



Meeting Agenda

City Council

City Hall
601 4th Avenue E
Olympia, WA 98501

Information: 360.753.8244

Tuesday, June 8, 2021

5:30 PM

Online and Via Phone

Study Session

Attend: <https://us02web.zoom.us/j/81817183619>

1. ROLL CALL

2. OTHER BUSINESS

2.A [21-0560](#) Hearing Examiner Update

Attachments: [Hearing Examiner Annual Report](#)
[WCIA Documents on Use of a Hearing Examiner](#)
[Land Use Review Flow Chart](#)

3. ADJOURNMENT

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City Council

Hearing Examiner Update

Agenda Date: 6/8/2021
Agenda Item Number: 2.A
File Number: 21-0560

Type: study session **Version:** 1 **Status:** Study Session

Title

Hearing Examiner Update

Recommended Action

Committee Recommendation:

Not referred to committee

City Manager Recommendation:

Receive briefing from Olympia Hearing Examiner Mark Scheibmeir. Briefing only. No action requested.

Report

Issue:

Whether to receive briefing from Olympia Hearing Examiner Mark Scheibmeir

Staff Contact:

Tim Smith, Planning & Engineering Manager, Community Planning and Development, 360.570.3915

Presenter(s):

Tim Smith, Planning & Engineering Manager
Mark Scheibmeir, Olympia Hearing Examiner

Background and Analysis:

The position of Hearing Examiner is established in Olympia Municipal Code (OMC) Chapter 18.82. The purpose of this Chapter, as stated in OMC 18.82.020, is to:

- A. Separate the land use regulatory function from the land use planning process.
- B. Ensure procedural due process and appearance of fairness in land use regulatory hearings and decisions.
- C. Provide an efficient and effective land use regulatory system which integrates the public hearing and decision-making processes for land use matters.
- D. Provide for consistency and predictability in land use decision making and the application of policies and regulations adopted by the City.
- E. Establish clear and understandable rules governing the land use decision-making process.

Olympia Hearing Examiner Mark Scheibmeir has prepared an annual report that further describes the

role of the Hearing Examiner and summarizes recent hearings. Mr. Scheibmeir will provide an overview of his report and answer questions at the Council Study Session.

The City conducts a land use review process in accordance with the requirements of RCW 36.70B (1995 Regulatory Reform Act). This statute has requirements for streamlining and creating a predictable process when making decisions on project permit applications. Many cities and counties use a Hearing Examiner to help satisfy the State requirements. Additional information on the use of the Hearing Examiner system in the State of Washington is provided in several documents from the Washington Cities Insurance Authority (WCIA).

Olympia's land use review process is codified in OMC Chapter 18.60. The City provides a flow chart to customers that outlines the key steps of this process. Target dates are set for each step, with an overall permit review timeframe of not more than 120 days as required by State law. Several of these key steps are:

- Determining whether an application is complete and ready for review
- Distributing and disseminating a Notice of Application to community members, and local and State agencies. This notice includes a process for how comments can be submitted to the City and the timeframe for the submittal of written comments.
- Formal issuance of a land use decision. The City's Site Plan Review Committee, comprised of staff from several departments, is responsible for making recommendations on whether to approve a permit application to either the Community Planning and Development Director or to the Hearing Examiner, depending on the type of application. Examples of applications that go before the Hearing Examiner are provided in the Hearing Examiner Annual Report. The Hearing Examiner must conduct a public hearing before issuing a decision.

Neighborhood/Community Interests (if known):

The work of the Hearings Examiner has been a topic of interest to many community members as development continues throughout the City.

Options:

1. Receive the update.
2. Do not receive the update.
3. Receive the update at another time.

Financial Impact:

There is not finance impact related to the update.

Attachments:

Hearing Examiner Annual Report
WCIA Documents on Use of a Hearing Examiner
Land Use Review Flow Chart

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Of Counsel

February 25, 2021

MEMORANDUM

TO: Tim Smith

FROM: Mark C. Scheibmeir, Olympia Hearing Examiner

SUBJECT: Olympia Hearing Examiner

This memo is in response to your recent request for a report for the benefit of the City Manager and City Council in reference to the role of the Hearing Examiner, including a summary of recent hearings.

General Role of the Hearing Examiner. The position of Hearing Examiner is created by City Ordinance, Chapter 18.82 Olympia Municipal Code (OMC). The purpose of the position of Hearing Examiner is well defined in OMC 18.82.020:

- a. Separate the land use regulatory function from the land use planning process.
- b. Ensure procedural due process and appearance of fairness in land use regulatory hearings and decisions.
- c. Provide an efficient and effective land use regulatory system which integrates the public hearing and decision making processes for land use matters.
- d. Provide for consistency and predictability in land use decision making and the application of policies and regulations adopted by the City.
- e. Establish clear and understandable rules governing the land use decision making process.

Re: Olympia Hearing Examiner

Olympia established the position of Hearing Examiner in 1995. The position was filled for many years by Tom Bjorgen until his election to the Court of Appeals in about 2013. I have served as the Hearing Examiner since then, or for about eight years.

Types of Hearings before the Hearing Examiner. The matters over which the Hearing Examiner has jurisdiction are set forth in OMC 18.82.120. It is a long list and breaks into two categories: (1) public hearings for permit approval or other land use approval, and (2) appeals of decisions/actions taken by staff.

1. **Examples of Public Hearings for Permit or Other Land Use Approval.**
The following are some of the more common types of public hearings before the Hearing Examiner together with a few recent examples:

Conditional Use Permits. Olympia recognizes that many uses may or may not fit well in certain zoning designations depending on a number of circumstances. Such uses are referred to as "conditional uses" and are neither permitted nor prohibited outright but are instead allowed if proven to be compatible with nearby land uses. The Hearing Examiner is given substantial discretion in determining whether the use is sufficiently compatible. The Hearing Examiner is also given authority to impose additional conditions on the project to better ensure compatibility. There were no conditional use permits before the Hearing Examiner during 2020 (probably due to the pandemic) but there were several a year or two earlier including a variety of mixed use developments in or near the downtown area including Laurana, Columbia Place and others. Conditional use permits were also approved for upgrades of Capital High School and Olympia High.

Variances. Variances are deviations from required setbacks, buffers, height limits, density requirements, etc. Olympia's variance ordinances require that the situation not be of the applicant's own making, and that approval will not grant a special privilege not enjoyed by others. Variance requests are usually attached to larger permit applications but may come before the Hearing Examiner on a stand alone basis. There have not been any notable variance requests during the past few years.

Shoreline Permits. Most development within 200 feet of a shoreline of statewide significance requires a Shorelines Substantial Development Permit. Development near especially sensitive shorelines may also require a Shoreline Conditional Use Permit. Shoreline permits are regulated by the Shorelines Management Act (SMA) and Olympia's Shoreline Master Program (SMP). Hearings on shoreline permits can range from the mundane to the highly controversial. This is especially true in the Olympia downtown area due to its proximity to Budd Inlet and Capital Lake. Shoreline permits are an overlay to other required permits – a waterfront mixed use project could conceivably require a standard conditional use permit, a shoreline substantial development permit and a shoreline conditional use permit. A good example of this is the Urban Olympia IX project at 114 Water Street N.W. which required a shoreline substantial development

Re: Olympia Hearing Examiner

permit, a shoreline conditional use permit and land use approval to construct a five story mixed use building at the southeast corner of State Avenue and Water Street (Hearing No. 19-1844). A shorelines permit was also approved this past year for a new emergency generator for the City's sewer system at 220 Water Street.

Subdivisions and Other Large Scale Development. The Hearing Examiner has authority to approve new subdivisions and preliminary plats. The general standard of review is "whether the public interest will be served" by the development. These applications are often complex, controversial, and can lead to lengthy hearings resulting in extensive conditions and phased development. During 2020 there was only one preliminary plat hearing involving the "Blackberry Hill" subdivision at 2817 Boulevard Road S.E. That hearing resulted in the approval of a subdivision of 4.77 acres into thirty-five townhome residences and two single-family lots. Public comment during the hearing was instrumental in the Hearing Examiner imposing slightly modified conditions of subdivision approval.

Staff Deferred Project Approval. Olympia allows planning staff to defer decision making on complex or controversial applications to the Hearing Examiner. The most memorable example of this was staff's fairly recent decision to defer the "Views on 5th" project to the Hearing Examiner for final decision. As is well known, that was a highly controversial project resulting in the Hearing Examiner's approval of the project.

This past year a somewhat similar situation arose with the Olympia School District's request to amend the restrictions imposed on non-district use of Ingersoll Stadium (to be precise, the matter did not come before the Hearing Examiner on a deferral of decision making by the staff but rather because previous restrictions had earlier been imposed by Hearing Examiners and any amendment should therefore be by the Hearing Examiner). That matter – also very controversial – resulted in a decision to revise limitations on groups allowed to use the stadium.

Recommendations to the City Council. OMC 18.82.240 empowers the Hearing Examiner to conduct public hearings for proposed rezones and master plan developments to then provide the City Council with a recommendation for their final decision making. This has allowed public hearings that are sometimes large and controversial to be shifted from the City Council to the Hearing Examiner. The Hearing Examiner conducts the hearing, evaluates the information provided by all sources, and provides a recommendation to the Council. Once such hearing occurred in 2020 for the rezoning of a small parcel at 414 and 422 Stoll Road S.E. from Manufactured Housing Park (MHP) to High Density Corridor-4 (HDC-4). The hearing resulted in a recommendation by the Hearing Examiner that the Council approve the rezone as requested.

Re: Olympia Hearing Examiner

2. **Examples of Appeals Hearings.** Appeal hearings are quasi-judicial proceedings resulting from a challenge to a decision or action taken by staff. Examples include:

a. Project Approval/Project Denial. An applicant denied a requested permit by staff must appeal the denial to the Hearing Examiner. The same is true for a project opponent challenging staff's approval of a permit. A recent example is the appeal to the Hearing Examiner made by Douglass Properties II, LLC in response to the traffic impact fees imposed by City Staff for a new storage facility. The hearing before the Hearing Examiner resulted in the fees being upheld. That decision was then appealed to the Thurston County Superior Court and, ultimately, to the Court of Appeals who affirmed the Hearing Examiner's decision in a published opinion filed this past week.

b. SEPA Determinations. Perhaps the most common form of appeal to the Hearing Examiner is a City's SEPA Determination for a proposed project. Currently pending before the Hearing Examiner is an appeal of the City's recent SEPA Determination for the West Bay Development Agreement.

c. Non Land Use Appeals. The role of the Hearing Examiner is sometimes expanded beyond traditional land use issues. A jurisdiction may ask its Hearing Examiner health or other code violations; dangerous animals; vehicle impoundment; and drug forfeitures.

2020 Review. 2020 was an unusually quiet year for matters before the Hearing Examiner. There were only five hearings, all of which are described above. The hearings had little or no public opposition with the exception of the changes to non-district use of Ingersoll Stadium.

The limited number of hearings is undoubtedly the result of the Covid-19 pandemic which made both project review and public hearings problematic. Early in the pandemic, public hearings were deferred until its impact could be better understood. Later, as it became clear that in-person hearings would not be possible for an indefinite period, arrangements were made for hearings to take place remotely. While not perfect, these remote hearings have gone as well as could be hoped for. In order to make certain that due process is accorded to all interested parties, including those struggling with remote hearings, provisions have been made to allow for additional written public comment outside the hearing.

Going Forward. It is reasonable to expect that 2021 – or certainly 2022 – will see an increased number of hearings as the world begins to escape the pandemic. Looking on the positive side, the challenges posed by the pandemic have revealed that remote hearings may, on occasion, be more appropriate than in-person hearings. This is especially true for hearings in which little or no public testimony is expected, or where all

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parties agree to conduct the hearing remotely. While remote hearings pose several technical challenges, especially with respect to cross examination of witnesses, they can often be conducted far more efficiently and inexpensively.


The 2020 hearings did not offer much insight on the public's current perception of land use uses in Olympia. The hearing involving Ingersoll Stadium revealed that there continues to be an uneasy relationship between the high school and many of its neighbors. It also revealed a frustration with growing traffic problems along Henderson Blvd. Meanwhile, the hearing for the Blackberry Hill Subdivision revealed, once again, that established neighborhoods struggle with the infill of undeveloped properties at more intensive levels than the surrounding neighborhood, but this is simply the byproduct of urban development.

I hope that this memo fully addresses any questions you, the City Manager or City Council may have. Should you wish anything further from me, please let me know.

Very truly yours,

HILLIER, SCHEIBMEIR,
KELLY & SATTERFIELD, P.S.

By



Mark C. Scheibmeir
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MCS:klf

Brief Summary of 2020 Hearings

Blackberry Hill Subdivision (Hearing No. 19-3976). The Applicant requested preliminary approval of a subdivision containing 35 townhome residences and 2 detached single-family lots on 4.77 acres along with associated improvements at 2817 Boulevard Road S.E. The preliminary subdivision was approved subject to a few additional conditions to improve its compatibility with an existing residential neighborhood to its south and a church to its north.

Ingersoll Use Modification (Hearing No. 20-3702). The Olympia School District requested amendment of the restrictions imposed in 2004 on non-district use of Ingersoll Stadium. In 2004 the then hearing examiner approved the remodeling of Ingersoll Stadium but subject to a number of conditions including a restriction on non-school district uses. In about 2013 the restrictions on Ingersoll's use were slightly modified by an interim hearing examiner. In 2019, the current hearing examiner was asked to approve a conditional use permit for upgrades to Olympia High School including a new artificial turf practice field adjacent to Ingersoll. Opponents of this project asked that the same restrictions imposed on non-district use of Ingersoll be similarly imposed on the new practice field. The Hearing Examiner declined this request. In the 2020 hearing, the School District asked that the 2004 restrictions on the allowed non-district user of Ingersoll be removed so that a wider array of recreational activities could use the stadium. The Hearing Examiner granted the School District's request but with some additional conditions to ensure that the wider array of uses prioritized youth and young adult recreational activities.

Stoll Road SE Rezone. The Hearing Examiner was asked to provide recommendations to the City Council as to whether property at 414 and 422 Stoll Road SE should be rezoned from Manufactured Housing Park (MHP) to High Density Corridor-4 (HDC-4). The rezone would allow the property to be more intensively developed in a manner similar to adjoining properties. The Hearing Examiner recommended that the requested rezone be approved by the City Council.

Water Street Sewer Lift Station Emergency Generator Replacement (Hearing No. 19-1127). The City's existing emergency generator for its sewer system, located at 220 Water Street N.W., was in need of replacement. The replacement generator was located within shoreline jurisdiction at approximately the same location as the existing one. The project required a Shoreline Substantial Development Permit as well as a Shoreline Conditional Use Permit. City Staff asked that the permits be granted subject to a number of conditions to ensure that Best Management Practices were utilized during replacement. There was no public opposition and they were approved subject to the conditions suggested by City Staff.

West Bay Yards Development Agreement (Hearing No. 20-3136). The Applicant, West Bay Development Group, has submitted a Development Agreement to City Council to allow redevelopment of the former Hardel Plywood facility along West Bay ("West Bay Yards"). City Staff issued a SEPA Determination of Non-Significance (DNS) for the Development Agreement. The Olympia Coalition for Ecosystems Preservation appealed the SEPA DNS and asked that the Development Agreement be required to undergo a SEPA Environmental Impact Statement (EIS). On summary judgment, the Hearing Examiner denied the Appellant's appeal, concluding that the City's SEPA DNS was not issued erroneously.

Are you using your land use hearing examiner to the fullest extent possible?

by Tanya Crites

While many WCIA member cities and towns are using hearing examiners for various land use and code enforcement matters, some may not be utilizing a hearing examiner to the fullest extent provided by law. RCW 35A.63.170 authorizes a local government's legislative body to adopt a hearing examiner system under which the hearing examiner may hear and decide on various types of issues, including but not limited to:

- (a) Applications for conditional uses, variances, subdivisions, shoreline permits, or any other class of applications for or pertaining to development of land or land use;
- (b) Appeals of administrative decisions or determinations; and
- (c) Appeals of administrative decisions or determinations pursuant to, RCW 43.21C, State Environmental Policy.

The legislative body prescribes the procedures to be followed by the hearing examiner and provides the authority for the hearing examiner to conduct open record hearings and decide applications for all types of permits and land use approvals.

The only two instances in which the legislative body must make decisions on land use permits and approvals are:

- (a) decisions on final plats (subdivisions), and
- (b) area-wide/general application zoning decisions/rezones.

There are many compelling arguments in favor of using a hearing examiner system. By using a politically neutral, specially trained professional hearing examiner to the greatest extent possible, the legislative body and planning commission have more time for other important planning, goal setting and law-making functions, in addition to reducing the risk of political influence and pressure. WCIA recommends that all members adopt a hearing examiner system that allows the hearing examiner to make final quasi-judicial decisions on land use permits and decide administrative appeals, and that hearing examiner decision appeals go to superior court.

Here is how WCIA can help members adopt or expand a hearing examiner system. Typically, the first step is educating the council on the benefits of a comprehensive

hearing examiner system. Through the legal consultation program, WCIA can provide information on the legal, political and community benefits of using a hearing examiner to the fullest extent. WCIA can provide this guidance in a written document specifically prepared for the member's council or with an on-site presentation. Contact your assigned Risk Management Representative to arrange for assistance.

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August 15, 2014

Heather D. Kintzley
City Attorney
City of Richland
975 George Washington Way
Richland, WA 99352-3548

RE: Use of a Hearing Examiner for Land Use Decision-Making

Dear Ms. Kintzley:

It is my understanding that in a recent land use audit of all member cities conducted by Washington Cities Insurance Authority ("WCIA"), the use of a hearing examiner for land use decision-making came up, and that the City of Richland may be considering adoption of a hearing examiner system for land use decision-making. In this regard, WCIA suggested I write regarding my opinions and experiences on the use of a hearing examiner for land use decision-making. Accordingly, I am providing this letter to you, which you are encouraged to forward to the City Manager, Mayor, City Council and staff, providing my strong recommendation for the use of a hearing examiner for land use decision-making.

As I explain in this letter, I believe the use of a land use hearing examiner to make final quasi-judicial decisions on land use permits (as well as for deciding administrative appeals) is invaluable and should be utilized to the fullest extent by the City of Richland. It is the trend of most local governments to use a land use hearing examiner to adjudicate quasi-judicial and administrative land use permitting.

By way of background, I am a partner and director at Keating, Bucklin & McCormack, Inc., P.S., a law firm emphasizing representation of local government in a wide variety of municipal matters, civil lawsuits and administrative and other legal claims. For over 25 years, my practice has emphasized a broad range of municipal, land use, regulatory, environmental, civil rights and tort-related issues in defense of government entities, elected officials and their employees. I represent cities, special purpose districts and other government entities in land use, permitting, environmental matters, civil rights and other claims, and have written numerous

articles on land use law, municipal and local government legislation and regulation, permitting and environmental issues, as well as risk management on various topics of interest to local government and land use agencies. As part of my practice, I also provide municipal, land use, environmental and risk management training to elected officials and government agencies throughout the State. A significant part of my practice involves defending land use claims arising out of quasi-judicial land use decisions, made by citizen and elected bodies as well as professional hearing examiners.¹ A copy of my professional resume is attached. You can also get more information on my law firm and my land use practice through our website at www.kbmlawyers.com.

I provide the foregoing summary of my background as context for my strong, unqualified, recommendation to all cities, towns and local government entities in the use of a hearing examiner to adjudicate quasi-judicial land use matters. Being “in the trenches,” as it were defending land use decisions – and frequently land use mistakes – by local government has given me first-hand experience in seeing the procedural, timeliness and significant liability risk differences in land use decisions made by planning commissions, boards of adjustment and city councils versus those decisions made by professional hearing examiners. This first-hand experience in defending literally thousands of these decisions over the past 25 years has made one thing crystal clear: there is no substitute for local government’s use of a professional hearing examiner in deciding quasi-judicial land use matters. For this reason, I write to encourage the City of Richland – as I do with all of the local government entities I work with or speak to – to take full advantage of a professional land use hearing examiner.

General Authority of Hearing Examiners

I recommend to cities I work for to utilize, to the fullest extent possible, a hearing examiner to (1) make final decisions on all quasi-judicial land use permits and decisions, and (2) to act as the administrative appeal body for review of routine administrative/ministerial permits (such as right-of-way permits, clearing and grading permits, tree cutting permits, building permits, etc.) and of administrative/code interpretations. The adoption of a hearing examiner position is expressly authorized in RCW 35A.63.170. A hearing examiner may hear:

- (a) Applications for conditional uses, variances, subdivisions, shoreline permits, or any other class of applications for or pertaining to development of land or land use;
- (b) Appeals of administrative decisions or determinations; and
- (c) Appeals of administrative decisions or determinations pursuant to RCW ch. 43.21C.

¹ I am not a hearing examiner, and do not derive any income as a hearing examiner.

RCW 35A.63.170(1)(a)-(c).² These are identical to the duties a board of adjustment would otherwise perform. *Compare* RCW 35A.63.110(1)-(4). The City must explain the nature and scope of the hearing examiner's duties if the position is created. *See* RCW 35A.63.170.

The Legislature has also authorized local government to establish the procedures to be followed by the hearing examiner.

(2) Each city or county legislative body electing to use a hearing examiner pursuant to this section shall by ordinance specify the legal effect of the decisions made by the examiner. The legal effect of such decisions may vary for the different classes of applications decided by the examiner but shall include one of the following:

- (a) The decision may be given the effect of a recommendation to the legislative body;
- (b) The decision may be given the effect of an administrative decision appealable within a specified time limit to the legislative body; or
- (c) Except in the case of a rezone, the decision may be given the effect of a final decision of the legislative body.

RCW 35A.63.170(2).

Thus, as an alternative to using a planning commission or city council to decide quasi-judicial land use applications and permits, the council has express statutory authority³ to adopt a hearing examiner system and vest in a hearing examiner with broad authority to conduct open record hearings on and decide applications for virtually all types of permits and land use approvals, including such things as site plans, full and short plats, conditional or special use permits, variances, reasonable use exemptions and waivers, shoreline permits, "or any other class of applications for or pertaining to development of land or land use." A hearing examiner can also be vested with authority to hear appeals of administrative or quasi-judicial permit decisions as well as appeals of determinations under SEPA. Hearing examiners also have other authorities set forth in RCW 35.63.130 and RCW 35A.63.170.

² The scope of authority of hearing examiners is best described in the case of *Chausee v. Snohomish County Council*, 38 Wn. App. 630, 689 P.2d 1084 (1984). In that case, the court described hearing examiners as "creatures of the legislature without inherent or common-law powers and may exercise only those powers conferred either expressly or by necessary implication." *Id.*, at 38 Wn. App. 636.

³ In any case, the city council must specifically adopt a hearing examiner system and through an ordinance or code amendment vest the hearing examiner with authority to hear and decide the specific types of land use applications or permits, or other administrative decisions, that he or she can make.

There are only two instances in which the State Legislature has mandated that legislative bodies (city councils) make decisions on land use permits and approvals: (1) decisions on final plats (subdivisions) (*see*, RCW 58.17.100); and (2) area-wide/general applicability zoning decisions/rezones. (RCW 35.63.130(1), RCW 35.63.130(2)(c), RCW 36.70.870(2)(c), and RCW 36.70.970(1). Aside from these two limited instances, hearing examiners can hear and decide virtually all other land use permits, approvals or appeals, as long as the city code expressly authorizes an examiner to hear those matters.

The Advantages of Using a Hearing Examiner for Land Use Decision-Making

The following are some of the many advantages and benefits to using a hearing examiner for quasi-judicial land use decision-making and administrative appeals of permit decisions:

- Avoids political influence or pressure (which is forbidden in quasi-judicial decision-making);
- They are professional, specially trained individuals;
- They have experience with many different jurisdictions and regulations and can carry that experience and knowledge over to your jurisdiction, helping to improve your land use code and process;
- They are technically adept, and have knowledge of physical land development and technical feasibility of land development and permitting;
- A hearing examiner is more cost effective (reduces appeals and judicial challenges);
- Allows for a more efficient process (faster decisions, fewer mistakes and far fewer appeals);
- Substantial reduction in judicial (court) reversal of decisions;
- Substantial reduction in potential damages claims against the city (I can attest to this, and most municipal attorneys and land use professionals would agree);
- Eliminates the risk of lawsuits and legal claims against citizen-decision makers – like Planning Commission and City Council members – personally;
- Instills public confidence in the decision-making process;
- Helps ensure constitutional protection of due process of law and equal protection;
- Helps ensure predictability and consistency in the process and decision-making;
- Hearing examiners are skilled in understanding, interpreting and applying nuances of your municipal code, state and federal laws, and general legal principles;

- Use of a hearing examiner helps satisfy State law requirements for streamlining the regulatory process and administrative review and appeals (1995 Regulatory Reform Act, RCW Chapter 36.70B);
- Use of a hearing examiner segregates and clearly delineates quasi-judicial decision making functions from legislative (law-making) and long-term planning functions (which are the functions of planning commissions and city councils);
- Provides the opportunity for feedback and correction of code ambiguities and conflicts;
- Use of a hearing examiner frees up city council and planning commission time for other, important planning, goal setting and law-making functions; and,
- Provides good customer service.

The following is a quote from a state Supreme Court justice endorsing Pierce County's rationale for creating a hearing examiner position:

A. The need to separate the County's land use regulatory function from its land use planning function;

B. The need to ensure and expand the principles of fairness and due process in public hearings; and

C. The need to provide an efficient and effective land use regulatory system which integrates the public hearing and decision-making processes for land use matters; it is the purpose of this chapter to provide an administrative land use regulatory system which will best satisfy these needs.

* * *

[A] land use hearing examiner system will be very beneficial to all concerned or involved with land use decisions, and said system will (1) provide a more efficient and effective land use decision procedure; (2) provide the Planning Commission more time to devote towards studying and recommending land use policy changes to the Board; (3) provide an experienced expert to hear and decide land use cases based upon policy adopted by the Board; and (4) provide the Board of County Commissioners more time to spend on other County concerns by relieving them from hearing land use cases, except any appeals ... [.]

Weyerhaeuser v. Pierce County, 124 Wn.2d 26, 51, 873 P.2d 498 (1994) (Madsen, J., dissenting) (citing Pierce County Resolution 20489 (1978)) (emphasis added).

Risks and Pitfalls in *Not* Using a Hearing Examiner for Land Use Decision-Making

Based on the broad authority of hearing examiners to adjudicate a wide range of land use permits, decisions and appeals, the significant reduction in land use lawsuit liability exposure by using a hearing examiner, and my experience defending both planning commission/city council/board of adjustment land use decisions versus those made by hearing examiners, there is, in my experience and opinion, no good reason to not use a hearing examiner for land use decision-making.

The few reasons offered *against* the use of a hearing examiner (and, by implication for retention of elected official or citizen body land use decision-making) are neither justified nor legally supportable. One such claim is that use of a hearing examiner system is too costly, or the jurisdiction can't afford to use a hearing examiner. My first response to this claim is that local governments can't afford *not* to use a hearing examiner for land use decision-making. Please refer to the many advantages discussed above. Second, in my experience the costs of using a hearing examiner are minimal, and, in many cases, can be passed on to permit applicants or land use appellants, either directly or included as part of carefully crafted permit or administrative fees associated with land use permits or appeals heard by hearing examiners. Additionally, many jurisdictions share in the cost of a hearing examiner or pay into a "pool" to use a hearing examiner who essentially "rides the circuit" between several geographically close jurisdictions. If the potential cost of using a hearing examiner is of concern to the City of Richland, I urge you to talk to other jurisdictions – including Pasco and Kennewick, your neighbors – to learn about how they handle costs and their experiences.

A second reason sometimes offered *against* the use of a hearing examiner is the lack of representative control over constituent demands for land use policy-making. Regarding this claimed loss of "citizen control" over the land use permitting process, this is actually a key reason that a hearing examiner *should* be used. Land use planning and policy decisions are made by the elected officials (city or town councils) through comprehensive planning and comprehensive plan updates, long range strategic planning, area-wide zoning and development regulations, and adoption of other area-wide development criteria. As noted above, land use planning should be reserved to and used by both planning commissions and city or town councils.

However, that is not the case with site- or property-specific land use permits or land use actions. Property- or site-specific land use approvals and decision-making should not be done based on citizen comment, policy criteria, planning criteria or constituent desires. Such permitting and decision-making decisions – whether at the administrative or quasi-judicial level – should be entirely, 100% free of citizen control and politics. For this reason, use of a

professional hearing examiner to make decisions on such site-specific or permit-specific land use applications is the best, safest and most appropriate method of decision-making.

In short, planning commissions and city councils, should not be involved in making final decisions on quasi-judicial land use permits; nor should they hear appeals of permit decisions or code interpretations. Rather, such decisions should be delegated to a professional hearing examiner. As State law makes clear, planning commissions and city councils have far more important tasks to do with their limited time: responding to their citizen constituencies; crafting, reviewing and amending comprehensive plans; crafting, reviewing, amending and updating zoning ordinances; crafting and updating shoreline plans; doing long range land use planning; doing utility and infrastructure planning; budgeting; contracting; completing ongoing and time-sensitive planning and regulatory obligations; and handling the many day-to-day affairs of local government.

A third reason sometimes given to not use a hearing examiner is that the local jurisdiction wants to be independent, retain its autonomy, and not be “pressured” to use one just because other jurisdictions do. Yet, neither the State nor any other jurisdiction can dictate the use of a hearing examiner. But it is noteworthy – and significant – that (a) the overwhelming majority of cities, towns, counties and other land use permitting jurisdictions use hearing examiners for land use decision-making, (b) virtually all land use and government attorneys agree on the use of hearing examiners, and (c) virtually all planning professionals agree that the use of a hearing examiner for land use decision making is not only good risk management, it is more efficient, more cost effective, instills public confidence in the process, avoids arbitrary and capricious decision-making, and limits improper political influence.

Fourth, I have heard one hearing examiner opponent claim “there is no evidence that supports such a proposition [that decisions made by a hearing examiner will hold up better in court].” Even a cursory review of trial court filings and appellate court decisions will readily confirm that not only are there far fewer judicial challenges to land use decisions made by hearing examiners, those few legal challenges that are made to examiner decisions are far more frequently upheld by the appellate courts than are decisions made by elected officials or citizen groups or bodies.

Indeed, the most egregious land use decisions in this State and in the federal courts arise from elected official or citizen-body decision-making on land use permits and applications – not hearing examiner decisions. For a sampling of such decisions, see: *Mission Springs v. City of Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998) (a good case to review; Supreme Court chastises the Spokane City Council for arbitrarily denying a grading permit for a contentious development project, and imposes sanctions and attorney fees on individual council members; numerous other bad land use decisions arising from city council or planning commission actions – but no hearing examiner case – referenced); *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 935 P.2d 555 (1997); *Hayes v. City of Seattle*, 131 Wn.2d 706, 934 P.2d 1179 (1997); *Robinson v. City of Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992); *West Main Assoc., Inc. v. City of Bellevue*, 106 Wn.2d 47, 720

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P.2d 782 (1986); *Pleas v. City of Seattle*, 112 Wn.2d 794, 744 P.2d 1158 (1989); *King v. City of Seattle*, 84 Wn.2d 239, 525 P.2d 228 (1974); *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988); *Westmark v. City of Burien*, 140 Wn. App. 540, 166 P.3d 813 (2007); *Saben v. Skagit County*, 136 Wn. App. 869, 152 P.3d 1034 (2006); *Cox v. City of Lynnwood*, 72 Wn. App. 1, 863 P.2d 578 (1993); *Anderson v. City of Issaquah*, 70 Wn. App. 64, 851 P.2 744 (1993).

Finally, I have also heard the comment that “hearing examiners tend to favor development interests more than local citizen bodies such as planning commissions.” There is no evidence to support this; in fact, it is contrary to my experience and the decisions of hearing examiners in the communities I do work for.

Conclusion and Summary

In summary, I urge the City of Richland to consider modifying its land use code to eliminate Planning Commission, Board of Adjustment or City Council for hearing and deciding final land use decisions (but not comprehensive or long range planning or area-wide regulations) and, instead, use a hearing examiner to make final land use decisions and administrative appeal decisions for the City.

I hope the foregoing is of benefit to the City of Richland as it looks to updating its land use code and decision-making process. If I can be of any assistance to the City or answer other questions regarding the use of a hearing examiner, do not hesitate to call or write.

Very truly yours,

Sent unsigned to avoid delay

Michael C. Walter

MCW/ch

cc: Bill King, Deputy City Manager and
Community Development Services Director
Cathleen Koch, Administrative Services Director
Ms. Ann Bennett, Executive Director
Washington Cities Insurance Authority
Ms. Tanya Crites, Risk Management,
Washington Cities Insurance Authority



LAND USE APPLICATION PROCESS

