

CITY OF TUMWATER
OFFICE OF THE HEARING EXAMINER

RULES OF PROCEDURE
FOR HEARINGS

Adopted 9-2-2005

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INTRODUCTION

These Rules of Procedure are established pursuant to *Tumwater Municipal Code*, Chapter 2.58, to help secure the fair and efficient conduct of matters subject to the City's administrative hearing system. The underlying concern is to ensure that the essentials of due process - notice and opportunity to be heard - are an integral part of every hearing conducted.

The Hearing Examiner has jurisdiction over a wide variety of specific matters identified in Chapter 2.58 TMC. From the standpoint of procedure, these fall into two major categories: (1) Pre-Decision Hearings and (2) Appeals.

Pre-Decision Hearings are held on a relatively limited number of matters as a means for assembling information, including public testimony, to be used as the basis for making a decision on an application.

Appeals constitute the vast majority of hearings. These are proceedings which seek to overturn or change a decision the City already has made. Such decisions are final, unless appealed to the City Council.

Because of the inherently different functions performed by Pre-Decision Hearings and Appeals, the procedures for the two differ. The major difference is in the level of public involvement. In Pre-Decision Hearings, testimony from the general public is sought. A feature of each hearing is to solicit the views of any citizen who wishes to be heard.

Appeal hearings, by contrast, are contests between specific identified parties: normally, the appellant, the City and the applicant (if different from the appellant). In appeal hearings, each party is responsible for his or her case and those testifying are usually only those persons called as witnesses by one of the parties. The public is normally allowed to attend, but public testimony is not taken.

TABLE OF CONTENTS

Section 1 - Generally Applicable Rules

1.01	Powers of Hearing Examiner	6
1.02	Ex Parte Communications	6
1.03	Disqualification of Hearing Examiner	7
1.04	Computation of Time	7
1.05	Filing and Service of Documents	7
1.06	Official File	8
1.07	Consolidation	8
1.08	Parties of Record	8
1.08.5	Subpoenas	8
1.09	Motions	9
1.10	Hearing Date/ Continuance	9
1.11	Evidence	9
1.12	Exhibits	9
1.13	Testimony	10
1.14	Continuation or Reopening Hearing/ Leaving Record Open	10
1.15	Site Visits	11
1.16	Criteria for Decision	11
1.17	Termination of Jurisdiction	11
1.18	Recording	11

Section 2 - Rules for Appeal Hearings

2.01	Matters Subject to Appeal Hearings	12
2.02	Notice of Appeal	12
2.03	Filing Fee	12
2.04	Who May Appeal (Standing)	12
2.05	Clarification or Amendment of Notice of Appeal	13
2.06	Parties to the Appeal	13
2.07	Intervention	13
2.08	Representative of Party	13
2.09	Dismissal Prior to Hearing	13
2.10	Default/Withdrawal of Appeal/Withdrawal of Decision	14
2.11	Prehearing Conference	14
2.12	Informal Settlement	15
2.13	Limited Public Participation	15
2.14	Format of Hearing	15
2.15	Burden of Proof	16
2.16	Expert Testimony	16
2.17	Hearing on Written Submissions	16
2.18	Hearing Examiner's Decision	16
2.19	Reconsideration	16
2.20	Further Review	17
2.21	Content of Record	17

Section 3 - Rules for Pre-Decision Hearings

3.01	Matters Subject to Pre-Decision Hearings	18
3.02	Public Participation	18
3.03	Parties of Record	18
3.04	Interested Persons	18
3.05	Staff Report	18
3.06	Format of Hearing	19
3.06.5	Default	19
3.07	Testimony for Organizations	19
3.08	Burden of Proof	19
3.09	Hearing Examiner's Decision	20
3.10	Reconsideration	20
3.11	Appeal of Examiner's Decision	20
3.12	Content of the Record	20

Section 1

GENERALLY APPLICABLE RULES

1.01 Powers of Hearing Examiner

In addition to the powers of the Hearing Examiner set forth in Ch. 2.58 TMC, the Hearing Examiner shall have all powers necessary to conduct orderly, efficient and fair hearings. The Hearing Examiner's powers shall include, but not necessarily be limited to the authority:

- (a) to administer oaths and affirmations;
- (b) to issue subpoenas compelling the attendance of witnesses and the production of documents; and to issue protective orders;
- (c) to rule on all procedural matters, objections and motions;
- (d) to admit and exclude evidence;
- (e) to limit testimony, by time or subject;
- (f) to question witnesses and request additional information;
- (g) to hold prehearing conferences;
- (h) to regulate the course of hearings and the conduct of participants;
- (i) to make orders, recommendations and decisions, including the imposition of reasonable conditions.

1.02 Ex Parte Communications

Any communication between any participant in a hearing and the Examiner that occurs outside of the hearing and in the absence of the other participants is an ex parte communication.

- (a) No interested person or representative shall communicate ex parte directly or indirectly with the Examiner, nor shall the Examiner communicate ex parte directly or indirectly with any interested person or representative, concerning the merits or facts of any matter being heard before the Examiner.
- (b) This rule does not prohibit ex parte communications about procedural topics, nor does it apply to written submissions made for the record and available to all participants.

(c) If prohibited ex parte communication is made directly or indirectly to the Examiner, such communication shall be disclosed on the public record. Within 10 days after notice thereof, any interested party desiring to rebut the communication shall be allowed to place a written rebuttal in the record.

1.03 Disqualification of Hearing Examiner

Any person acting as Hearing Examiner is subject to disqualification for bias, prejudice, conflict of interest, or any other cause for which a judge can be disqualified.

(a) Whenever the Examiner believes that his relationship to participants or financial interest in the subject of a hearing create the appearance that the proceedings will not be fair, the Examiner shall either: (1) voluntarily step down from the case, or (2) disclose, the relationship or interest on the record, stating a bona fide conviction that the interest or relationship will not interfere with the rendering of an impartial decision.

(b) Any party or interested person may petition for the disqualification of an Examiner promptly after receipt of notice that the individual will preside or, if later, promptly upon discovering grounds for disqualification. The Examiner for whom the disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination.

1.04 Computation of Time

Time Computation. In computing any time period set forth in this chapter, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is neither Saturday or Sunday, nor a legal holiday. Legal holidays are described in RCW 1.16.050. Lack of observance of time periods for filing and service of documents as set forth in these rules will operate against the party that failed to observe the same.

1.05 Filing and Service of Documents

(a) All written submissions made in advance of a hearing shall be filed with the Development Services Office, 555 Israel Road SW, Tumwater, WA 98501. Filing shall be complete only upon receipt. Facsimile submissions are prohibited.

(b) Documents required to be served on other participants may be delivered personally, or sent by mail. In the latter case, service shall be deemed complete upon deposit in the mail.

(c) Service on the representative of a party shall constitute service upon the party, except for decisions or recommendations of the Examiner, or petitions for review to the court. Such decisions, recommendations or appeals shall be served on the parties themselves.

1.06 Official File

All written submissions shall be maintained in the official file, to be maintained by the Development Services Office. The official file shall be available for public inspection and copying during normal business hours, except for any portions thereof which the Examiner has ordered to be confidential.

1.07 Consolidation

(a) Multiple appeals of the same decision and multiple appeals concerning different aspects of a single project shall be consolidated for hearing. Except where a Determination of Significance was issued, review of compliance with State Environmental Policy Act procedures shall be consolidated with any decision on the underlying application.

(b) The Examiner shall otherwise have discretion to consolidate related matters for hearing whenever the interests of justice and efficient procedure will be served by such action.

(c) When the consolidated matters involve both a pre-decision hearing and an appeal hearing, the pre-decision hearing portion of the proceeding shall normally be held first. This will allow members of the public to testify without a protracted wait. In such a case, the Examiner may determine that evidence given in either portion of the proceeding may apply to the decision in the other portion.

1.08 Parties of Record

(a) In appeals, the parties of record shall be the appellant(s), the City, the applicant(s), if different from the appellant(s), and any intervenor(s) who are granted intervention status.

(b) In pre-decision hearings, the initial parties of record shall be the applicant(s) and the City. Subsequently, any individual or organization that participates in the hearing by oral testimony or written submission shall become a party of record.

1.08.5 Subpoenas

Subpoenas may be issued by the Examiner compelling the appearance of witnesses and the production of documents and 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 for which the subpoena is issued. Provided, that a subpoena may be issued with like effect by the attorney of record of the party to the matter in whose behalf the witness is required to appear and the form of such subpoena in each case may be the same as one issued by the Examiner except that it shall only be subscribed by the signature of such attorney.

Each witness subpoenaed shall be allowed the same fees and mileage as provided by law to be paid witnesses in the courts of records in the state.

Subpoenas issued in the matter before the Examiner may be enforced in the Tumwater Municipal Court.

1.09 Motions

Any application to the Examiner for an order shall be by motion. Unless agreed to by all known participants or made during a hearing, a motion shall be in writing. Known participants include all parties of record at the time the motion is made.

- (a) Written motions shall be filed at least eight calendar days in advance of the hearing, and copies thereof shall be served on other known participants according to Rule 1.05. Such motions shall state the reason(s) for the request and specify the relief sought.
- (b) Parties of record shall have an opportunity to respond to written motions no later than five calendar days after receipt.

1.10 Hearing Date/Continuance

Hearings shall normally be held at the time and place specified in the notice thereof. A scheduled hearing may be continued by the Examiner on his or her own motion or for good cause on motion of a party of record.

1.11 Evidence

- (a) Evidence, including hearsay evidence, is admissible if in the judgment of the Examiner it is the kind of evidence upon which reasonably prudent persons are accustomed to rely in the conduct of their affairs.
- (b) The Examiner may exclude evidence that is irrelevant, unreliable, immaterial, or unduly repetitious.
- (c) The Examiner shall exclude evidence that is privileged or excludable on constitutional or statutory grounds.
- (d) The Examiner may take official notice of enacted provisions of law, of codes or standards adopted by a recognized organization, of matters within his specialized expertise and of notorious or commonly understood facts.

1.12 Exhibits

- (a) Documents, photographs, drawings and physical evidence may be offered as exhibits and each will be assigned an exhibit number. Exhibits admitted into the record will be

retained until after a decision is rendered and all appeal proceedings, if any have been concluded.

(b) The Staff Report, if any, and all documents offered from the official file shall be admitted.

(c) Documentary evidence may be offered in the form of copies or excerpts.

(d) The Examiner may order that an exhibit be kept confidential. Any such exhibit shall not be subject to examination, except as the Examiner may permit.

1.13 Testimony

(a) All oral testimony shall be taken under oath or affirmation.

(b) The Examiner may impose reasonable limitations on the nature and length of testimony. In so doing the Examiner shall give consideration to: (1) the expeditious completion of the hearing; (2) the need to provide parties of record a fair opportunity to present their cases; (3) accommodating the desires of all members of the public to be heard when public testimony is taken.

(c) Where the rights of the participants will not be prejudiced, testimony of a witness may be taken by deposition or by electronic means, such as telephone or television, as long as the Rules of Civil Procedure for the taking of depositions has been fully complied with.

(d) Parts of a hearing may be closed to public observation by the Hearing Examiner under a provision of law expressly authorizing such closure or under a protective order entered by the Examiner. Upon a showing of good cause, the Examiner may exclude a witness from observing parts of the hearing in which the witness is not a participant.

1.14 Continuation or Reopening Hearing/Leaving Record Open

(a) Every effort shall be made to complete the hearing on the scheduled date(s). If, however, testimony cannot be presented in the time available, the hearing may be continued for completion on another date. When in open hearing, the Examiner specifies the date, time and place of the continuation of the hearing, no further notice is required.

(b) The Examiner may hold the record open for the receipt of additional requested information, for legal briefing, or in order to allow participants to respond to matters raised.

(c) After closing the record, the Examiner may reopen the hearing for good cause at any time prior to the issuance of the subject decision(s) or recommendation(s).

1.15 Site Visits

The Examiner may visit the site before a hearing upon motion by a party. The purpose of a site visit is to assist the Examiner in understanding the evidence presented at hearing. If the Examiner conducts a post-hearing site inspection, the hearing record will not close until the inspection is completed. However, the observations made at such an inspection are not evidence.

1.16 Criteria for Decision

The applicable legal standards shall be the basis for every decision or recommendation by the Examiner.

1.17 Termination of Jurisdiction

The jurisdiction of the Examiner terminates upon the end of the period for appealing or seeking review of the Examiner's decision or recommendation. Notwithstanding the foregoing, clerical mistakes in decisions, orders, or recommendations and errors therein arising from oversight or omission may be corrected by the Examiner at any time on his or her own motion or on the motion of a party of record or if such decision, order, or recommendation is appealed, such mistakes may be so corrected before review is accepted by the reviewing authority.

1.18 Recording

All proceedings before the Examiner shall be electronically recorded and the recordings shall be made a part of the record. Copies of the recordings shall be made available on request and upon payment of the costs of reproduction. The preparation of a written transcript shall be the responsibility of the person desiring the transcript.

Section 2

RULES FOR APPEAL HEARINGS

2.01 Matters Subject to Appeal Hearings

Appeal hearings shall be held on all matters within the jurisdiction of the Hearing Examiner as set forth in Ch. 14.08 and 2.58 TMC.

2.02 Notice of Appeal

(a) An appeal to the Hearing Examiner is initiated by filing a Notice of Appeal. The notice must be in writing and shall contain the following:

- (1) A brief statement showing how the appellant is aggrieved or adversely affected.
- (2) A statement of the grounds for the appeal, explaining why the appellant believes the administrative decision is wrong.
- (3) A specific reference to state law (by RCW cite), City code (by TMC cite), and/or policy document, that supports the grounds for appeal.
- (4) The requested relief, such as reversal or modification of the decision.
- (5) The signature, mailing address and telephone number of the appellant and any representative of the appellant.

2.03 Filing Fee

(a) The Notice of Appeal shall be accompanied by any filing fee required by City resolution. Filing of the appeal shall not be complete until both the Notice of Appeal and any required filing fee have been received. For an appeal to be timely, filing must be complete before the appeal period has run.

(b) As authorized by law, indigence may support a waiver of the filing fee.

2.04 Who May Appeal (Standing)

Any person aggrieved or adversely affected by a decision may file a Notice of Appeal. A person is aggrieved or adversely affected when: (1) the decision has prejudiced or is likely to prejudice that person; (2) the person's interests are among those required to be considered in rendering the decision; and (3) a determination in favor of the person would substantially eliminate or redress the prejudice. The term person includes individuals and collective entities, such as associations or corporations.

2.05 Clarification or Amendment of Notice of Appeal

(a) If the Notice of Appeal is unclear or does not sufficiently explain the basis for the appeal as set forth in Rule 2.02, the Examiner may require that the appellant clarify the appeal to correct the deficiency.

(b) After the initial filing, a Notice of Appeal may be amended to add new grounds, so long as the opportunity of other parties for a fair hearing is not prejudiced by the amendment.

2.06 Parties to an Appeal

The parties to an appeal are the appellant(s), the City, the applicant(s) if different from the appellant(s), and any intervenor(s) granted intervenor status. The City and all parties resisting the appeal shall be designated as respondents. All parties, including the City, may be represented by counsel.

2.07 Intervention

Upon a showing sufficient to meet the requirements of Civil Rule 24, the Examiner may permit an individual or entity who has not filed a timely appeal to intervene, either as an appellant or as a respondent. In ruling on an intervention request the Examiner shall ensure that the intervention will not interfere with the orderly and prompt conduct of the proceedings or otherwise prejudice the rights of any of the original parties. Conditions may be imposed upon the intervenor's participation, including precluding the intervenor from expanding the issues in the appeal.

2.08 Representative of Party

(a) An individual may represent himself or herself, or may be represented by counsel. This rule shall not prevent an individual from using a non-lawyer as a translator, so long as the only service performed is translation.

(b) Where the party is other than an individual, a representative shall be designated. This person shall be the only person authorized to speak on behalf of the party. The representative shall speak for and otherwise exercise the rights of the party. Any authorized person may serve as a representative for an association, corporation or other collective entity.

2.09 Dismissal Prior to Hearing

An appeal may be dismissed prior to hearing if the Examiner determines that:

(a) The appeal was not timely filed.

- (b) The appeal is based on grounds or seeks relief outside the authority of the Examiner.
- (c) The appellant lacks standing to bring the appeal. (See Rule 2.04)
- (d) The appeal is without merit on its face, patently frivolous, or brought merely for purposes of delay.
- (e) The Notice of Appeal fails to sufficiently explain the basis for the appeal.

2.10 Default/ Withdrawal of Appeal/Withdrawal of Decision

- (a) If an appellant fails to appear at a regularly scheduled prehearing conference or hearing, an order shall be entered dismissing the appeal for default. A default order shall be final unless, within seven days of service, good cause to vacate the order is shown by the party against whom it was entered.
- (b) An appellant may request withdrawal of the appeal. Such a request shall be granted if made before the appellant has completed presentation of his or her case. Thereafter, the granting of the request is discretionary.
- (c) When the decision or action being appealed is withdrawn by the City, the appeal shall be dismissed as moot and the appellant(s) shall be entitled to return of any filing fee paid.

2.11 Prehearing Conference

- (a) When it will assist the orderly and efficient disposition of the appeal, the Examiner may schedule and hold a prehearing conference. Alternatively, any party may request a prehearing conference. A prehearing conference may, among other things, consider:
 - (1) Settlement of the appeal;
 - (2) Simplification, definition or limitation of issues;
 - (3) The possibility of obtaining stipulations relating to undisputed facts, the admission of documents or other matters which will avoid unnecessary proof;
 - (4) Identification of witnesses and documentary or other evidence to be presented at hearing;
 - (5) The conduct of reasonable discovery prior to hearing;
 - (6) Procedural matters.
- (b) Prehearing conferences may be held by telephone conference call.

(c) Based on the discussion and agreements at the prehearing conference, the Examiner shall issue a Prehearing Order which shall govern subsequent proceedings. If the case is settled at such a conference, the Examiner shall enter an Order reciting the terms of the settlement and dismissing the appeal.

2.12 Informal Settlement

Nothing in these rules shall be construed to limit the right of any party to attempt informal settlement of an appeal at any time.

2.13 Limited Public Participation

Unless specifically required by law to be closed, appeal hearings are open to the public. However, testimony or other evidence is generally not allowed from individuals or entities that are not parties, unless they are called as witnesses by a party or by the Examiner. Appellants have the right to organize their appeals as they see fit, including the selection of the witnesses they wish to present.

2.14 Format of Hearing

The appeal hearing will be informal in nature, but organized so that testimony and other evidence can be presented efficiently. An appeal hearing shall include at least the following:

- (a) An introductory outline of the procedure by the Examiner;
- (b) Any preliminary matters;
- (c) Opportunity for opening statements;
- (d) Presentation of the appeal by the appellant(s), including any witnesses;
- (e) Opportunity for cross-examination of appellant(s) and witnesses;
- (f) Presentation of the City, including any witnesses;
- (g) Opportunity for cross-examination of City staff and witnesses;
- (h) Presentation by the other respondent(s), including any witnesses.
- (i) Opportunity for cross-examination of respondent(s) and witnesses;
- (j) Questions by the Examiner;
- (k) Rebuttal evidence, if any;

(l) Closing arguments.

The Examiner may change the order of presentation at his or her discretion.

2.15 Burden of Proof

Unless otherwise provided by law, the appellant(s) have the burden to establish by a preponderance of the evidence, that the matter fails to conform with applicable legal standards and the administrative decision should be reversed.

2.16 Expert Testimony

In general, expert opinion prepared for a specific case shall be received only from witnesses appearing in person and available for cross examination. Unless the parties otherwise agree, affidavits, declarations or letters containing such opinion shall be excluded.

2.17 Hearing on Written Submissions

When the parties so agree, an appeal may be submitted entirely on written submissions. If this option is selected, the Examiner shall establish a schedule for initial and responsive submissions. The record shall close when this schedule is completed.

2.18 Hearing Examiner's Decision

(a) The Examiner shall issue a written decision and provide a copy thereof to each party pursuant to TMC 2.58.130.

(b) The Examiner's decision may affirm, modify, remand or reverse the administrative decision(s) being reviewed. When an administrative decision is modified, the Examiner may attach reasonable conditions found necessary to make the action consistent with applicable approval criteria.

2.19 Reconsideration

Any party feeling that the decision of the Examiner is based on errors of procedure, fact or law may make a written request for reconsideration pursuant to TMC 2.58.135. This request shall set forth the alleged errors, and the Examiner may, after review of the record, take such further action as is deemed appropriate, which may include the issuance of a revised decision.

2.20 Further Review

The Examiner's decision after an appeal hearing is the final decision of the City and further review must be sought pursuant to TMC 2.58.150.

Pursuant to TMC 2.58.180, any court action to challenge the decision of the City Council shall be commenced within 21 days of the date the decision of the City Council was transmitted to the parties, unless otherwise provided by statute.

2.21 Content of Record

The record of an appeal hearing conducted by the Examiner shall include at least the following:

- (a) All Notices of Appeal and any amendments;
- (b) The Staff Report and all accompanying documents;
- (c) All pleadings, briefs and memoranda of the parties;
- (d) All documentary or physical evidence admitted;
- (e) The electronic recording of the proceedings;
- (f) The Hearing Examiner's findings, conclusion and decision(s), together with any other rulings made in the matter.

Any person who desires a copy of the electronic recordings of the proceedings must pay the cost of reproducing the tapes. If a person desires a written transcript from the electronic recording, he or she shall arrange for transcription and pay the cost thereof.

Section 3

RULES FOR PRE-DECISION HEARINGS

3.01 Matters Subject to Pre-Decision Hearings

Pre-decision hearings will be held on matters indicated pursuant to TMC 14.08.030.

In all of these matters, the City makes a recommendation to the Examiner and the Examiner makes the final decision.

3.02 Public Participation

At pre-decision hearings members of the public are invited to express their views and to offer factual testimony and exhibits. Public testimony may be presented orally, in writing, or both. Written public testimony may be submitted either in advance or at the hearing. The Examiner shall have the discretion to provide an opportunity for written responses by other participants.

3.03 Parties of Record

The initial parties of record are the applicant(s) and the City. Anyone who participates in the hearing by oral testimony or written submission shall by such action become a party of record.

3.04 Interested Persons

Interested persons are those individuals or organizations indicating a desire to be informed of the result of the hearing by signing an attendance sheet at the hearing or otherwise requesting notice, but who do not give testimony.

3.05 Staff Report

At least seven days prior to the hearing the Department of Development Services or other appropriate department of the City shall make its Staff Report to the Examiner. The Report shall coordinate and assemble the comments and recommendations of other City departments, other governmental agencies and utility providers having an interest in the matter and shall summarize the factors involved and make a recommendation for approval, approval with conditions, or denial.

3.06 Format of Hearing

The pre-decision hearing shall be informal in nature, but organized so that testimony and evidence can be presented efficiently. The hearing shall include at least the following elements:

- (a) An introductory outline of the procedure by the Examiner.
- (b) Presentation by the City summarizing the Staff Report and providing any additional exhibits or testimony the staff believes should be brought to the Examiner's attention.
- (c) Testimony by the applicant(s) or petitioner(s) and their witnesses.
- (d) Testimony from the public, including any questions for staff, the applicant(s) or witnesses for the staff or applicant(s). Any public participant may make all or part of his or her presentation through witnesses.
- (e) Questions by the Examiner.
- (f) Rebuttal testimony (if any).
- (g) Closing statements by applicant(s) or petitioner(s) and staff.

3.06.5 Default

If an applicant, petitioner, or his or her representative fails to appear at the hearing, an order may be entered dismissing the matter. A default order shall be final unless, within 7 days of service, good cause is shown by the party against whom it was entered.

3.07 Testimony for Organizations

Whenever the view of any formal or informal organization are to be presented, the organization shall designate a representative with authority to coordinate the presentation and to speak for the group. Any communications with the organization by the Examiner or any party of record shall be through the designated representative.

3.08 Burden of Proof

The burden of proof shall be on the applicant or petitioner to establish by a preponderance of the evidence that the request is consistent with applicable legal standards.

3.09 Hearing Examiner's Decision

(a) The Examiner's decision shall be in writing and shall contain findings of fact and conclusions of law supporting the result reached. A copy thereof shall be provided to each party of record.

(b) The Examiner's decision may approve the application or petition with or without conditions, remand the matter to the City for further investigation, or deny the proposal.

3.10 Reconsideration

Any aggrieved individual or entity having standing under the ordinance governing the matter or as otherwise provided by law may file a written request for reconsideration pursuant to TMC 2.58.135. The request shall set forth the alleged errors of procedure, fact or law, and the Examiner may, after review of the record, take such further action as is deemed appropriate, which may include the issuance of a revised recommendation.

3.11 Appeal of Examiner's Decision

Appeal of the Examiner's decision is governed by TMC 2.58.150 et seq. Only those persons having standing under the ordinance governing the application, or as otherwise provided by law, may appeal the Examiner's decision to the City Council. Such appeals are heard on the record made before the Examiner.

3.12 Content of the Record

The record of a pre-decision hearing shall include at least the following:

- (a) The application or petition;
- (b) The Staff Report and any attachments;
- (c) All documentary and physical evidence received and admitted;
- (d) All pleadings, briefs, or memoranda submitted by a party of record;
- (e) The electronic recording of the proceedings;
- (f) The Examiner's findings and conclusions and the decision made, together with any other rulings made in the matter.

Any person who desires a copy of the electronic recording must pay the cost of reproducing the tapes. If a person desires a written transcript of the electronic recording, he or she shall arrange for transcription and pay the cost thereof.