



## Land Use & Environment Committee

### Rezone Hearing Body - Potential Code Amendment

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#### **Title**

Rezone Hearing Body - Potential Code Amendment

#### **Recommended Action**

##### **Planning Commission Recommendation:**

Recommend to City Council that the Development Code be amended to provide that the Planning Commission, instead of the Hearing Examiner, will hold public hearings related to site-specific rezone applications. (Option 2.)

##### **City Manager Recommendation:**

Recommend to the City Council that the City retain existing development code provision so that Hearing Examiner holds public hearings and makes recommendations to City Council regarding site-specific rezone applications; and direct staff to report to Land Use and Environment Committee in 2016 regarding experience with this approach. (Option 1.)

[Note, staff did not make a recommendation when this issue was considered by the Planning Commission.]

#### **Report**

##### **Issue:**

Should Olympia's Hearing Examiner or Planning Commission hold public hearings before making a recommendation to the City Council regarding proposed changes in the land use zoning of individual properties?

##### **Staff Contact:**

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##### **Presenter:**

Todd Stamm, Principal Planner

##### **Background and Analysis:**

During the recent update of the Comprehensive Plan some members of the public suggested that if the Plan were to allow for more rezone applications, the City's Development Code should be amended to provide that rezone hearings would be held by the Planning Commission instead of the Hearing Examiner. On September 23, 2013, the Commission held a public hearing regarding this

proposal and following deliberation on October 21, 2013 the Commission unanimously recommended that the City Council amend the Development Code accordingly. (See attached minutes' excerpts.) This proposal was placed on hold until the Council's decision regarding the Plan update in December of 2014. On May 19, 2015, the Council referred the rezone-hearing-body issue to the Land Use and Environment Committee for consideration.

### Legal Framework

Land use zoning, i.e., limiting land uses in each part of the community, is one of the primary means by which most cities seek to implement their Comprehensive Plans. Changes in the zoning map, commonly referred to as "rezones," may be proposed for individual properties or large areas of the City. As required by state law, the City Council makes the final decision for the City regarding all such zoning and development code amendments. However, a series of court decisions have outlined that the process for reviewing '**site-specific**' zoning changes should be different than for '**area-wide**' zoning changes. (Although these terms are commonly used by the courts and in State law, they do not have specific definitions.)

Olympia's current development code provides that **area-wide** zoning changes and any proposed rezone that would be inconsistent with the City's Comprehensive Plan are to be the subject of a Planning Commission public hearing and recommendation prior to a decision by the City Council. In contrast, the Code provides that the 'open record' public hearing regarding a proposed '**site specific**' rezone is to be held by the Olympia Hearing Examiner prior to the Examiner making a recommendation to the Council. Such **site-specific** rezone proposals are also referred to the Commission for review and recommendation, but because State law allows only one such hearing, the Commission does not hold a public hearing.

### History of Olympia's Rezone Process

Olympia first adopted land use zoning during the 1930s. For about fifty years, rezone hearings were held by the Planning Commission. However, in the 1980s Olympia and many other cities instituted a 'Hearing Examiner system' in response to court directives requiring that certain land use actions conform with 'quasi-judicial' procedures. These directives noted that certain actions, including site-specific rezones, determined the property rights of a few individuals and accordingly that these proceedings should be more akin to judicial processes. These practices -- intended to achieve a fair hearing and result -- include specific design criteria, sworn testimony, the opportunity for cross-examining witnesses, limited contact outside the hearing, and ultimately specific written findings of fact and conclusions of law. These proceedings differ greatly from the more common "legislative" processes where the City has broad discretion with regard to procedures and the courts give much greater deference to local government decisions.

To ensure compliance with these strict procedural requirements, Olympia's code was amended and for about ten years the Olympia Hearing Examiner held hearings regarding site-specific rezone proposals. However, in the mid-1990s Olympia's Comprehensive Plan became more specific, with the result that rezone applications were routinely joined with 'legislative' Plan amendments, and as a result subject to Planning Commission hearings.

Since the Plan adopted by the City in December of 2014 is not specific with regard to the zoning of each parcel of land, the staff anticipates that a few (maybe 2 or 3) site-specific rezone applications will be received each year hereafter. State law requires that one and only one 'open record' public hearing be held by a city when considering a proposed site-specific rezone. The question now

presented for the Council's consideration is whether the public hearing for these types of proposals should be heard by a Hearing Examiner or the Planning Commission. Neither Olympia's Comprehensive Plan nor State law designates whether the Commission or the Examiner should hold such hearings and makes recommendation to the Council - so ultimately this choice of processes is at the Council's discretion.

Considerations (not intended to be in order of priority or importance):

1. Both the Hearing Examiner and Planning Commission membership are selected by the City Council. If the regular Examiner is unable to hear a particular matter, a temporary Examiner is selected by the Community Planning and Development Director from a list pre-approved by the Council.
2. Unlike a voting body such as the Commission, an Examiner's decision cannot result in a tie vote. Similarly, conflicting statements or opinions expressed by different commissioners can result in greater legal risk when quasi-judicial decisions, such as site-specific rezones, are reviewed on appeal.
3. Since the Commission's review must occur at public meetings with due notice, review and recommendation; reaching a decision generally requires more time for a Commission than if review is conducted by an Examiner. (Examiners are generally limited to a 14-day review period.)
4. The Planning Commission's work program is typically very full throughout the year. Adding site-specific rezone requests likely would affect the timeliness for completing consideration of other items on their meeting agendas. The Hearing Examiner is available as needed to address site-specific rezones.
5. Unlike a single Examiner, the recommendation of a Planning Commission can turn on the particular members who participate in the proceeding, and especially who attends the meeting where the final vote occurs.
6. Site-specific rezones are 'quasi-judicial' matters subject to extraordinary procedural requirements. Among these are requirements to ensure that the process is not only fair in fact, but that it appears fair to a reasonable person; contact with interested parties outside of the hearing is generally prohibited; and specific findings and conclusions supporting the decision are usually needed. In general, professional Hearing Examiners are better trained in complying with these requirements than lay Planning Commissioners. The higher number of commissioners can lead to greater opportunity for contact with interested parties.
7. Hearing Examiners usually are responsible for reviewing development proposals, while Planning Commissions generally address broader policy questions. Site-specific rezones include aspects of both types of decisions. Like development proposals, they must be decided based on specific criteria, but like broader code amendments they are changes in regulations.
8. Hearing Examiners are trained professionals accustomed to the quasi-judicial format and process required for site-specific rezone reviews, while Planning Commissioners are generally appointed based on other considerations.

9. Although site-specific rezones must be reviewed according to court-mandated and adopted legal criteria, both proponents and opponents will often seek to have reviewing parties consider factors outside these standards.
10. Site-specific rezones not associated with a Comprehensive Plan amendment are subject to the Washington Local Project Review Act. Thus any appeal is to Superior Court instead of the Growth Hearings Board, and the Court's review is different in form and substance from that of the Board. For instance, the Court will generally review the City's decision for consistency with the Comprehensive Plan but not for consistency with the Growth Management Act. The Court's review will usually be based on the City's hearing record and written decision.
11. Site-specific rezones can be the subject of only one 'open-record' (evidentiary) hearing and, pursuant to a recently adopted City code, are reviewed in two sets each year and must be decided within 180 days. (Absent this City code, the State imposes a 120-day time limit.)
12. The direct cost to a rezone applicant is greater when review is conducted by a Hearing Examiner since the City requires the applicant to reimburse the City for the cost of employing an Examiner.
13. Unlike a Comprehensive Plan amendment proposal, any application for a site-specific rezone is to be considered on its merits; i.e., unlike Plan amendments, there is no 'screening' step by which the City can decline to consider a rezone application. It is difficult to predict how many such applications will be received each year. In general the Hearing Examiner can adapt more easily than the Commission's calendar to workload surges.
14. The proposed amendment would not be applicable to the 'master planned development' approvals of 'centers and villages' which are a hybrid of development approval and zoning map amendment. Such master plans are reviewed by both the Hearing Examiner and the Design Review Board and subject to final action by the Council. Unlike 'pure' rezones such map amendments simply add a note referencing the master plan approval consistent with the zoning. (Some citizens have suggested that the Commission, instead of the Examiner, should also hold the hearings related to these types of developments.)
15. Although rezone proposals must be judged against specific criteria including those in Olympia Municipal Code 18.59.050, these criteria are much broader in nature than the prescriptive measurements and criteria usually applicable to specific development proposals. Olympia's rezone criteria set forth more specifically in Olympia Municipal Code 18.59.050 and 18.59.055, can be summarized as whether:
  - The rezone is consistent with the Comprehensive Plan and its Future Land Use Map
  - The rezone will maintain the public health, safety, or welfare
  - The rezone is consistent with other development regulations
  - The rezone will result in a zoning district that is compatible with adjoining district

- Existing and planned public facilities are adequate and likely available to serve the potential development

### Conclusions

A survey of Olympia's peer cities (over a dozen similarly sized Washington cities plus Tumwater and Salem) revealed a broad range of approaches. For example, in Richland, Lacey, Longview, and Edmonds all rezones are reviewed by their Planning Commissions. In contrast, in Salem and Bremerton all rezones are reviewed by Hearing Examiners. Puyallup and Sammamish have split processes similar to Olympia. Many cities responded that they have tried or considered alternatives and each approach has advantages and disadvantages.

As noted above, Olympia has little recent experience with site-specific rezone applications independent of Comprehensive Plan amendments. A site-specific rezone, known as the Medela rezone, is now being considered by the Hearing Examiner. The Examiner's resulting recommendation will reach the Council in the coming months. Review of any other rezone applications received in the next few months will commence on October 1.

The Washington Cities Insurance Authority recommends that all quasi-judicial matters, including site-specific rezones, be heard by a Hearing Examiner. (See attached WCIA guidance.)

On balance, it is the staff's opinion that, given the procedural complexity similar to other development proposals, the Examiner is the more appropriate officer to hold site-specific rezone hearings. Staff can provide annual reports to the LUEC on site-specific reviews by the Examiner.

### **Neighborhood/Community Interests (if known):**

Public interest in this topic has been minimal, but those citizens who have commented have generally favored the Planning Commission holding hearings regarding site-specific rezones.

### **Options:**

1. Recommend that the Council not approve the proposed amendment and instead retain the current Examiner review of site-specific rezones; and direct staff to report to the Committee in about one year regarding experience with this process.
2. Recommend that the Council approve the amendment recommended by the Planning Commission, i.e., that the Code be revised so the Commission holds rezone hearings, instead of the Hearing Examiner.
3. Recommend that the Council hold a public hearing regarding this proposal.

### **Financial Impact:**

No direct impact; Examiner's hearing costs are borne by rezone applicants. As discussed above, increases in secondary costs could result from the proposed change.