

# City of Federal Way Hearing Examiner Rules of Procedure

## 1. EXPEDITIOUS PROCEEDINGS

The Hearing Examiner and all parties shall make every reasonable effort to avoid delay at each stage of every proceeding consistent with fairness to all parties.

## 2. COMPUTATION OF TIME

(a) In computing any period of time prescribed or allowed by these Rules of Procedure (“Rules”), the day of the act, event, or default from which the designated period of time begins to run shall not be included.

(b) The last day of the period so computed shall be included, terminating at 5:00 p.m., unless the last day of the period is a Saturday, Sunday or legal holiday as defined in RCW 1.16.050, in which event the period shall run until 5:00 p.m. of the next day which is not a Saturday, Sunday or legal holiday.

(c) When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays or legal holidays shall be excluded from the computation.

(d) “Working” days as referenced in these Rules exclude weekends and legal holidays.

## 3. DEFINITIONS

(a) “Code” or “FWRC” means the Federal Way Revised Code.

(b) “Council” means the Federal Way City Council.

(c) “Examiner” or “Hearing Examiner” means the Federal Way Hearing Examiner.

(d) “Interested Person” means any individual, partnership, corporation, association, or public or private organization of any character significantly affected by a proceeding before the Hearing Examiner or identified by the ordinance or Code under which the proceeding is brought as having a right to participate.

(e) “Party” means:

(1) For an open record hearing on a permit application:

- (i) the applicant;
- (ii) the City;
- (iii) a person who testifies at the hearing or who submits written testimony for consideration at the hearing; and

- (2) For any open record appeal of an administrative decision:
  - (i) the applicant;
  - (ii) the appellant;
  - (iii) the City; and
  - (iv) any intervenors allowed by the hearing examiner to join as a party.

**4. QUALIFICATIONS, DUTIES AND JURISDICTION OF THE HEARING EXAMINER**

(a) Hearing Examiner Qualifications: Hearings shall be presided over by a duly qualified Hearing Examiner or deputy Hearing Examiner appointed by the City Council pursuant to FWRC 1.15.060 and 2.95.

(b) Hearing Examiner Duties: The Hearing Examiner shall have the duty to conduct fair and impartial hearings, to take all necessary action to avoid delay in the disposition of proceedings, and to maintain order. The Hearing Examiner shall have all powers necessary to that end, including the following:

- (1) To administer oaths and affirmations;
- (2) To issue subpoenas to compel witnesses to appear at the hearing;
- (3) To rule upon offers of proof and to admit evidence;
- (4) To regulate the course of the hearings and the conduct of the participants;
- (5) To consider and rule upon procedural and other motions appropriate to the proceedings;
- (6) To make and file orders, recommendations and decisions; and
- (7) To hold prehearing or other conferences.

(c) Hearing Examiner Jurisdiction: The Hearing Examiner shall have the authority to conduct hearings, prepare a record, enter written findings and conclusions, and issue decisions or recommendations for any matter or appeal for which the FWRC, other ordinance, or the City Council designates the Hearing Examiner to be the Hearing Body.

On appeals, the Hearing Examiner shall have the authority to vacate, affirm or modify the underlying appealed from decision.

(d) Hearing Examiner Independence: In the performance of these duties, the Hearing Examiner shall not be responsible to, or subject to the supervision or direction of, any elected official or any officer, employee or agent of any municipal department.

(e) Disqualification:

(1) The Examiner on his or her own initiative may enter an order of disqualification in the event of personal bias or prejudice, or to preserve the appearance of fairness.

(2) A party may file a declaration (a statement in writing and under penalty of perjury) stating facts supporting the belief that such party cannot have a fair and impartial hearing by reason of the personal bias, prejudice, or appearance of unfairness of the Hearing Examiner.

The declaration shall be filed not less than ten (10) working days before the hearing unless good cause is shown, and in any case before the Hearing Examiner makes any discretionary ruling; provided a declaration seeking disqualification on appearance of fairness grounds may be filed at any time, but must be filed promptly after the basis for disqualification is known or should have been known to the party seeking such disqualification.

The Hearing Examiner shall rule on the declaration prior to making any other ruling and prior to proceeding with the hearing.

**5. EX PARTE COMMUNICATION**

(a) For purposes of this rule, "ex parte communication" means a written or oral communication concerning the pending matter with the Hearing Examiner outside of a public hearing and not included in the public record.

(b) Pursuant to Chapter 42.36 RCW, as is currently exists or is hereby amended, no interested person (nor his/her agent, employee or representative) shall communicate ex parte directly or indirectly with the Hearing Examiner concerning the merits or facts of any matter being heard before the Hearing Examiner, or any factually related matter. This rule shall not prohibit ex parte communications about schedules and other procedural topics.

(c) The Hearing Examiner shall not communicate ex parte directly or indirectly with any interested person (nor his/her agent, employee or representative) regarding the merits or facts of any matter being heard before the Hearing Examiner except about procedural topics as identified above.

(d) If a substantial, prohibited ex parte communication is made to or by the Hearing Examiner, such communication shall be publicly disclosed at the next following and each succeeding public hearing regarding the pending matter or, if there is no further such

hearing, disclosure shall be made in writing to all parties of record within five (5) working days of the date of the improper communication. Parties shall have the opportunity to make objections to the ex parte communication within ten (10) working days of such disclosure.

## **6. RIGHTS OF A PARTY**

Every party in any proceeding before the Hearing Examiner shall have a right to the following:

- (a) Due notice.
- (b) Presentation of evidence.
- (c) Objection.
- (d) Motion.
- (e) Argument.
- (f) Rebuttal (but not surrebuttal unless authorized by the examiner).
- (h) Any other rights essential to a fair hearing.

## **8. PREHEARING AND OTHER CONFERENCES**

(a) The Examiner may, on his or her own order, or at the request of a party, hold a conference prior to the hearing to consider:

- (1) Identification, clarification, and simplification of the issues;
- (2) Disclosure of witnesses to be called and exhibits to be presented;
- (3) Motions;
- (4) Other matters deemed by the Hearing Examiner appropriate for the orderly and expeditious disposition of the proceedings.

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

(d) All parties shall be represented at any prehearing conference unless they waive the right to be present or represented, and are granted permission by the Hearing Examiner not to attend.

(e) Following the prehearing conference, the Hearing Examiner may issue an order reciting the actions taken or ruling on motions made at the conference.

## **9. APPEALS BEFORE THE HEARING EXAMINER**

(a) Filing Requirements for Filing of the Appeal

Fee and content requirements are set by Code. Any applicable Code deadlines for filing an appeal or serving the appeal at specified places or upon specified persons shall be considered jurisdictional. The failure of a party to comply with a jurisdictional requirement shall be grounds for dismissal of the appeal upon motion by a party or sua sponte by the examiner at any time prior to the issuance of a final decision.

(d) Clarification of the Appeal Statement

If the Hearing Examiner determines that the appeal is vague or ambiguous or does not sufficiently set forth the exceptions and objections with regard to the appealed matter, the Hearing Examiner may require that the appellant amend the appeal.

Within ten (10) calendar days of notice to amend, or a shorter time period as found to be equitable by the Hearing Examiner, the appellant shall file a written clarification of the appeal as required by the Hearing Examiner. If the appeal is not amended by 5:00 p.m. of the last day of that time period, it shall be dismissed by the Hearing Examiner.

(e) Dismissal of Appeals

The Hearing Examiner shall dismiss an appeal without hearing when it is determined by the Hearing Examiner without merit on its face, frivolous, or brought merely to secure a delay.

(f) Parties to the Appeal

The parties to the appeal are the City, appellant(s) and the applicant. If multiple appellants or a group of appellants file an identical appeal, the Hearing Examiner may request that a representative be appointed to receive notices and copies of documents. The appointed representative will receive copies of documents and notices for the group.

(g) Intervention

An interested person may petition the Examiner to intervene as a party. The petition shall be filed at least ten (10) working days prior to the appeal hearing and shall set forth reasons why the petitioner should be allowed to participate. The petition shall be considered at or before the beginning of the hearing and intervention shall be allowed only if the Examiner so orders, and upon such terms and conditions as the Examiner determines to be appropriate.

The parties shall have the opportunity for reply or objection. Any reply or objection must be filed at least three (3) working days prior to the appeal hearing.

(h) Withdrawal of the Appeal

The appellant may withdraw an appeal at any time prior to the close of the record.

(i) Receipt of City File and City Response to the Appeal

Where required under the Code, the Director of Community Development Services shall send written reports and files, including the official file, to the Hearing Examiner. The official City file shall contain all documents used to reach the determination which is the subject of the appeal.

Copies of any written response to the appellant's objections and exceptions shall be sent to the Hearing Examiner and all parties to the appeal by the responding department prior to the appeal hearing.

(j) Staff Report

Where required under the Code, the Department of Community Development shall file a written staff report with the Hearing Examiner, within the timeframe prescribed by the Code, summarizing its case and making a recommendation for a remedy. A copy of this report shall be mailed simultaneously to the appellant. The staff report shall be completed pursuant to the Code.

(k) Format of Appeal Hearing

The format for an appeal hearing will be informal, yet designed in such a way that the evidence and facts relevant to the proceeding will become readily and efficiently available to the Hearing Examiner. Any appeal hearing shall include, but need not be limited to, the following elements:

- (1) A brief introductory statement by the Hearing Examiner.
- (2) Presentation by the City including any relevant testimony the City wishes to present.
- (3) Cross examination of City witnesses by the appellant, if needed.
- (4) Presentation by the appellant, including any relevant testimony the appellant wishes to present.
- (5) Cross examination of appellant witnesses by the City, if needed.
- (6) Presentation of rebuttal witnesses, if needed.
- (7) Questions by the Hearing Examiner.
- (8) Concluding remarks or summations and rebuttal thereto as necessary.

(l) Participation by Non-Party

Appeal hearings are open to the public, but testimony is generally not allowed from a person who is not a party to an appeal hearing unless called as a witness by a party. The Hearing Examiner at his or her discretion may call or allow a non-party witness to testify upon a determination that such testimony will be relevant and not repetitive.

## **10. PRE-DECISION HEARING ON APPLICATIONS**

### **(a) Departmental Staff Report on Application**

Pursuant to the Code, the involved City department(s) shall distribute a staff report to the Hearing Examiner, the applicant, and any other required parties prior to the date of the public hearing and, at the same time, copies shall be made available to the public at the City Clerk's Office.

### **(b) Format of Hearing**

The format for a pre-decision hearing will be public and informal, but organized so that the testimony and evidence can be presented quickly and efficiently. A pre-decision hearing shall include, but need not be limited to, the following elements:

- (1) A brief introductory statement by the Hearing Examiner.
- (2) A presentation by the City, which may include reference to visual aids such as maps, and a summary of the recommendation of city staff.
- (3) Testimony by the applicant.
- (4) Testimony from interested persons.
- (5) Rebuttal by the City.
- (6) Rebuttal by the applicant.
- (6) Closing remarks, if needed.

The examiner may ask questions at any time of any party prior to close of the hearing.

### **(c) Content of the Record**

The record of a hearing conducted by the Hearing Examiner shall include, but need not be limited to, the following:

- (1) The application.
- (2) The departmental staff reports.

(3) All other evidence received or considered including all exhibits and other materials filed.

(4) A recommendation or decision containing findings and conclusions including a statement of matters officially noticed by the Hearing Examiner.

(5) Electronic recordings of the proceedings.

(6) An affidavit or certificate of written notice given of the hearing.

## **11. EVIDENCE**

### **(a) Burden of Proof**

(1) Where applicable ordinance(s) so provide, the Hearing Examiner shall accord deference or other presumption as directed by the applicable ordinance(s).

(2) Where the applicable ordinance(s) provide that the appellant has the burden, appellant(s) must show by the applicable standard of proof that the City's decision or action is not in compliance with ordinance(s) authorizing that decision or action.

(3) Where the applicable ordinance(s) do not provide that the appellant has the burden, the City shall make a prima facie showing that its decision or action is in compliance with the ordinance(s) authorizing that decision or action.

(4) Unless otherwise provided by applicable ordinance(s), statute, or case law, the standard of proof is a preponderance of the evidence.

### **(b) Admissibility**

The hearing generally will not be conducted according to technical rules relating to evidence and procedure. Any evidence that is relevant, material, and reliable may be admitted if in the Hearing Examiner's judgment it possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs.

### **(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 Hearing Examiner may take official notice of generally accepted and recognized facts and law, including but not limited to City ordinances, resolutions, court decisions, and prior Hearing Examiner decisions. The Examiner may also take notice of technical or scientific facts generally accepted as such within the relevant scientific or technical community.

**12. RECORDING**

All proceedings before the Hearing Examiner shall be electronically recorded including but not limited to prehearing conferences, appeal hearings, and pre-decision hearings. The recordings of hearings shall be part of the official case record.

**13. OATH OR AFFIRMATION**

All testimony shall be taken under oath or affirmation.

**14. CROSS-EXAMINATION**

Cross-examination shall be permitted as necessary for full disclosure of the facts and as required by law.

**15. LIMIT ON TESTIMONY**

The Examiner may impose reasonable limitations on the number of witnesses heard, and on the nature and length of their testimony, in order to expedite the proceeding and avoid continuation of the hearing. Notice shall be given as early as practical when time limitations are to be imposed. If a party is unable to present his or her arguments and testimony within the allotted time, the record may be kept open and an opportunity may be granted to submit written materials after the close of the hearing.

**16. MOTIONS**

Any application to the Hearing Examiner for an order shall be by motion which, unless made during a public hearing, shall be in writing. The motion shall state explicitly the reasons for the request, and shall state the specific relief or order sought.

Motions in advance of the hearing shall be received by the Hearing Examiner and all parties of record at least five (5) working days before the date of the hearing. Written replies to such a motion shall be received by the Hearing Examiner and all parties of record before the time set for the hearing.

The Hearing Examiner may issue an order based on the written motion and any replies, without oral arguments, or may call for oral arguments before ruling on the motion.

## **17. CONSOLIDATION OF HEARINGS**

When practical and consistent with ordinance requirements, the Hearing Examiner will consolidate land use matters for hearing. Any party may bring to the attention of the Hearing Examiner the need for consolidation.

## **18. SITE VIEW**

The Hearing Examiner may view a site before or after a hearing. Failure to view a site will not invalidate the Hearing Examiner's decision.

## **19. CONTINUING OR REOPENING HEARING**

(a) Prior to a scheduled hearing, the Examiner may continue the hearing for good cause as determined by the Hearing Examiner. Written notice of the new date, time, and place of the continued hearing shall be provided to each party and person(s) entitled to receive notice pursuant to the FWRC. The notice of a rescheduled hearing need not observe the time requirements to which the original notice was subject.

(b) Prior to the issuance of the subject decision or recommendation, the Examiner may continue or reopen proceedings for good cause and may permit or require written briefs or oral argument as consistent with state law. If a matter is reopened after conclusion of the hearing, written notice of the date, time, and place of the reopened hearing shall be provided to each party and person(s) entitled to receive notice pursuant to the FWRC. Such notice shall be provided not less than ten (10) prior to the reopened hearing

(c) If the Examiner determines at hearing that there is good cause to continue such proceeding and then and there specifies the date, time, and place of the new hearing, no further notice is required.

## **20. LEAVING THE RECORD OPEN**

(a) The Examiner may leave the record of hearing open at the conclusion of a hearing in order to receive argument, additional evidence, or for other good purpose. Parties shall be provided notice of the consideration of any evidence received after hearing and shall have an opportunity to review such evidence and to file rebuttal evidence or argument.

(b) Except as otherwise provided in these rules, , information submitted after the close of the record shall not be included in the hearing record or considered by the Examiner in making the decision or recommendation.

## **21. RECOMMENDATION OR DECISION**

The Hearing Examiner shall issue a written recommendation or decision within ten (10) working days of the closure of the record, unless the time period is extended as

authorized by Code. The decision shall assess any monetary penalty the Hearing Examiner determines to be appropriate pursuant to the Code and may modify the corrective action or the correction date where permitted by the Code.

Copies of the recommendation or decision shall be mailed to all parties of record, and to any other person pursuant to the Code.

## **22. CONTENT OF RECOMMENDATION OR DECISION**

The Hearing Examiner's recommendation or decision shall contain findings of fact, conclusions based thereon, and a recommendation or decision consistent with those conclusions. In addition, the Hearing Examiner's recommendation or decision may include conditions necessary to mitigate any impacts of the proposal and a brief statement of appeal rights of the parties.

## **23. CLARIFICATION OF A DECISION OR RECOMMENDATION OF THE EXAMINER**

A party may file a written request for clarification of the decision or recommendation. Alternatively, the Hearing Examiner may issue a clarification upon his or her own motion. A clarification may not materially alter the outcome of the decision or recommendation. A request for clarification does not stop the running of the time for filing appeals, whether to the City Council or Superior Court.

The written request for clarification must be received by the City Clerk and by all parties within five (5) working days after the date of issuance of the Hearing Examiner's decision or recommendation.

The Hearing Examiner, in his or her discretion, shall determine what further action is proper, and within five (5) working days after filing of the request shall issue that determination in writing to all parties of record.

## **24. RECONSIDERATION**

(a) A party may file a written motion for reconsideration with the City Clerk within five (5) calendar days of the date of the Hearing Examiner's decision. The timely filing of a motion for reconsideration shall stay the Hearing Examiner's decision until such time as the motion has been disposed of by the Hearing Examiner. No party may file a motion to reconsider on a decision issued after reconsideration.

(b) The grounds for seeking reconsideration shall be limited to the following:

1. The Hearing Examiner engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
2. The Hearing Examiner's decision is an erroneous interpretation of the law;

3. The Hearing Examiner's findings, conclusions and/or conditions are not supported by the record;
4. The Hearing Examiner's decision is a clearly erroneous application of the law to the facts; or
5. The Hearing Examiner exceeded the Hearing Examiner's jurisdiction;

(c) The motion for reconsideration must:

1. Contain the name, mailing address and daytime telephone number of the moving party, together with the signature of the moving party;
2. Identify the specific findings, conclusions, actions and/or conditions for which reconsideration is requested;
3. State the specific grounds upon which relief is requested;
4. Describe the specific relief requested; and
5. Where applicable, identify the specific nature of any new evidence. Such new evidence shall be considered only if the additional evidence relates to: (i) the grounds for disqualification of the Hearing Examiner when such grounds were unknown by the moving party at the time the record was created; or (ii) matters that were improperly excluded from the record after being offered by a party.

(d) The Hearing Examiner shall issue a decision on the motion as follows:

1. Deny the motion in writing; or
2. Issue an amended decision; or
3. Accept the motion and set the matter for closed record review with no or limited new evidence or information allowed to be submitted and only written reconsideration arguments allowed. Any written arguments must be filed within 10 calendar days from notice of the Hearing Examiner.

## **25. TERMINATION OF JURISDICTION**

The jurisdiction of the Hearing Examiner in a matter shall terminate upon the issuance of his or her final action in that matter. The Hearing Examiner's final action is the issuance of a recommendation or decision unless a request for reconsideration or clarification is timely filed. If a request for reconsideration or clarification is timely filed, the final action

of the Hearing Examiner is his or her determination on the reconsideration or clarification request.

Upon termination of the Hearing Examiner's jurisdiction, matters which require City Council action are under the jurisdiction of the City Council. The City Council may, however, revive the jurisdiction of the Hearing Examiner and remand a matter for clarification of specific issues, or to consider facts not available at the time of the original hearing. Remand hearings shall be processed in the same manner as the original proceeding before the Hearing Examiner, using the same procedures for posting, public notice and the forwarding of the Hearing Examiner's recommendation to the City Council.

## **25. DISPOSITION OF CASE RECORD**

The official case record and other related materials shall be forwarded to the City Clerk for storage after a matter has been finally acted upon by the City Council or by the Hearing Examiner. Tape recordings of all proceedings before the Hearing Examiner shall be maintained in the City Clerk's Office for the period required by law.

Case records of matters before the Hearing Examiner are public records and available for review.

## **26. RULES FOR SPECIFIC CASES**

The rules in this section address those specific cases where the procedures and practices must be different because the requirements and/or operation of the underlying ordinance or other substantive authority are unique. Where the FWRC or other substantive authority for the Hearing Examiner's jurisdiction specifies a practice or procedure different or additional to the Hearing Examiner Rules, that FWRC or substantive authority shall control. In the event that the rules in previous Sections of the Hearing Examiner Rules conflict with this section, the rules in this section shall control.

### **(a) Seized Property Claims**

(1) Upon written referral from the Police Department, a claim relating to property seized pursuant to RCW 69.50 or other applicable statute or ordinance shall be scheduled for hearing with notice provided to the parties.

(2) Proceedings for seized property claims shall be conducted in accordance with RCW 34.05.

(3) Proceedings for seized property claims pursuant to RCW 69.50 shall be presided by the Chief of Police or his/her designee.

### **(b) Vehicle Impound Hearings and Junk Vehicles**

Proceedings relating to impounded vehicles and junk vehicles are governed by RCW 46.55 and FWRC Title 8.

(c) Animal Control

Proceedings relating to Animal Control are governed by FWRC Title 9.

27. Filing.

(a) Documents shall be deemed filed with the Hearing Examiner, City Clerk and City on receipt at the City of Federal Way City Clerk's Office, located at 33325 8<sup>th</sup> Ave S., Federal Way, WA 98003.

(b) Documents shall be served personally or, unless otherwise provided by applicable ordinance, by first-class, registered, or certified mail, or by facsimile (fax) transmission. Service shall be regarded as complete upon deposit in the regular facilities of the U.S. Mail of a properly stamped and addressed letter or packet, or at the time personally delivered, or transmitted by fax. On a case by case basis the Hearing Examiner may authorize service by email to specified email addresses in lieu of fax or mail.

ADOPTED this 28th day of October, 2014.



Phil A. Olbrechts

City of Federal Way Hearing Examiner