

Chapter 2.58 LAND USE HEARING EXAMINER

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2.58.010 Creation of Land Use Hearing Examiner.

Pursuant to RCW 35.63.130 and RCW 57.17.330, the office of land use hearing examiner, hereinafter referred to as "examiner" is created. The examiner shall interpret, review and implement land use regulations as provided in this chapter, TMC 14.08.030, or as provided by any other ordinances of the city. Unless the context requires otherwise, the term "examiner" as used in this chapter, shall include "examiners pro tem."

(Ord. 1259, Added, 11/06/1990; Ord. O96-004, Amended, 04/16/1996)

2.58.020 Appointment and term.

The examiner shall be appointed by the mayor and shall serve at the mayor's discretion. The mayor may also appoint, for terms and functions deemed appropriate, examiners pro tem to serve in the event of the examiner's absence or inability to act.

(Ord. 1259, Added, 11/06/1990)

2.58.030 Qualifications.

Examiners shall be appointed solely with regard to their qualifications for the duties of their office and will have such training and experience as will qualify them to conduct administrative or quasi-judicial hearings on regulatory enactments and to discharge the other functions conferred upon them. Examiners shall hold no other elective or appointive office or position in the governmental structure of the city.
(Ord. 1259, Added, 11/06/1990)

2.58.040 Freedom from improper influence.

No person, including city or county officials, elective or appointive, shall attempt to influence an examiner in any matter pending before the examiner, except at a public hearing duly called for such purpose, or to interfere with an examiner in the performance of the examiner's duties in any other way; provided, that this section shall not prohibit the city attorney or county prosecuting attorney from rendering legal services to the examiner upon request.
(Ord. 1259, Added, 11/06/1990)

2.58.050 Conflict of interest.

No examiner shall conduct or participate in any hearing, decision or recommendation in which the examiner has a direct or indirect substantial financial or familial interest, or concerning which the examiner has had substantial pre-hearing contacts with proponents or opponents. No member of the city council who has such an interest or has had such contacts shall participate in the consideration of an appeal from or a review of an examiner's decision.
(Ord. 1259, Added, 11/06/1990)

2.58.060 Organization.

The operation of the hearing examiner's office shall be under the administrative supervision of the examiner and shall be separate from the departments of the City. Provided however, the department of development services shall provide administrative support to the hearing examiner.
(Ord. 1259, Added, 11/06/1990; Ord. O96-004, Amended, 04/16/1996)

2.58.070 Improper influence, conflict of interest and appearance of fairness.

A. No city official elective or appointive, shall attempt to influence the examiner in any matter officially before him so as to constitute misconduct of a public office under RCW 42.20 or a violation of the Appearance of Fairness Doctrine. No member of the council shall participate in any proceeding on appeal from an examiner's decision if to do so would constitute a conflict of interest or violation of the Appearance of Fairness Doctrine.

B. The examiner shall conduct all proceedings in a manner to avoid conflicts of interest or other misconduct and to avoid violations of the Appearance of Fairness Doctrine. If such conflicts or violations cannot be avoided in a particular case, the examiner shall assign an examiner pro tem to act in his/her absence.
(Ord. 1259, Added, 11/06/1990; Ord. O96-004, Amended, 04/16/1996)

2.58.080 Rules.

The examiner shall have the power to prescribe rules not in conflict with this chapter for the scheduling and conduct of hearings and other procedural matters related to the duties of this office.

(Ord. 1259, Added, 11/06/1990)

2.58.090 Powers of the examiner.

A. The hearing examiner shall conduct open record predecision hearings and open record appeal hearings and render decisions on such matters as are within the examiner's jurisdictional authority. The examiner shall receive and examine all available information, conduct public hearings and prepare a record thereof and enter decisions as provided for herein for the following matters:

1. Variances;
2. Conditional use permits;
3. Preliminary plats;
4. Administrative land use appeals;
5. Shoreline permits;
6. SEPA appeals;
7. Site-specific rezone not requiring a Comprehensive Plan amendment;
8. Planned unit development;
9. Impact fee determinations;
10. Concurrency determinations;
11. Such additional matters as are described in TMC 14.08.030;
12. Administrative orders and civil penalties issued for violations of TMC

Chapters 13.12, 16.20 and 16.32;

13. Applications for reasonable use exception decisions under TMC 16.28.190 and 16.32.097.

B. The decision of the hearing examiner shall be final unless such decision is appealed to the city council pursuant to TMC 2.58.150.

(Ord. O2009-018, Amended, 01/19/2010; Ord. O2005-021, Amended, 09/06/2005; Ord. O96-024, Amended, 09/17/1996; Ord. O96-004, Amended, 04/16/1996; Ord. O95-022, Amended, 11/07/1995; Ord. 1333, Amended, 10/20/1992; Ord. 1278, Amended, 08/20/1991; Ord. 1259, Added, 11/06/1990)

2.58.095 Takings and substantive due process review and modifications.

A. In addition to the powers described in TMC 2.58.090, the hearing examiner is hereby authorized to hear, by way of appeal or upon review of a project permit application, all assertions of project-specific taking of property for public use without just compensation and/or the denial of substantive due process of law, and all challenges to imposition of conditions on a project of a similar nature, whether based on constitutional, statutory or common law. Failure to raise a specific challenge to such condition or exaction shall constitute a waiver of such issue and a failure to exhaust an administrative remedy.

B. In deciding and resolving any such issue, the examiner may consider all law applicable to the city. Should the examiner determine that, but for a taking without just compensation or a violation of substantive due process of law, imposition of any such

condition would be required by standard, regulation, or ordinance the examiner shall so state in the decision and so report to the Tumwater City Council. In lieu of failing to impose such condition, the examiner shall first provide the city with due opportunity to provide just compensation. The examiner shall specify a time period in which the council shall elect to or not to provide just compensation. Upon notice of the election of the city council not to provide such compensation, the examiner is authorized to and shall, within fourteen (14) days, issue a decision modifying to whatever degree necessary such condition to eliminate the taking or violation of substantive due process. (Ord. O96-004, 04/16/1996)

2.58.100 Applications for permits or approvals.

A. Applications for permits or approvals within the jurisdiction of the hearing examiner shall be presented to and processed by the department of development services as set forth in Title 14, Development Code Administration.

B. Consolidated Appeals. All appeals of project permit application decisions, other than an appeal of Determination of Significance (DS), shall be considered together in a consolidated appeal. [RCW 43.21C.075, RCW 36.70B.070(6).] (Ord. 1259, Added, 11/06/1990; Ord. O96-004, Amended, 04/16/1996)

2.58.110 Distribution of Information.

The department of development services shall provide for the distribution of reports, comments and other appropriate information, including those of other government agencies, to the hearing examiner. This process shall comply with the provisions of Title 14, Development Code Administration, and the provisions of this chapter. In addition thereto, the development services department shall prepare a report summarizing the factors involved and the department's findings and recommendations. At least five working days prior to the scheduled hearing the report shall be filed with the examiner and copies thereof shall be mailed to the applicant and made available for public inspection. Copies thereof shall be provided to interested parties upon payment of reproduction costs.

(Ord. 1259, Added, 11/06/1990; Ord. O96-004, 04/16/1996)

2.58.115 Hearing Examiner subpoenas.

A. A subpoena issued by the Hearing Examiner may be served by any person 18 years of age or over, competent to be a witness, but who is not a party to the matter in which the subpoena is issued.

B. Each witness subpoenaed by the Hearing Examiner as a witness shall be allowed the same fees and mileage as provided by law for paid witnesses in courts of record in this state.

C. If a person fails to obey a subpoena issued by the Hearing Examiner in an adjudicative proceeding, or obeys the subpoena but refuses to testify or produce documents when requested concerning a matter under examination, the Hearing Examiner or attorney issuing a subpoena may petition the Tumwater Municipal Court for enforcement of the subpoena. The petition shall be accompanied by a copy of the subpoena and proof of service, shall set forth in what specific manner the subpoena has not been complied with, and shall request an order of the court to compel compliance.

Upon such petition, the court shall enter an order directing the person to appear before the court at a time and place fixed in the order to show cause why the person has not obeyed the subpoena or has refused to testify or produce documents. A copy of the court's show cause order shall be served upon the person. If it appears to the court that the subpoena was properly issued, and that the particular questions the person refused to answer or the requests for production of documents were reasonable and relevant, the court shall enter an order that the person appear before the Hearing Examiner at the time and place fixed in the order and testify or produce the required documents, and on failing to obey this order the person shall be dealt with as for contempt of court. (Ord. O2005-021, Added, 09/06/2005)

2.58.120 Notices and hearings/Appeal rights.

In the furtherance of the responsibilities of the hearing examiner, the department of development services shall comply with the notice and hearing requirements set forth in TMC 14.06 and such other code related or statutory notice and hearing requirements as are applicable to the proceeding. At the commencement of the hearing, the examiner shall give oral notice regarding the register provided for in Section 2.58.140. At the conclusion of the hearing, those present shall be advised of appeal rights and the hearing examiner shall specifically advise that the scope of appeal shall be strictly limited to the specific assignment of error alleged by any appealing party. The Department of Development Services shall also provide written information to interested parties describing their appeal rights.

(Ord. 1259, 11/6/1990; Ord. O96-004, Amended, 04/16/1996; Ord. O96-039, Amended, 11/05/1996)

2.58.125 Dismissals.

A petitioner's failure to state specific grounds of the appeal and relief sought may result in dismissal of such appeal. The city staff or any party may request dismissal of an appeal at any

time with notice to all parties. Upon finding that the appeal fails to state cause to reverse or modify the decision or that the examiner lacks jurisdiction to grant relief, the examiner may dismiss such appeal without hearing. The examiner shall state in writing whether such dismissal is with or without prejudice.

(Ord. O96-004, Added, 04/16/1996)

2.58.130 Examiner's decision.

A. Within ten working days of the conclusion of a hearing, unless a longer period is agreed to in writing by the applicant, the examiner shall render a written decision which shall include at least the following:

1. Findings based upon the records and conclusions therefrom which support the decision. Such findings and conclusions shall also set forth the manner by which the decision would carry out and conform to the city's comprehensive plan, other official policies and objectives, and land use regulatory enactments;

2. A decision on the application which may be to grant, deny or grant with such conditions, limitations, modifications and restrictions as the examiner finds

necessary to make the application compatible with its environment, the comprehensive plan, other official policies and objectives, and land use regulatory enactments;

3. A statement as to appeal rights of any party (quasi-judicial or judicial) including the jurisdictional time limits for such appeal. See TMC 2.58.150, TMC 2.58.160 and TMC 2.58.180.

B. Except where the parties have agreed to extend time periods, the time period for consideration and decision on appeals shall not exceed:

1. Ninety (90) days for open record hearings; and
2. Sixty (60) days for a closed record appeal.

(Ord. 1259, Added, 11/6/1990; Ord. O96-004, Amended, 04/16/1996)

2.58.135 Reconsideration.

Upon the written request of a party of record as defined in TMC 2.58.140 filed with the Department of Development Services within five working days of the Hearing Examiner's written decision, such decision may be reconsidered at the discretion of the Hearing Examiner. The request for reconsideration must state the grounds upon which the request is made. In the event reconsideration is granted, the Hearing Examiner shall have an additional ten working days to render a written final decision.

(Ord. O96-039, Added, 11/05/1996)

2.58.140 Notice of examiner's decision.

Not later than five working days following the rendering of a written decision, copies thereof shall be mailed to the applicant and to other parties of record in the case. "Parties of record" shall include the applicant and all other persons who specifically request notice of decision by signing a register provided for such purpose at the public hearing. The original of the decision shall be transmitted to the director of the department of development services.

(Ord. 1259, Added, 11/6/1990; Ord. O96-004, Amended, 04/16/1996)

2.58.150 Appeal from examiner's decision.

A. In cases where the examiner's jurisdictional authority is to render a decision (following an open record predecision), the decision of the examiner shall be final and conclusive unless within fourteen calendar days following rendering of such decision an appeal therefrom is filed with the director of development services by the applicant, a department of the city, county or other agency or a party of record as defined in Section 2.58.140. Persons not in attendance at the hearing but who submit written information prior to the hearing which becomes a part of the record of the hearing shall also have appeal rights. Such appeal shall be in writing, shall contain all grounds on which error is assigned to the examiner's decision and shall be accompanied by a fee as established by resolution of the city council; provided, that such appeal fee shall not be charged to a department of the city or to other than the first appellant

B. In the event an apparent prevailing party files an appeal to preserve appeal rights and no opposing appeals are filed, said party may, by giving written notice thereof to the Director of Development Services, abandon their appeal and in such event shall be refunded their filing fee.

C. The timely filing of an appeal shall stay the effective date of the examiner's decision until such time as the appeal is adjudicated by the city council or is withdrawn.

D. Within five days after the final day upon which an appeal may be filed, notice thereof and of the date, time and place for city council consideration shall be mailed to the applicant, to all other parties of record and anyone who submitted written information prior to the hearing. Such notice shall additionally indicate the deadline for submittal of written arguments as prescribed in Section 2.58.160. (Ord. 1259, Added, 11/06/1990; Ord. O96-004, Amended, 04/16/1996; Ord. O96-039, Amended, 11/05/1996)

2.58.160 City Council consideration/ procedural rules.

An examiner's decision, which has been timely appealed pursuant to Section 2.58.150 shall come on for city council consideration as a closed record appeal hearing within thirty days after the final day upon which an appeal may be filed.

The appellant and parties of record must submit the written argument to the director of development services no later than ten days preceding the city council meeting at which the matter is scheduled to be heard.

An oral argument of up to ten minutes duration or such additional amounts as the mayor deems appropriate, (excluding time devoted to answering questions), will be allowed if a written argument was timely submitted. Both the written and oral argument must be within the scope of the appeal. To be within the scope of the appeal the written and oral argument must be directly related to the specific error assigned to the Hearing Examiner's decision filed within fourteen days of the Hearing Examiner's decision

The development services staff/examiner shall submit in writing a summary of the findings, conclusions and decision, as well as the alleged errors forming the basis of the appeal. The city council shall consider the matter based upon the written record before the examiner, the examiner's decision, and the written appeal of any petitioner or party of record and shall not consider written argument or documentation not within the scope of the appeal. The scope of appeal is limited to the assignment of error set forth in the written appeal of any petitioner.

(Ord. 1259, Added, 11/06/1990; Ord. O96-004, Amended, 04/16/1996; Ord. O96-039, Amended, 11/05/1996)

2.58.170 City council action.

A. The city council may accept, modify or reject the examiner's decision, or any findings or conclusions therein, or may remand the decision to the examiner for further hearing. A decision by the city council to modify, reject or remand shall be supported by findings and conclusions.

B. If the council finds that:

1. The examiner's conclusions or decision contains substantial error or are inconsistent with the city's adopted plans, policies or ordinances, or are not based on findings established by the examiner; or

2. The examiner's proceedings were materially affected by irregularities in procedure; or

3. The examiner's findings were unsupported by substantial evidence in view of the entire record as submitted; it may remand for further hearing before the hearing

examiner or may reverse the hearing examiner's decision. In addition, the council may choose to modify the examiner's decision based on the above criteria. Further, any proposal may be continued to a time certain for additional city staff analysis desired by the council, before a final determination by the council.

4. If the council determines that there is no basis for the alleged errors set forth in the appeal, it may adopt the findings and conclusions of the hearing examiner and accept the decision of the hearing examiner.

C. This procedure is the only method of appealing alleged errors or irregularities in procedure which may have occurred before the hearing examiner. All objections are deemed waived if no appeal is taken from the action by the examiner. The city council shall render its decision within sixty calendar days of the filing of the appeal.

(Ord. 1259, Added, 11/06/1990; Ord. O96-004, Amended, 04/16/1996)

2.58.180 Judicial appeals.

Final decisions, (after exhausting administrative remedies), may be appealed by a party of record with standing to file a land use petition in the Thurston County Superior Court. Such petition must be filed within twenty-one (21) days of issuance of the decision as provided in Chapter 36.70C RCW.

(Ord. 1259, Added, 11/06/1990; Ord. O96-004, Amended, 04/16/1996)

2.58.190 Council review/Hearing examiner functions.

The director of development services shall at least annually provide the city council with a written report of the non-appealed decisions of the hearing examiner for the previous period for the purpose of reviewing the administration of the development code and the city's land use policies and regulations.

(Ord. 1259, Added, 11/06/1990; Ord. O96-004, Amended, 04/16/1996)