

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

MARK C. SCHEIBMEIR
BRIAN J. KELLY

WILLIAM T. HILLIER
Retired

ATTORNEYS AT LAW
299 N. W. CENTER STREET
P. O. BOX 939
CHEHALIS, WASHINGTON 98532
PHONE: (360) 748-3386/ FAX: (360) 748-3387
www.centerstlaw.com

ERIN L. HILLIER
SAMUEL D. SATTERFIELD

MICHAEL P. ROEWE
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.

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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

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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.

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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
mark@centerstlaw.com

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.