



City Council

Action on Complaint Against Public Officer - Hearing Examiner

Agenda Date: 9/14/2021
Agenda Item Number: 6.C
File Number:21-0871

Type: decision **Version:** 1 **Status:** Passed

Title

Action on Complaint Against Public Officer - Hearing Examiner

Recommended Action

Committee Recommendation:

Not referred to committee.

City Manager Recommendation:

Move to reject the complaint and deny the demand to terminate services of the Hearing Examiner.

Report

Issue:

Whether just cause exists under OMC 18.82.060 to terminate the services of the City's Hearing Examiner, Mark Scheibmeir, for violation of the appearance of fairness doctrine.

Staff Contact:

Leonard Bauer, Director, Community Planning & Development, 360.753.8206
Mark Barber, City Attorney, 360.753.8223

Presenter(s):

Cheryl Selby, Mayor

Background and Analysis:

On July 13, 2021, resident Dan Leahy submitted a complaint to the Olympia City Council, alleging a violation of the appearance of fairness doctrine by the City's Hearing Examiner, Mark Scheibmeir, during the Wellington Heights Subdivision hearing in 2018 and 2019. Mr. Leahy argues the Hearing Examiner failed to disclose a business relationship with property owners in the area of Cooper Point Road.

Mr. Leahy further complains the Hearing Examiner should have recused himself from the hearing for the Wellington Heights development based on this business relationship. He argues the Hearing Examiner should have disclosed this relationship during the Wellington Heights public hearing in 2018 and 2019.

Based on these arguments, Mr. Leahy requests that the City Council (1) remove the Hearing Examiner “with regard to the opening of Decatur SW at the Public Pathway to automobile traffic;” and (2) that Council replace the Hearing Examiner due to his failure to disclose business relationships with property owners in the area of Cooper Point Road.

On July 16, 2021, a letter on behalf of the Council was sent to the Hearing Examiner by Mayor Selby and Mayor Pro-Tem Gilman. In this letter, Council requested the Hearing Examiner provide a response to Mr. Leahy’s complaint concerning the hearing in the Wellington Heights Subdivision matter. A copy of Mr. Leahy’s complaint was attached.

In a letter dated July 30, 2021, the Hearing Examiner submitted his response and stated why he disagrees with Mr. Leahy’s assertions. He pointed out that the requested subdivision did not propose to open any streets to the south or provide access to Cooper Point Road. As a result, the possible extension of Decatur Street “was not an issue in the Wellington Heights hearing.”

The Hearing Examiner further stated his role does “not include any authority to regulate the use of City streets (with the exception of streets internal to a development). In other words, as part of the Wellington Heights hearing I had no authority to alter the status of Decatur Street or cause its connection to Caton Way. . .If Decatur is ever extended it will be done by the City Council, not the Hearing Examiner, with guidance from the Engineering, Public Works and Planning Departments, and without guidance from the Hearing Examiner.”

Mr. Scheibmeir admitted that Mr. Leahy correctly identified Mr. Scheibmeir’s role as the registered agent for his clients. However, he stated “. . . I do not see any connection between the two - now or then. Indeed, I am at a loss as to any connection. It was because there is no connection between the two that no disclosure was felt necessary. I feel the same way about this today as I did three years ago.”

Further, in the Hearing Examiner’s response, he identifies that Mr. Leahy “wonders if I may have discussed the Wellington Heights hearing with [my clients]. The answer is ‘no’ for the simple reason as there would have been no reason to. At the risk of repetition, there is simply no connection that I can see.”

The Hearing Examiner further noted that “In one respect it is quite unusual for this complaint to be raised nearly three years after the hearing but, in another respect, the delay in raising it allows the passage of time to help demonstrate my points. Three years later, Decatur Street remains disconnected from Caton Way and, I assume, will stay that way indefinitely. The Wellington Heights decision had no bearing on its status then, now or in the future,” stated Mr. Scheibmeir.

Following the Hearing Examiner’s response, the Council requested a legal opinion from the City Attorney.

RCW 42.36.080 provides that:

Anyone seeking to rely on the appearance of fairness doctrine to disqualify a member of a decision-making body from participating in a decision must raise the challenge as soon as the basis for disqualification is made known to the individual. Where the basis is known or should reasonably have been known prior to the issuance of a decision and

is not raised, it may not be relied on to invalidate the decision. The information cited by Mr. Leahy is contained within public records readily available for inspection in 2018 and 2019. Mr. Leahy provides no excuse why almost three years have expired before making his complaint.

OMC 18.82.060 provides in part that the Council may remove a Hearing Examiner “. . . from office for cause by majority vote of the Council . . .”

Neighborhood/Community Interests (if known):

The Southwest Olympia Neighborhood Association (SWONA) has submitted support for Mr. Leahy’s complaint.

Options:

1. Move to reject Mr. Leahy’s complaint as not supporting a violation of the appearance of fairness doctrine by the City’s Hearing Examiner in the Wellington Heights Subdivision hearing in 2018 and 2019 and does not provide a factual basis to terminate the City’s Hearing Examiner for cause pursuant to OMC 18.82.060.
2. Move to sustain Mr. Leahy’s complaint of a violation of the appearance of fairness doctrine by the City’s Hearing Examiner in the Wellington Heights Subdivision hearing in 2018 and 2019, and that it provides a factual basis to terminate the Hearing Examiner for cause pursuant to OMC 18.82.060.
3. Move to take no action on Mr. Leahy’s complaint.

Financial Impact:

None known.

Attachments:

- July 13, 2021 Letter from Dan Leahy to City Council
- July 16, 2021 Letter to Mark Scheibmeir on Behalf of City Council
- July 30, 2021 Letter to City Council from Mark Scheibmeir