ In each ~~particular~~ proceeding regarding an application, the petitioner, applicant, or proponent of ~~an individual petition or the~~ application shall have the burden of proof.

~~A. B.~~

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. ~~The Laws rules of regarding privilege shall be effective to the extent recognized by law apply.~~

Comment [CES18]: what does this mean? should it be defined in the definitions section?

C. ~~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. ~~D.~~ The Hearing Examiner may take ~~official notice of judicially cognizable~~ judicial notice of facts in the same manner as a judge, and ~~in addition~~ may take notice of general, technical, or scientific facts within his or her specialized knowledge, ~~except.~~ ~~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 disprove such notices of the fact shall be granted any affected person making a timely motion therefor. The Hearing Examiner shall not take notice of disputed adjudicative facts that are at the center of central to a the particular proceeding matter. Parties with standing may dispute facts of which the Hearing Examiner has taken judicial notice.~~

E. ~~E.~~ If additional evidence is submitted after the public hearing pursuant to §2.10, it will be considered only upon a showing of significant relevance and good cause for delay in 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. This provision shall not apply to material submitted under Rule 2.5D, above, but shall apply only to evidence presented other than at the request of the Hearing Examiner.~~

Comment [CES19]: This repeats language in 2.10

Comment [CES20]: Check X-ref

2.81126 Representation at Hearings.

Comment [RE21]: This a very confusing paragraph can we simply: or break out into separate

Comment [RE22]: Should we add conduct for Attorney's: Attorneys engaged in the representation of clients before the Hearing Examiner shall conduct themselves in accordance with all applicable Rules of Professional Conduct, including the display of courtesy to other members of the bar, witnesses, and all other persons present in the hearing room.

~~The a~~ Parties with standing ~~applicant or those in opposition to the application~~ may appear ~~in on~~ their own behalf or may be represented by counsel or ~~other an~~ agent. In the event ~~that~~ those ~~opposing appearing in opposition an application~~ retain legal counsel to represent them at the hearing, ~~then~~ such legal counsel shall notify the appellant, ~~or the~~ 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 offices of the Hearing Examiner and ~~to~~ the applicant or his/~~her~~ agent or attorney at least two (2) days prior to the scheduled hearing. If such notices are not given ~~by counsel retained by party opponents~~, ~~then the applicant or his agent or attorney shall have the option of postponing the hearing to the next available hearing date other party may continue the hearing.~~

2.91237 Authorization to Act as Agent or Counsel at Hearings.

Any person appearing on behalf of any party with standing of record as ~~said party's~~ agent or counsel shall provide to the Hearing ~~Examiner Examiner prior to the date of the hearing~~, a written

authorization from ~~the-that~~ party prior to the date of the hearing, of record authorizing the appearance of agent or counsel on behalf of the party of record.

ARTICLE 3 – DISMISSAL OF APPLICATIONS

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

- A. ~~A.~~—By written request for dismissal by the applicant.
- B. ~~B.~~—~~For~~ failure of an applicant or his 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 ~~by him~~ 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 ~~and upon payment to the Hearing Examiner a filing fee which may be established by the Whatcom County Council.~~ The applicant shall also be responsible for the payment of any costs associated with the provision of required hearing notice ~~for hearing~~ on the reinstated application.
- C. ~~C.~~—Upon the filing of applications found to contain false information or incomplete or erroneous property owner's names and addresses.
- ~~D.~~ D.—Where the Hearing Examiner finds that proper notice, as required by the applicable ordinance, has not been given.
- ~~E.~~ E.—Pursuant to other applicable laws, including Article 2.5 of these Hearing Examiner's Business Rules.

Comment [RB23]: Not sure there exists a filing fee for "reinstatement" under #2. I did not see one in the Unified Fee Schedule.

ARTICLE 4 – ~~PROCEDURES FOR APPEAL OF ADMINISTRATIVE DECISIONS~~ HEARING PROCEDURES FOR APPEALS

- 4.1 Appeals from administrative decisions may be brought before the Hearing Examiner as provided for by WCC Title 22 and other applicable law ordinance. In the case of conflicting statutory or rule language, Title 22 shall control.
- 4.2 The Hearing Examiner shall, upon receipt of the ~~application for~~ appeal, transmit to the administrative official involved a copy of the ~~application appeal~~ for review.
- 4.3 Original planning case files of the Whatcom County Planning and Development Services Department (PDS) are kept at the Planning Department. In each case before the Hearing Examiner, Whatcom County PDS staff shall forward to the Hearing Examiner's Office an index of the planning case file along with copies of all relevant evidence. All evidence forwarded by PDS shall be placed in the record. It shall be the practice of staff to include all evidence that might be relevant to the decision but to refrain from sending originals or 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. Original planning case files of the Whatcom County Planning Department are kept at the Planning Department. In each case.

Comment [RE24]: Clear direction on what the County must provide and Appellant including time frame(s).

~~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.~~

Comment [CES25]: this is a repeat of section 2.1. Is it needed here, too?

~~upon receipt of which the administrative official shall transmit to the Hearing Examiner all papers and other materials constituting the record upon which the action appealed from was taken. All materials forwarded shall be available for inspection by the appellant.~~

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

4.45 Filing of an ~~application for~~ appeal shall stay all ~~proceedings action~~ in furtherance of the ~~action matter~~ appealed, ~~unless planning staff or the Hearing Examiner determine there is good cause or a legal requirement to proceed from unless the Hearing Examiner finds that a stay of decision would cause peril of life or property or would otherwise work cause an undue hardship.~~

Comment [CES26]: on whom?

4.56 ~~Unless the parties with standing have mutually agreed to waive the applicable time limit, 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 findings of fact based upon information provided by the applicant, the Whatcom County Comprehensive Plan, pertinent provisions of the applicable codes and ordinances, site inspection, testimony and other evidence presented at the public hearing.

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

4.8 The appellant shall have the burden of proof.

~~4.89 E-The Hearing Examiner may dismiss an appellant's appeal for (1) failure to prosecute; (2) for failure to file an appellant's brief within the required time period without good cause, or (3) for appellant's delay of, or failure to schedule, the hearing date within the required time period without good cause.~~

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~~ included in the notice of decision ~~and embodied in the findings of fact~~. Decisions shall be rendered in 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 ~~the applicant~~parties with standing, pertinent administrative officials, and all ~~parties of record~~persons who request said notice in writing. Any ~~party of record~~person may receive a copy of the Hearing Examiner's decision upon written request therefor and upon payment of the costs of reproduction. Provision of a copy of the decision shall constitute notice of decision.

5.4 Reconsideration.

~~A. Within three (3) business days of the Hearing Examiner's recommendation or decision, a party may file a motion for reconsideration. The motion shall set forth alleged errors of law or fact, or the discovery of new evidence that was not available at the time of the hearing.~~

~~B. The hearing Examiner shall respond to the motion for reconsideration in writing within five (5) business days by either denying the request or approving the request. If the Hearing Examiner grants the motion, the Hearing Examiner shall issue a revised decision within ten (10) business days of the date of the approval, unless additional information is required.~~

~~5.4 Unless otherwise specified by the Hearing Examiner, a final decision of the Hearing Examiner authorizing a proposal shall expire if the applicant fails to obtain other necessary permits to commence, if required, or to otherwise take advantage of the approval of the original request 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 in a timely manner, at least thirty (30) days prior to the expiration date. A Hearing Examiner may, at his 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, and although the Hearing Examiner is not required to modify his original decision to reflect the comments received thereon, he may initiate such action as is deemed appropriate. Where the Hearing Examiner determines that the grounds cited for reconsideration do not warrant modification of the original notice of decision, he shall provide the requesting party with written notice of his determination prior to the expiration of the time set out herein for the filing of an appeal.~~

5.65 Appeal of Hearing Examiner Decision.

~~A person aggrieved by a final decision of the Hearing Examiner may make application for appeal to the Whatcom County Superior Court. Such an application for appeal must be made within twenty-one (21) days of the date of the decision of the Hearing Examiner, as provided in RCW 36.70C.040.~~

5.6 Appeal of Hearing 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 90.58.180(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~~

Comment [RB27]: Not sure about the expiration language in this section.

Comment [CES28]: What does execute mean? Start a project? Finish a project? What if it's, say, a plat that might take a couple of years to complete? This type of expiration of permits is usually tied to substantial completion or a percentage of costs expended. There are lengthy sections of code that define this in most jurisdictions.

Comment [CES29]: I thought under T22, permits were good for 2 years?

Comment [RE30]: Remove WCC 22 contains expiration for all permit decisions.

Comment [RB31]: Does the appeal period run from the time of the decision if reconsideration is requested? Or does the request for reconsideration stay the appeal period so that it runs from the time that the reconsideration is decided?

Comment [RE32]: Suggested change for Reconsideration.
Request for Reconsideration
a. Within five (5) business days of the Hearing Examiner's recommendation or decision, a Party may file a motion for Request for Reconsideration.
The motion shall explicitly set forth alleged errors of law or fact, or the discovery of new evidence which was not available at time of the hearing.
b. The Hearing Examiner shall respond to the Request for Reconsideration, in writing, within five (5) business days, by either denying the request or approving the request. If the Hearing Examiner approves the request, the Hearing Examiner shall issue a response to the request within ten (10) business days of the date of the response unless additional information is required.

Comment [CES33]: This says the same thing as below. Is it needed?

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).

Comment [CES34]: Not sure why we need this, since the rule cites this section.