DRAFT FOR PUBLIC REVIEW

City of Seattle
OFFICE OF HEARING EXAMINER

# HEARING EXAMINER
# RULES OF PRACTICE AND PROCEDURE

(Effective _____ 2022)

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**HEARING EXAMINER**
**RULES OF PRACTICE AND PROCEDURE**

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## SECTION 1 GENERAL PROVISIONS

### 1.01 APPLICABILITY

The Hearing Examiner Rules of Practice and Procedure ("Rules" or "HER"~~s~~) supplement Seattle Municipal Code and ordinances and other applicable law, for matters within the Hearing Examiner's jurisdiction. They govern Office of Hearing Examiner ("Office") administrative practice and procedure.

### 1.02 EFFECTIVE DATE

The Rules apply to matters before the Examiner on or after the Rules' effective date.

### 1.03 INTERPRETATION

(a) The Examiner interprets the Rules and determines their application.

(b) Sections 1-3 generally apply to all proceedings. Sections 4-6 apply to specific types of proceedings. If a Rule in Sections 1-3 and a Rule in Sections 4-6 conflict, the Rule in Sections 4-6 governs. If a Rule and the Seattle Municipal Code or other applicable law conflicts, the Seattle Municipal Code or other applicable law controls.

(c) While a matter is pending before the Examiner, an affected party may request by motion that the Examiner issue a declaratory ruling on the applicability of a Rule to identified, existing circumstances. The motion must identify the Rule and describe the circumstances for which the declaratory ruling is sought.

(d) The Rules may be waived or modified, at the Hearing Examiner's discretion, to promote hearing fairness and efficiency. When questions arise that the Rules do not address, or a procedural conflict is created by the application of the Rules, the Examiner shall determine the ~~appropriate~~ practice or procedure most appropriate and consistent with providing fair treatment, and efficiency ~~procedure based on fairness and efficiency concerns~~. The Examiner may look to the Washington State Superior Court Civil Rules for guidance (http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=sup&set=CR).

### 1.04 PETITION FOR RULES (SMC 3.02.040)

Any ~~interested~~ person may petition the Hearing Examiner requesting adoption, amendment or repeal of any R~~r~~ule. The petition shall be written, signed by the petitioner, and include:

(a) Petitioner's name and address; and either

(~~b~~1) In the case of a petition for adoption, the substance of the requested rule, and a brief statement of the reason why adoption of the rule is necessary or desirable; or

(~~c~~2) In the case of a petition for ~~rule~~ amendment or repeal of a rule, the number of the rule to be amended or repealed, the substance of any proposed new text amendment, and a brief statement explaining why amendment or repeal of the rule is necessary or desirable.

Within 60 days of petition ~~-~~submittal, the Examiner will either issue a written denial, with an explanation for the denial, or initiate rulemaking under SMC 3.02.030.

**1.05 OFFICE LOCATION AND PUBLIC RECORDS (SMC 3.02.070)**

(a) The Office~~-~~ is a separate and independent City office. The Office conducts administrative hearings and issues decisions and recommendations as authorized by the ~~where~~ the Seattle Municipal Code~~ authorizes it~~. The Office's location, mailing address, and operating hours are posted on the Office's webpage.~~The Office is in the Seattle Municipal Tower, 700 Fifth Avenue, 40th floor, Seattle, Washington. The Office is open 8:00 a.m. to 5:00 p.m. on business days. The mailing address is PO Box 94279, Seattle, Washington 98124~~.

(b) The Office retains case files, including recordings, exhibits, and decisions or recommendations in accordance with retention schedules. Case files are available to the public during normal business hours for inspection and copying ~~per~~ pursuant to the Public Records Act, RCW Chapter 42.56, ~~-~~and other laws governing public records. In addition, most case records from January 2010 to the present and all e-filed documents are available online. http://www.seattle.gov/hearing-examiner/decisions/case-search.

**1.06 ACCESSIBILITY AND ACCOMMODATION**

(a) ~~(a)~~ Proceedings before the Examiner shall be accessible to the greatest extent practicable.

~~(a)~~(b) Upon request, the Office will provide reasonable accommodations to ensure persons needing accommodation (e.g. hard of hearing, deaf, physically impaired, non-English speakers) can attend, and where appropriate participate, in hearings.

(c~~b~~) If a ~~hearing impaired~~hard of hearing, deaf, or non-English speaking party requires an interpreter or other accommodation to fully and fairly participate in an ~~contested case~~appeal hearing, the Examiner shall appoint a qualified and impartial interpreter in accordance with the Hearing Examiner's adopted procedures for using interpreters, or provide other necessary accommodation where feasible. A request for appointment of a qualified interpreter should be submitted at least ~~10~~ 7 business days prior to the proceeding for which the services are requested.

## SECTION 2 DEFINITIONS

### 2.01 DEFINITIONS

These definitions apply unless the context requires otherwise:

(a) "Affidavit" - a written ~~factual statement~~statement of fact confirmed by oath or affirmation by the person making it before a notary public, an officer of the court, or any other person authorized to administer such an oath.~~.~~

(b) "Appeal" - a challenge to a decision or other action the Examiner is authorized to review and decide.

(c) "Appeal hearing" - a hearing the Examiner holds to consider an appeal of a decision or other action within the Examiner's jurisdiction. An "appeal hearing" is distinguished from a "public hearing."

(d) "Appellant" - the person, organization, or other entity who files a complete and timely appeal of a decision or other appealable action.

(e) "Applicant" - the person, organization, or other entity who files an application or otherwise formally requests a permit or other type of City action that is appealled to or reviewed by the Examiner.

(f) "Business days" - days other than Saturday, Sunday, and legal holidays~~, and emergency closures~~.

(g) ___"City" – City of Seattle.

~~(h) "City department" - any agency, office, board or commission of the City, or any department employee acting on its behalf, but does not include a public corporation chartered under Chapter 3.110 SMC, or any contractor, consultant or concessionaire or lessee.~~

(h~~g~~) "Code" - Seattle Municipal Code ("SMC").

(i~~h~~) "Days" - calendar days.

(j~~i~~) "Declaration" - a written ~~factual~~ statement of fact declared to be true and correct under penalty of perjury under ~~State of~~ Washington law.

(k~~j~~) "Department" - the City entity responsible for the decision or action that is subject to appeal or other Examiner review.

(l~~k~~) "Director" - the head of ~~the unit of City government responsible for the decision or other action subject to appeal or Examiner review~~a Department.

(m~~l~~) "Discovery" - the disclosure by one party to another party of documents and information relevant to an appeal, or which are reasonably calculated to lead to documents and information ~~that are relevant to the subject matter of~~relevant an appeal.

(n) "Emergency closure" – closure of the Office for emergency purposes.

(o~~m~~) "Ex parte communication" - a direct or indirect communication between the Examiner and a proponent, opponent, or a party ~~and the Examiner~~, made outside a hearing or ~~properly~~ scheduled conference, and outside the presence of all other parties, on the merits of a matter pending before the Examiner.

(p) "File" (when used as a verb) or "filing" means submitting documents to the Examiner. (See HER 3.03). When used as a noun, "file" refers to the documents a Department or the Examiner keeps related to a particular case.

(q) "Frivolous" – a frivolous claim has no basis in fact or for which the law provides no remedy such that the claim has no merit.

(r~~n~~) "Hearing Examiner" or "Examiner" - The ~~Hearing Examiner is the~~ official the City Council appointed per Chapter 3.02 SMC to serve as the City's Hearing Examiner. In the Rules, the terms "Hearing Examiner" and "Examiner" are used interchangeably to refer to the Hearing Examiner, a Deputy Hearing Examiner, or Hearing Examiner Pro Tempore ~~who~~ to whom the Hearing Examiner has delegated authority to preside over a particular matter.

(s~~o~~) "Interested person" - any person, organization, or other entity ~~significantly~~ affected by, or interested in proceedings before the Examiner, including any party.

(t~~p~~) "Intervenor" - ~~means~~ a party granted permission to participate in an appeal by motion, as specified by the~~se~~ Rules.

(u~~q~~) "Law" - federal or state statute or regulation, Code, City ordinance or regulation, or common law.

(v~~r~~) "Legal Holidays" - a legal holiday designated in SMC 4.20.190~~a public holiday established by Federal, or State law, or such dates established by the City or Office~~.

(w~~s~~) "Motion" - a formal request ~~made~~presented, either in writing (and clearly identified as a motion) or orally during a proceeding, to the Examiner for an order or other ruling. (See also HER 3.17)

(x~~t~~) "Offer of proof" - a party's statement for the record of what excluded evidence would show had it been admitted.

(y~~u~~) "Order" – an Examiner ruling, instruction, or other directive issued in response to a ~~party's request or~~ motion, or on Examiner initiative.

(z~~v~~) "Party" ~~–~~ those who properly appear as participants in a matter including but not limited to: the person, organization, or other entity that has filed an appeal or complaint, or is granted a hearing automatically by law; the person, organization, or other entity granted party status through intervention; the Department which issued the decision or took the action that is the subject of the hearing or appeal; the person, organization, or other entity who filed the application, request, or petition for a permit or other type of City authorization or action that is the subject of the hearing or appeal; or the owner of the property subject to the City decision or other action.~~a participating individual, group or entity to a matter the Examiner is considering~~.

(aa) "Prejudice" to a party – as determined by the Examiner, an impairment of a legal interest, legal claim, or legal argument, including but not limited to serious delay, or preclusion from being able to raise an argument or effectively participate in a hearing.

(bb~~w~~) "Public hearing" - a hearing the Examiner holds to gather evidence to prepare a final decision on a preliminary subdivision application, on a recommendation to the City Council or where the Code provides for a recommendation. A "public hearing" is distinguished from an "appeal hearing."~~(See also "Appeal hearing")~~

(cc) "Remand" – to send a Department decision back to the Department for further proceedings, additional review, or to otherwise take action consistent with the decision of the Examiner.

(dd~~x~~) "Representative" - the individual or firm a party designates to be the official contact person and to speak for the party. Unless otherwise required, a representative need not be an attorney.

(ee) "Serve" or "Service" means submitting documents to other named parties. (See HER 3.03)

(ff) "Temporary closure" – temporary closure of the Office for non-emergency purposes (e.g. staff shortage etc.).

(gg~~y~~) "Timely" - within the time prescribed law, Rule, or Examiner order.

(hh) "Unsworn statement in lieu of affidavit" - whenever a matter is required or permitted to be supported or proved by affidavit, the matter may be supported or proved by an unsworn written statement executed by affixing or placing their signature in accordance with this Rule. The unsworn statement must state (1) that it is certified or declared by the person to be true under penalty of perjury, (2) the date and place of its

execution, and (3) that it is so certified or declared under the laws of the state of Washington. The certification or declaration may be in substantially the following form:

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

_____

_____

(Date and Place) (Signature)

(ii) "Without merit" - no legal basis exists for the acceptance, allowance, or crediting of a claim, defense, or legal argument.

## SECTION 3 RULES OF GENERAL APPLICATION

### 3.01 EXAMINER JURISDICTION AND AUTHORITY

(a) The Office is independent of other City departments, boards, and commissions and is responsible for the impartial facilitation of administrative hearings.

(b) Examiner jurisdiction is limited to matters identified in the Seattle Municipal Code or assigned to the Hearing Examiner by ordinance or other City Council action.

~~(c) Equitable defenses, or claims based on the constitutionality of City ordinances or codes, may be raised to exhaust administrative remedies and make a record for judicial review but are beyond Examiner jurisdiction, unless otherwise provided in City code.~~

(c~~d~~) A party or the Examiner may raise ~~jurisdictional~~ issues concerning Examiner jurisdiction at any time. A party shall raise jurisdictional issues promptly upon becoming aware of the facts giving rise to the issue.

(d~~e~~) The Examiner and Office staff cannot provide legal advice.

### 3.02 TIME COMPUTATION

In computing a period of time prescribed by the Rules, the day of the event from which the time begins to run is not included. The last day of the period so computed is included unless it is a non-business day, in which case the period extends to the end of: (a) the next business day if the period is counted forward from the event; or (b) the preceding business day if

the period is counted backward from the event.~~Computing a period of time begins with the first day after the day on which the event that started the time period occurred. When the last day of the computed time period is a Saturday, Sunday, or legal holiday, the time period extends to the end of the next business day.~~

### 3.03 FILING AND SERVICE

(a) Documents may be filed with the Office in hard copy, or in electronic format through the Office e-File web page (*see* www.seattle.gov/examiner). ~~Unless the Examiner otherwise authorizes, if an e-Filed document is more than 10 pages including exhibits, a hard copy must be delivered to the Office.~~ Unless directed by an Examiner, ~~E~~electronic mail filing with the Office is not authorized, except with regard to exhibits (See HERs 3.11 and 3.14).~~.~~

(b)~~(b)~~ Documents are deemed filed with the Examiner when the Office receives them. Documents filed on non-business days, or outside regular business hours, are deemed filed on the next business day. Documents filed during emergency or temporary closures are deemed filed on the day they were filed.

(c) All documents filed with the Office must be served on opposing parties. Service must be initiated on the same day of filing.

(d~~e~~) Unless otherwise provided by law, the Examiner, or party~~-~~ agreement, documents shall be served on all parties via electronic mail. Where a party has not provided an electronic mail address, service may be by U.S. mail or personal service. ~~City agencies may serve other City agencies through the City's regular interoffice mail.~~

(e~~d~~) Unless the Examiner otherwise provides or by party agreement, service is complete at the time documents are personally delivered, or confirmed as having been successfully transmitted by electronic mail. Unless earlier receipt is shown, service by mail is complete on the third day after deposit of a properly stamped and addressed letter or packet into regular U.S. mail facilities. If the third day falls on a non-business day, service is complete on the first following business day ~~following~~.

(f~~e~~) It is the sender's responsibility to confirm receipt of an e-Filing or of electronic mail service. Requesting a confirmation receipt for electronic mail is recommended. It is the sender's responsibility to ~~confirm~~ file e-Filed materials that the Examiner can read, view, and/or listen to ~~e-Filed materials~~.

### 3.04 EXPEDITIOUS PROCEEDINGS

All proceedings will be conducted to promote efficient use of hearing time, minimize hearing participant costs, and reduce delay through active case management. Throughout the proceedings, all parties shall avoid unnecessary delay.

### 3.05 SCHEDULING AND NOTICE OF HEARINGS

(a) Upon receipt of an appeal that meets the requirements of HER 5.01, the Examiner will promptly schedule an appeal hearing in accordance with the requirements of the law and the~~se~~ Rules.

(b) The Examiner will promptly schedule a public hearing when the Department notifies the Office of a recommendation, decision or action requiring one.

(c) Hearing notice will be provided as legally required. Hearing dates are posted on the Office website at www.seattle.gov/examiner.

(d) As a courtesy, the Examiner ~~may~~ will consult with the parties to determine mutually agreeable hearing dates. However, hearing dates and schedules are compulsory and where mutually agreeable dates are not available, parties must adhere to the case schedule set by the Examiner.

(e) ~~Notice to a non-English or limited-English-speaking party.~~ When the Examiner is notified, or otherwise made aware, that a limited or non-English-speaking person is a party, notices concerning the hearing:

(1) Shall be written in English and the party's primary language; or
(2) Shall include a notice in the party's primary language, describing the notice's significance, and how the party may receive assistance in understanding and responding.

### 3.06 CONSOLIDATION

All cases relating to the same matter should be consolidated for hearing. At party request, or on Examiner initiative, the Examiner may order consolidation.

### 3.07 PREHEARING CONFERENCE

(a) On party request or Examiner initiative, the Examiner may schedule a pre-hearing conference to consider:

(1) Issue identification, clarification, and simplification;
(2) Potential for mediation or settlement;
(3) Stipulations and admissions, including whether the parties can agree to a stipulated record;
(4) Witness and exhibit disclosures;
(5) Discovery;
(6) Motions;

(7) Hearing date and pre-hearing deadlines;
(8) Other matters appropriate for orderly and efficient case disposition.

(b) Prehearing conferences will be held by video conference, unless otherwise arranged. In person attendance at a prehearing conference will be arranged on request. ~~may be held by telephone conference call.~~ A request by a party to appear by telephone must be made at least two days in advance, and is allowed at the discretion of the Examiner. ~~The Examiner may require telephone conferencing costs to be borne by the requesting party.~~

(c) The Examiner shall notify the parties of any prehearing conference. Notice may be electronic, written or oral.

(d) Parties shall be represented at any prehearing conference unless a party waives the right to be present or if the Examiner has excused participation.

(e) Following the prehearing conference, the Examiner may issue an order reciting actions taken and deadlines imposed, and rule on any motions made at the conference.

(f) Failure to adhere to a pre-hearing order deadline may result in forfeiting the right to take the action subject to the deadline where failure to meet a pre-hearing order deadline causes prejudice to a party or impairs the Examiner's ability to decide the matter.

(g) The Examiner may hold more than one prehearing conference in a proceeding.

**3.08 INTERFERENCE PROHIBITED**

In performing adjudicative functions, deciding appeals and preparing recommendations, the Examiner is an independent official and is not responsible to, or subject to the supervision or direction of, any elected official, any officer or employee of any department, or any other person whether or not associated with City government.

**3.09 PRESIDING OFFICIAL**

The Examiner conducting a hearing shall take measures to ensure a fair and impartial hearing, avoid delay, gather facts necessary for making the decision or recommendation, and maintain order. The Examiner has all powers necessary to these ends including, but not limited to:

(a) Determine the order for presenting evidence;

(b) Determine the appropriate hearing location and setting to ensure safety, and efficiency of the hearing;

(c) Administer oaths and affirmations;

(d) Issue subpoenas;

(e) Rule on offers of proof and receive evidence;

(f) Rule on procedural matters, objections and motions;

(g) Question witnesses and request additional exhibits;

(h) Permit or require oral or written argument, briefs, proposed findings of fact and conclusions, or other appropriate submittals, and determine the timing and format for such submittals;

(i) Regulate the hearing proceeding and participant conduct to maintain order and provide a fair hearing; and

(j) Hold conferences for issue simplification or any other proper purpose.

### 3.10 EXAMINER DISQUALIFICATION OR RECUSAL

An Examiner is subject to disqualification for bias, prejudice, conflict of interest, or any other cause for which a Superior Court judge can be disqualified under the Code of Judicial of Conduct. In such matters, the Examiner ~~shall~~ may be guided by the current version of the Code of Judicial Conduct, Rule 2.11. (http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Code%20of%20Judicial%20Conduct%20Task%20Force%20Committe/CodeOfJudicialConduct.pdf).

(a) Any party may request assigned Examiner disqualification. The request shall be written and identify the reasons for the belief the assigned Examiner cannot remain objective in hearing the matter. This request must be submitted as soon as the basis for disqualification is known~~, and in all cases raised at least seven days before a hearing, or before any discretionary ruling~~. If not, the objection may be considered waived. A disqualification request should be granted whenever the Examiner has:

(1) a demonstrated personal bias or prejudice concerning the party or matter;
(2) directly served in a professional or business relationship with respect to the specific matter at issue, or is professionally associated with a person who is so engaged; or
(3) has a direct financial or personal interest in proceeding outcome either personally or through a family member.

(b) The fact that an Examiner has considered the same or a similar issue or proposal in another matter, or made a ruling adverse to the interests of the party in the same or another matter, is not a basis for disqualification.

(c) The Examiner's decision on a disqualification request shall be documented on the record. The Examiner may orally or in writing:

(1) Disqualify ~~himself/herself~~themself, if ~~he/she~~the Examiner determines that the reasons the party set forth for disqualification establish that the Examiner's impartiality might reasonably be questioned. ~~may create a reasonable question concerning the appearance of impartiality or fairness of the tribunal;~~

(2) Reject the request, setting forth the reasons for the rejection; or

(3) Disclose any relationship or appearance on the record, stating a bona fide conviction that the interest or relationship will not interfere with rendering an impartial decision.

### 3.11 REMOTE HEARING APPEARANCE

(a) A party may appear by telephone or video conference (collectively "remote" appearance) at a hearing when authorized by the Rules or directed by the Examiner to do so in advance of the hearing. ~~All r~~Requests for remote appearances must be made as early as possible and should be made no later than one week in advance of the hearing. Authorization for a party or witness to appear remotely is subject to successful completion of a system test, prior to the hearing, to ensure the party's system is compatible with the Office equipment.

(b) Procedural hearings such as prehearing conferences or a status conference will be held by video conference. Appeal hearings for citations will also be held by video conference. Parties may request, or ~~T~~the Examiner may order in person or telephonic partici~~t~~pation for such matters. ~~A request by a party to appear at a procedural hearing by telephone or video conference must be made by a party at least two days in advance.~~See also HER 3.07.

(c) To the degree possible, hearings conducted remotely should be treated as an in-person hearing in accordance with the Seattle Municipal Code and ~~Hearing Examiner Rules of Practice and Procedure~~ the Rules. This includes logging in to participate in the hearing on time, and each participant conducting themselves with the decorum and respect owed to each other and the hearing forum for an in-person hearing. ~~It is inevitable that remote hearings will encounter limitations concerning technology. All parties are urged to be patient with regard to the technological and other difficulties experienced by others.~~

(d) It is inevitable that remote hearings will encounter limitations concerning technology. All parties are urged to be patient with regard to the technological and other difficulties experienced by others.

(e) If in the determination of the ~~Hearing~~ Examiner, the technology supporting the hearing is not performing adequately, the Examiner may suspend or continue the hearing, make arrangements for submission of materials or testimony at a later date, or make other necessary arrangements.

(f) ~~Participants~~ Parties must adhere to any protocols for remote hearings issued by the Examiner, and the Rules~~.~~

(g) Parties to an appeal appearing remotely.

(1) A party to an appeal authorized to appear remotely must send electronic copies of documents it intends to submit as evidence to the Examiner and other parties, with receipt by the Examiner and other parties –no later than seven days before the hearing (or such other date the Examiner identifies). ~~A~~ On request of the Examiner, a single hard copy of each exhibit must also be mailed to the Office ~~on the same day electronic filing is completed~~.

(2) All exhibits shall be marked numerically and presented in sequential order. Electronic documents shall ~~include~~ have 1-3 word titles clearly identifying the document.

(3) A party appearing remotely shall arrange a means to receive exhibits from other parties instantaneously during the hearing (e.g. ~~email~~electronic mail).

(4) No exhibits will be admitted by showing documents through a videoconference call.

(5) Exhibits submitted for purposes of impeachment may be admitted according to order of the Exminer, or during the hearing subject to Examiner discretion.

~~(4)~~(6) If a party is not able to access the hearing due to a technological failure, the party shall notify the Office immediately.

(h) Witnesses appearing remotely.

(1) The party calling the witness must provide all necessary exhibits to the witness before the hearing, so the witness may refer to them during the hearing.

~~(1)~~(2) The party calling the witness shall ensure email communication is available with the witness during the hearing.

**3.12 TESTIMONY AND ARGUMENT**

(a) Witnesses testifying at hearing must take an oath or affirmation to be truthful in their testimony. Witnesses are subject to cross-examination by other parties.

(b) Testimony and argument are limited to matters relevant to the Examiner's decision.

(c) The Examiner may limit testimony length to expedite the proceedings.The Examiner may pre-set allotted time for testimony. If parties are unable to complete their testimony and arguments within the allotted time, and the hearing ~~will~~ may not be continued, it is within Examiner discretion to leave the record open and to provide an opportunity to submit written materials after the close of the hearing~~to provide an opportunity to submit written materials after the close of the hearing; other parties may be allowed an opportunity to offer written rebuttal to any such materials~~.

(d) No person shall be compelled to divulge information, which could not be compelled in a court of law. A witness has the right to invoke any legally recognized privilege. The rules of privilege (e.g. attorney-client, etc.) apply to the extent recognized by law.

(e) The Examiner may allow witness testimony to be submitted by sworn statement, granting to such statement the evidentiary weight warranted under the circumstances.

(f) Facts or argument from an unsworn attorney or other representative are not evidence.

(g) Although Examiner hearings are open to the public, those who are not parties are generally not permitted to testify, or comment, in appeal hearings unless a party calls them as witnesses.

(h) Interpreters. Before beginning to interpret, every interpreter shall take an oath that to the best of the interpreter's ability, a true interpretation shall be made that is understandable for the person utilizing the interpreter, and that the interpreter shall repeat statements in English to the Examiner and the other parties. (See also HER 1.06~~(b)~~).

(i) Cross-Examination. Subject to the below, every party may cross-examine witnesses:

(1) Cross-examination is limited to direct testimony subject matter, the foundation for opinions and statements, and to determine any bias, conflict of interest or any other issue that reflects on credibility.
(2) Expert witnesses may also be subject to cross-examination on the sufficiency of their qualifying credentials.
(3) The Examiner will prohibit irrelevant, cumulative, unduly repetitious, argumentative, or abusive cross-examination.
(4) Only one person representing each party may cross-examine a witness. In cases with multiple parties with shared interest, the Examiner

may place limits on the ~~number of parties that may~~ cross-examination ofe an individual witness by such parties to protect against undue repetition in the questions being asked. ~~and require parties to submit their questions for cross-examination jointly through one party.~~

(5) A party may seek re-direct testimony after cross-examination. Re-direct is limited to the subjects addressed during cross-examination.

(6) The Examiner may limit cross examination of opinion testimony offered by interested persons who do not claim to be experts.

(7) The Examiner may establish reasonable time limits for cross examination, consistent with the requirements of due process.

**3.13 OBJECTION**

An objection to admitting testimony or evidence shall identify the grounds for objection. Any evidence entered into the record without objection is admissible. ~~The Examiner determines the probative value, if any, of all admitted evidence.~~

**3.14 EXHIBITS**

(a) A party to an appeal must send electronic copies of exhibits it intends to submit as evidence to the Examiner and other parties, with receipt by the Examiner and other parties no later than seven days before the hearing (or such other date the Examiner identifies). On request of the Examiner, a single hard copy of each exhibit must also be mailed to the Office ~~Any person offering an exhibit into evidence must provide a copy for the record, a copy for each named party, and, at Examiner discretion, a mark-up copy for the Examiner.~~

(b) Documents submitted as exhibits must be legible. Unless challenged for authenticity and found unreliable by the Examiner, documents may be received in their entirety or as excerpts~~copy or excerpt form~~. The Examiner may require that the parties be given an opportunity to compare the copy with the original, and that the complete document from which an excerpt is taken be made available for inspection.

(c) The Examiner may exclude any evidence imposing an unreasonable custodial burden. The Examiner may require substitute photographs, reduced-sized copies, or written or oral descriptions.

(d) Copies of ~~A~~any screen presentation, such as PowerPoint~~, must be accompanied by printed paper copies of each panel or image. Copies of the presentation~~ must be provided as specified above.

(e) Exhibits submitted for the record will not normally be returned.

(f) Exhibits at remote hearings must comply with Rule 3.11.

### 3.15 EXPECTED CONDUCT

(a) All persons appearing before the Examiner shall conduct themselves with civility and courtesy to all persons involved in the hearing. If an individual or group fails to meet this requirement, or if circumstances otherwise warrant, the Examiner may take reasonable measures to maintain order, including but not limited to:

(1) Provide security officers whenever necessary to maintain order

~~(1)~~(2) , safety, civility, or to protect against witness intimidation.

~~(2)~~(3) Recess a hearing and reconvene it under reasonable conditions to assure the violation will not be repeated.

~~(3)~~(4) Exclude any disruptive person from further participation and have them removed ~~them~~ from the premises. A person so excluded is deemed to have forfeited any right to participate in the hearing.

~~(4)~~(5) Limit or prohibit picket signs, posters, flags or other visible or audible demonstrations as necessary to maintain order, security, and the appearance of fairness in any hearing.

~~(5)~~(6) Identify an alternative secure location for the hearing, with specific limits placed on access to the hearing location.

(b) No profanity, combative, rude, degrading or irrelevant statements, questions, or testimony will be allowed, and shall be deemed to be disruptive behavior.

(c) The Examiner may permit tripods, easels, photographic and recording equipment, or other equipment subject to conditions preventing disruption. Flash photography and high-intensity lighting are prohibited.

(d) Witnesses, counsel and other participants should be referred to and addressed by their surnames unless, leave to do otherwise is granted. Office personnel should be referred to and addressed by their surnames or titles. The Examiner should be addressed as Mr./Ms. Examiner or Examiner (surname).

(e) Except by leave of the Examiner, all communications to the Examiner should be made from a position at or beside the dedicated table location.

(f) Party representatives should not approach opposing party representatives, witnesses, the Examiner or hearing staff without leave of the Examiner. If it becomes necessary for a party representative to confer with the Examiner, permission should be obtained.

(g) Parties must adhere to Orders issued by an Examiner.

### 3.16 APPEARANCE OF FAIRNESS

(a) ~~The~~ Hearings shall be conducted in accordance with the appearance of fairness doctrine, codified at RCW Chapter 42.36~~, requires the Examiner to conduct hearings in a way that is fair and unbiased in appearance and fact~~.

(b) Ex parte communication is prohibited.~~Any communication between a hearing participant and the Examiner outside the hearing and in the absence of other participants, is an ex parte communication~~. No interested person or representative shall communicate ex parte directly, or indirectly, with the Examiner concerning the merits or facts of any matter before the Examiner.

(c) 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.

(d) If a prohibited ex parte communication is made, the Examiner shall promptly and publicly disclose the communication, and provide the parties an opportunity to review and rebut it.

**3.17 MOTIONS**

(a) All motions shall state the order or relief requested and the grounds for the motion. All motions other than those made at a prehearing conference or during a hearing shall be written, and the filing shall be identified as a motion for Examiner consideration. ~~Every motion, response, and accompanying paper, shall be served on every other party representative on the day it is filed with the Examiner. (See HER 3.04 on Filing and Service of Documents.)~~

(b) Within seven days of service of a written motion, or such other time as the Examiner may designate, any other party may file a written response. After the Examiner has received any written responses, or the seven days or other designated time has elapsed, the Examiner may rule on the motion. Failure of a party to file a timely response may be considered as evidence of that party's consent to the motion, and failure to respond to an issue raised in the motion shall constitute abandonment of that issue.

(c) The Examiner may authorize a reply or other additional briefing. Where the Examiner has not yet determined if a party may file a reply, such parties should request a determination prior to filing a reply.

(d) Parties may request oral argument on a motion. The Examiner may grant or deny the request.

(e) For motions made ~~at~~ during a prehearing conference or at hearing, and motions made for the extension of time or to expedite the hearing, the Examiner may waive this section's requirements.

(f) The Examiner may rule upon motions orally, except for motions that are fully dispositive of a case.

(g) Written decisions on motions do not require findings and conclusions to be made in support of the decision, except for motions that are fully dispositive of a case.~~.~~

~~(h) Motions to dismiss all or part of an appeal, other dispositive motions, and motions to exclude evidence (testimony or exhibits) shall be filed at the earliest possible time in the proceedings to allow time for the other party to respond, as provided in HER 3.18.(b).~~

(h) If a schedule for filing motions and related briefing is established by order of the Examiner, motions may not be filed at any other time without permission of the Examiner.

(i) Motions to dismiss all or part of an appeal, other dispositive motions, and motions to exclude evidence (testimony or exhibits) must be in writing and shall be filed at the earliest possible time in the proceedings to allow time for the other party to respond, as provided in HER 3.17.(b).

(j~~i~~) Motion to Dismiss. A party may move to dismiss an appeal~~ without a hearing~~, in whole or in part, if:

(1) The appellant lacks standing to appeal the decision or action being challenged;
(2) The appeal was not filed before the appeal deadline, or does not otherwise conform to appeal requirements;
(3) The Examiner lacks jurisdiction, in whole or in part, over the appeal;
(4) The appeal is frivolous on its face; or
(5) Other grounds as established by law.

(k~~j~~) Motion for Summary Judgment. Due to the efficiency and frequent participation of pro se litigants in the hearing process, summary judgment motions are disfavored. A party may move for summary judgment on an appeal with permission of the Examiner~~A party may move for summary judgment in an appeal without a hearing, in whole or in part~~, and if:

(1) There are no material facts in dispute; and
(2) The moving party can show that when the law is applied to those facts, the party is entitled to judgment on the claim or claims; and
(3) The issues raised primarily involve legal interpretations based on facts that are either uncontested or can be determined expeditiously.~~.~~

The schedule for filing and responsive briefing for a summary judgment motion will be set by the Examiner, and will generally exceed the deadlines identified in HER 3.17 (b).

(l) A party may request, or the Examiner may grant upon his or her initiative, oral argument on a motion. Parties are not entitled to oral argument on a dispositive motions.

(ml) The Examiner may grant a written motion seeking permission to file a brief *amicus curiae*, if the Examiner determines that the brief would assist the Examiner. A motion to file an *amicus curiae* brief, shall not exceed six pages and must identify:

(1) The applicant's interest and the person or group the applicant represents, if any;
(2) The applicant's familiarity with the issues involved in the proceeding;
(3) Issues the amicus curiae brief will address; and
(4) The reason additional argument is necessary.

(nm) A primary purpose of prehearing motions is to enhance hearing efficiency. Where filing of a motion will cause delay or inefficiency, the Examiner may prohibit or deny the motion.

(on) Generally, the Examiner issues a decision within 21 days of final briefing on a motion.

(p) Orders on motions may result in the dismissal of all or part of a matter without an in-person hearing.

**3.18 EVIDENCE**

(a) Evidence, including hearsay, may be admitted if the Examiner determines it is relevant, comes from a reliable source, and has probative (proving) value. Such evidence is that which responsible persons would commonly rely on in conducting important affairs.

(b) The Examiner may exclude evidence that is irrelevant, unreliable, immaterial, unduly repetitive, or privileged.

(c) At public hearings on matters in which the Examiner prepares a recommendation for the City Council, opinion evidence of non-experts may be admitted into the record. At appeal hearings, opinion evidence from non-experts is discouraged but the Examiner may admit the testimony and give it appropriate weight.

(d) All evidence that a party plans to submit at hearing must be exchanged with all other parties to the appeal, except as otherwise agreed by the parties or ordered by the Examiner. Any evidence offered at the hearing that was not disclosed by the party offering it may be excluded, unless the Examiner permits it for impeachment purposes, or the party demonstrates extenuating circumstances apply.

(f) The Examiner determines the probative value, if any, of all admitted evidence.

(g) In passing upon the admissibility of evidence, the Examiner ~~The Examiner's rulings on objections to evidence admissibility is guided by the~~may consider, but shall not be bound to follow, the Washington State Rules of Evidence (http://www.courts.wa.gov/court_rules/?fa=court_rules.rulesPDF&groupName=ga&setName=ER), . Where ~~those rules~~the Rules of Evidence conflict with the Rules or Code, the Rules or Code shall take precedent.

**3.19 OFFICIAL NOTICE**

(a) The Hearing Examiner may take official notice of judicially cognizable facts. In addition, the Examiner may take notice of general, technical, or scientific facts within his or her specialized knowledge.

(b) A Hearing Examiner ruling, decision, or recommendation may refer to and utilize any part of the Code and any issued Examiner decision.

**3.20 SITE VISIT**

When it would assist the Examiner, the Examiner may visit or view the site before, during, or after the hearing.

(a) If the Examiner conducts a post-hearing site visit, the hearing record will not close until the visit is completed.

(b) The Examiner's observations at the site visit are not evidence.

(c) Unless the Examiner provides otherwise, site visits include only the Examiner; ~~interested~~ parties may not accompany or approach the Examiner during the visit.

(d) The Examiner may view publicly accessible electronic ~~aerial~~ mapping or imagery of the site ~~such as is available through Google Earth, Google Maps, orMapQuest~~. If the Examiner intends to utilize such materials, the mapping or imagery shall be disclosed to the parties in advance so they may comment or object. As with site visits, such electronic aerial mapping or imagery is not evidence.

**3.21 CONTINUING OR REOPENING HEARING**

(a) A scheduled hearing may be continued on the Examiner's initiative, or on the motion of a party for good cause shown. Written notice of the date, time, and place of the continued hearing shall be provided to each party. The notice of a continued hearing need not conform to the time requirements for the original notice.

(b) At a hearing the Examiner may, for good cause shown, continue the hearing.

(c) If the Examiner determines at hearing to continue it, and then and there specifies the date, time, and place of the new hearing, no further notice is required. ~~Otherwise a notice consistent with Rule 3.06 shall set forth the continuance date, time, and place.~~

(d) Following the close of the hearing and/or the record, but before issuing a decision or recommendation, for good cause, the Examiner may reopen the record and/or the hearing, and may permit or require written briefs or oral argument.

(e) If a matter is reopened after conclusion of the hearing, unless otherwise agreed, parties shall be provided no less than 10 days notice of the reopened hearing.

**3.22 LEAVING THE RECORD OPEN**

(a) At the conclusion of the hearing, the Examiner may close the hearing, but leave the record open to receive argument or for other good purpose. Parties shall be provided notice of any evidence received after hearing and shall have an opportunity to review the evidence and file rebuttal evidence or argument.

(b) Except as the~~is~~ Rules provide~~s (including HER 3.22, 3.23 and HER 3.25)~~, the Examiner shall not consider information submitted after the record closes.

**3.23 DISTRIBUTION OF DECISIONS AND RECOMMENDATIONS**

The Examiner's decision or recommendation shall be distributed to each party representative, and to others as required. A copy of the decision and the certificate of service shall be made part of the case record

**3.24 REMAND PRIOR TO RECOMMENDATION OR DECISION**

(a) Before issuing a recommendation, a decision on an appeal or a preliminary subdivision application, or other matter, if the Examiner determines that necessary information or analysis ~~necessary to the Examiner's recommendation~~ has not been provided, the Examiner may remand the matter to the relevant department to allow for submittal.

~~(b) Before issuing a decision on an appeal or a preliminary subdivision application, or other matter, if the Examiner determines that evidence or analysis needed to satisfy the relevant legal provisions has not been provided, the Examiner may remand the matter to allow for submittal.~~

(b~~e~~) If the Examiner remands a matter for additional information or analysis, the Examiner ~~may~~ retains jurisdiction to review the adequacy of the remand response. The

remand decision shall state ~~whether~~ jurisdiction is retained and what information or analysis is to be provided and when.

(c~~d~~) The information or analysis filed with the Examiner in response to a remand shall be served on all parties. If document size or condition makes electronic mail or copying impractical, filing notification is sufficient. ~~Where the Examiner retains jurisdiction, p~~Parties may rebut the remand response.

(d~~e~~) After receiving a remand response and any rebuttal, the Examiner may reopen the hearing, or issue a final decision or recommendation without reopening the hearing.

### 3.24 REMAND FOR FINAL DECISION

Where permitted by law, the Examiner may remand a matter to the Department as a final decision. The Examiner may retain jurisdiction over a remanded matter, but only if the Examiner explicitly retains jurisdiction in the decision.

### 3.~~25~~26 TERMINATION OF JURISDICTION

Hearing Examiner jurisdiction is terminated on the date a decision or recommendation is issued unless the Examiner expressly retains jurisdiction, or the law or the~~se~~ Rules provide otherwise ~~(*see e.g.*, HER 3.25)~~.

### 3.~~26~~27 CLERICAL ERRORS AND CLARIFICATIONS

Clerical mistakes in decisions, recommendations, orders, or the record, and errors arising from oversight or omission, may be corrected by Examiner order or initiative, or in response to a motion for clarification by a party. A motion for clarification does not stop, or alter, the running of the time period provided by law for appealling the Examiner's decision.

### 3.~~27~~28 PROCEEDINGS RECORDED

Examiner proceedings are electronically recorded. Hearing recordings are part of the official case record. Copies of the recordings are available for each proceeding on the Office of Hearing Examiner website under the case number for each matter (http://www.seattle.gov/hearing-examiner/decisions/case-search).

### 3.298 CERTIFIED TRANSCRIPT ~~AND RECORD OF PROCEEDINGS~~

(a) Anyone desiring a certified hearing transcript must obtain a hearing recording copy from the Office and arrange and pay for verbatim transcript preparation, preferably by a certified transcriptionist. ~~(*See also* HER 3.28.). The completed transcript must be returned to the Examiner for certification. Where a certified transcriptionist is not used to prepare the transcript, the Examiner reserves the right to decline certification.~~

~~(b) The parties shall have an opportunity to review and comment on the transcript. The Examiner shall resolve conflicts as to transcript form and content, and provide a certification when such disputes are resolved and the Examiner is satisfied the transcript provides a reliable record of the proceedings.~~

### 3.3029 RECORD TRANSMITTAL

(a) Anyone may request a certified copy of the record from the Office.

(b) The Office shall promptly transmit the record when requested by an entity with jurisdiction to review the decision or recommendation.

(c) Those seeking a copy are responsible for costs to copy the record or portions thereof.

## SECTION 4 RECOMMENDATIONS TO CITY COUNCIL

The Rules of General Application in Section 3.0, and the Section 4 Rules govern matters where the Examiner holds a public hearing and prepares a City Council recommendation. These matters include, but are not limited to, various Council land use actions: Rezone Petition, SMC Chapter 23.34; Major Institution Master Plan, SMC Chapter 23.69; and Council Conditional Use, SMC Chapters 23.44 and 23.50. In the event of a conflict between a Rule in Section 4, and other sections of the Rules, the Rule in Section 4 shall govern.

### 4.01 PUBLIC HEARING NOTICE

Unless otherwise provided by law, notice shall be given as follows:

(a) Contents. Notice of a public hearing shall be in writing and include:

(1) Hearing time and place;
(2) Type of decision under consideration;
(3) Property location;
(4) Director's recommendation;

(5) Environmental determination, if required, and appeal information regarding that determination.

(b) Time Requirement. Notice of the hearing shall be given within the legally required time. Where no time is specified, notice shall be given no later than 20 days prior to hearing.

(c) Method of Notice. Unless otherwise required by law or requested, notice of hearing shall be provided in person, ~~or~~ by U.S. mail, ~~. A person may request notice~~or by electronic means. For City departments, notice shall be provided by the City's regular interoffice mail service or electronic means, as the Office determines. The hearing date will also be posted on the Office website at www.seattle.gov/examiner.

(d) Record of Notice. A copy of the notice of hearing and certificate of service shall be made part of each case record.

**4.02 NATURE AND PURPOSE OF PROCEEDINGS**

Public hearings are conducted so that the relevant facts are efficiently available to the Examiner. The Examiner may exclude irrelevant, immaterial, unreliable or unduly repetitious testimony, exhibits, or other information.

**4.03 RIGHTS OF PARTIES AND INTERESTED PERSONS**

(a) Any party to a matter subject to a public hearing before the Hearing Examiner has the right to receive notice of hearing and other Examiner orders or actions, to testify and present evidence, and to receive a copy of the Examiner's recommendation.

(b) Interested persons who testify or submit information at the public hearing, shall be sent a copy of the Hearing Examiner's recommendation.

**4.04 FORMAT OF PUBLIC HEARING**

(a) A public hearing shall include, but need not be limited to, the following:

(1) Examiner's introductory statement;
(2) Report by the Director (including introduction of the official file, reference to exhibits, and a summary of the recommendation of the Department);
(3) Applicant or petitioner testimony;
(4) Public comment on the application or petition;
(5) Opportunity for Examiner to ask questions;
(6) Opportunity for presentation of additional information as rebuttal.

(b) The Examiner may alter or modify the presentation order as needed. Recesses will be set by the Examiner.

(c) Questions asked of citizens expressing their opinions shall generally be designed to clarify the opinions presented.

(d) Persons testifying as expert witnesses may be subject to cross-examination with Examiner permission.

### 4.05 HEARING EXAMINER'S RECOMMENDATION

(a) Issuance. The Examiner shall issue a written recommendation as required by applicable law. A copy of the recommendation and the certificate of service shall be made part of the case record.

(b) Contents. The Examiner's recommendation shall include, but not be limited to, a statement of the following:

(1) Background. The nature and background of the proceeding.
(2) Findings. Facts the Examiner finds relevant, and credible to inform the City Council's deliberations and decision.
(3) Conclusions of Law. Legal and factual conclusions based upon specific provisions of law and the findings of fact.
(4) Recommendation. Examiner's recommendation to the City Council as to whether the application or petition should be approved, denied, or remanded.
(5) Postscript. Information on subsequent procedural steps.

### 4.06 RECORD

The public hearing record shall include, but need not be limited to, the following:

(a) Application or petition;

(b) Director's report and recommendation;

(c) Written public and agency comments received during the Director's review;

(d) Exhibits and written comments received by the Examiner prior to the close of the record;

(e) Statement of anything ~~officially~~ juidicially noticed;

(f) Examiner's findings, conclusions, and recommendation;

(g) Notice and mailing list for notice and decision;

(h) Recording of the public hearing.

## SECTION 5 RULES FOR APPEALS

## 5.00 PURPOSE

Appeal Hearings are conducted for the purpose of eliciting a complete factual account involved in a disputed issue. The Rules controlling appeals are intended to facilitate order, fairness, and openness in public hearings. These Rules further those purposes by reducing delays through active case management and efficient use of hearing time, minimizing costs to hearing participants, and facilitating adherence to codified time limits. Conversely, to ensure fulfillment of fact finding obligations, the Rules are not intended as vehicles for technical dismissal of appeals All proceedings will be conducted with the primary goal of resolving cases on their merits. The Examiner will strive to decide cases on their merits and will not dismiss claims or issues due to non-material procedural mistakes made by an appellant.

## 5.01 FILING

(a) Compliance with Rules. All Appeals must comply with the~~se~~ Rules and with the requirements established in the law under which the appeal is filed. Where an appeal fails to meet these requirements the appeal may be dismissed as determined by the Examiner. The Examiner, and Office of Hearing Examiner staff, cannot provide advice concerning the appealability of a matter or issue.

(b) Timeliness. To be timely, the Office must receive an appeal ~~must be received~~ in the Office of Hearing Examiner during regular business hours no later than the last day of the appeal period. (See also HER 3.02~~3~~ and HER 3.03~~4~~.) Appeals filed after regular business hours are deemed filed on the next business day. If using the U.S. Postal Service, as mail service can be delayed, parties are encouraged to mail well before the deadline.

(c) Fee. Any filing fee required by law (see SMC 3.02.125) ~~must~~ should accompany an appeal or be paid by credit or debit card (VISA and MASTERCARD only) by telephone, during regular business hours.~~,~~ If an appeal fee is not paid within seven days of~~no later than~~ the last day of the appeal period ~~or~~ the appeal will be dismissed. A filing fee cannot be paid by third-party check.

(1) Fee Waiver : If ~~allowed~~requested, the Examiner may waive part or all of the required fee due to demonstrated financial hardship.

(2) Fee Refund: The Examiner may refund a filing fee if the Examiner determines ~~he or she lacks~~ jurisdiction is lacking to hear the appeal, or otherwise determines it is appropriate, in fairness to the appellant, and consistent with C~~c~~ode, to refund the fee.

(d) Contents. An appeal must be in writing and contain:

(1) Identification of the matter being appealed, including the application number or departmental action, and where applicable, the applicant name and property address;

(2) A brief statement as to how the appellant is ~~significantly~~ affected by or interested in the matter appealed;

(3) A brief statement of the appellant's issues on appeal, noting appellant's specific objections to the decision or action being appealed (See also HER 5.01.(f~~e~~) below);

(4) The relief requested, such as reversal or modification;

(5) Signature, address, telephone, and electronic mail address of the appellant and appellant's designated representative;

(6) A copy of the matter being appealed (e.g. decision or permit) ~~must~~ should be submitted with the appeal. At party request, for unusually lengthy documents, the Examiner may waive this requirement.

(e) Multiple appeals. More than one appeal may be filed, by different parties, concerning the same appealable decision or other action. Multiple appeals may be consolidated (see HER 3.06).

(f) The issues identified in the notice of appeal may be amended in a timely manner. In considering whether an amendment is timely, the Examiner will consider the prejudice to a parties' ability to respond to the issue, given the nature of the issue, the time remaining until the hearing on the merits, the reason for the delay in raising the issue, and other relevant factors.

~~An Appellant's issues on appeal are limited to those issues identified in the appeal. No new issues may be raised after the appeal filing deadline expires.~~

**5.02 PARTY REPRESENTATIVE REQUIRED**

(a) An individual may ~~represent himself/herself~~serve as their own representative or may ~~be represented by~~appoint an attorney, or other designee to be their representative. Individuals choosing to represent themselves, or "pro se litigants," must follow the same rules of procedure and substantive law, including the~~se~~ R~~r~~ules, as attorneys.

(b) When a party consists of more than one person, or is an organization or other entity, the party shall designate an individual or firm to be its representative and provide written notification to the Examiner and the other parties of contact information for the representative. The party representative shall exercise the party's rights. Notice or other communication to the party representative is notice or communication to the party.

**5.03 NOTICE OF APPEARANCE**

When an attorney represents a party, the attorney shall promptly file a notice of appearance with the Office and serve the notice on the other parties at the earliest possible time in the proceedings.

### 5.04 DISMISSAL

(a) ~~An appeal may be dismissed without a hearing if the Examiner determines it fails to state a claim the Examiner has jurisdiction over, where the Examiner cannot provide relief, or if it is without merit on its face, frivolous, brought merely to secure delay, or other legal grounds.~~

~~(b)~~ Any party may request dismissal of all or part of an appeal by motion pursuant to HER 3.~~18~~17.

(c) When the issuing Department withdraws the decision or action being appealed, the appeal becomes moot and shall be dismissed.

### 5.05 AUTOMATIC APPEAL

Where the underlying law provides for automatic appeal (*i.e.*, notice of the appeal hearing is sent with notice of the Department's action), an appeal statement is not required.

### 5.06 CLARIFICATION OF APPEAL

On the motion of a party, or at the Examiner initiative, the Examiner may require that the appellant provide clarification, additional information, or other submittals necessary to demonstrate the basis for Examiner jurisdiction, or to make the appeal complete and understandable. A request must be timely made so the other parties have a reasonable opportunity to respond. The need for clarification of issues on appeal is not grounds for dismissal of the appeal.

### 5.07 AMENDMENT

On a party's motion, for good cause shown, the Examiner may allow an appeal to be amended ~~no later than 10 days after the filing date~~. In deciding whether to allow amendment, the Examiner ~~shall~~ may consider whether the amendment ~~would~~: has been timely filed; would prejudice ~~the other~~ a parties' fair hearing opportunity; ~~and/or whether amendment~~ raise~~s~~ jurisdictional issues (e.g., if a party is seeking to ~~belatedly~~ add ~~new~~ appeal issues not identified in the notice appeal after the appeal period has expired ~~not identified in the original notice appeal~~); reason for any delay in raising the issue; and any other relevant factors.

### 5.08 WITHDRAWAL

(a) An appeal may be withdrawn only by the appellant, in writing.

(b) Where an appeal is filed by more than one person, or by an organization or other entity, only the designated party representative may withdraw the appeal.

(c) An appellant's written request to withdraw shall be granted and the appeal dismissed. Withdrawal of an Application or Appeal after a decision has been issued will not be honored unless expressly authorized by Code or state law.

**5.09 INTERVENTION**

(a) Intervention is not a substitute means of appealing a decision for those who could have appealed but failed to do so.

(b) A person, organization or other entity who has not appealled may request by motion to participate in the appeal. The motion must state how the person or entity is interested in the matter appealed, and demonstrate a substantial interest that the existing parties do not adequately represent. The motion shall specify the legal issue(s) the intervenor seeks to address and may not raise new issues. A written request for intervention must be filed with the Examiner and served on all parties at the earliest possible time, and in no event later than 15 business days prior to the scheduled hearing date.

(c) In determining the merits of a request for intervention, the Examiner shall consider whether intervention will promote resolution of the appeal on its merits, unduly delay the hearing process, expand the issues beyond those stated in the appeal, or prejudice ~~the rights of the parties~~to a party. If intervention is granted, the Examiner may limit the nature and scope of the intervenor's participation in the proceedings including but not limited to limiting witness presentation, cross-examination participation, and briefing.

**5.10 MEDIATION AND SETTLEMENT**

**5.10.01 PURPOSE**

(a) Mediation is a process that allows the participants to explore resolution of an appeal without going through a formal hearing procedure. In mediation, a neutral third party (a "mediator") facilitates communication and negotiation between the parties to assist them in finding mutually acceptable solutions to disagreements. The process is voluntary and the parties may or may not reach a written agreement. The mediator does not have the power to make a decision for the parties, but can help the parties find a resolution that is mutually acceptable. The only people who can resolve the dispute in mediation are the parties themselves. Mediation is more flexible than the formal appeal process and may allow the participants greater control over the process and outcome, and may allow consideration of outcomes beyond those an Examiner might have authority to address.

(b) Settlement is the voluntary resolution of a dispute through party agreement. The Examiner does not participate in the settlement process.

(c) Mediation or settlement may be used to address some, or all of the issues that have been raised in a notice of appeal. The Examiner encourages the use of mediation and/or settlement to reach voluntary and mutually acceptable solutions.

**5.10.02 INITIATION**

(a) Mediation may be requested by the parties, or it may be suggested by the Examiner. Parties may initiate mediation privately at any time.

(b) Settlement is initiated privately between the parties at any time.

(c) If all parties agree to mediate or engage in settlement discussions, and to extend deadlines in the proceedings, the Examiner may continue any deadlines and hearings. ~~If less than all parties agree to mediate any substantial issue, the Examiner may consider that in deciding whether to grant an extension.~~

**5.10.03 RESOURCES**

(a) At any time, a party may request a referral for mediator services.

(b) The Examiner may provide information on mediation resources, including free or low-cost mediation services, but the Examiner does not warrant or represent the quality or suitability of any such source.

(c) In some cases, the Examiner may request another Examiner to offer mediation services. If another Examiner mediates the case:

(1) The Examiner serving as mediator shall not be the Examiner assigned to the case.
(2) The Examiner serving as mediator may not communicate or discuss the mediation, or any other aspect of the case, with the Examiner assigned to the case, except procedural matters to arrange the mediation.
(3) The parties must agree to the Examiner serving as mediator.
(4) Whether an Examiner may serve in such a role is dependent on availability, and subject to Examiner discretion.

**5.10.04 CONDUCT OF MEDIATION**

(a) Before mediation, each party representative shall file a declaration affirming:

(1) A party representative with authority to settle the matter will be available for the duration of the mediation; and

(2) The party representative with authority to settle the matter has reviewed the mediation materials submitted by that party, as well as the materials submitted by opposing parties.

(b) Mediation during an Examiner proceeding is governed by the Uniform Mediation Act, RCW Chapter 7.07. To the extent the Rules are inconsistent with RCW Chapter 7.07, state law governs.

(c) During mediation, prehearing procedures, including but not limited to discovery and motions for dispositive orders, shall continue according to the prehearing order.

**5.10.05 PRIVILEGE AND CONFIDENTIALITY**

(a) A mediation communication is a statement, whether oral, written, or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.

(b) A mediation communication is privileged, except as provided by Chapter 7.07 RCW, and is not subject to discovery or admissible in evidence in a proceeding before the Examiner unless the privilege is expressly waived. In any subsequent Hearing Examiner proceeding following a mediation, the following privileges apply:

(1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.
(2) Evidence or information otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in mediation.

(c) A privilege under subsection (b) above may be waived in a written agreement or orally during the proceeding if expressly waived by all parties to the mediation and:

(1) In the case of the privilege of the mediator, it is expressly waived by the mediator.
(2) In the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.
(3) A person who discloses or makes a representation about a privileged mediation communication that prejudices another person in a proceeding is precluded from asserting a privilege under subsection (b) above, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.
(4) There is no privilege for a mediation communication that is a written agreement signed by all parties to the dispute.

**5.10.06 OUTCOME**

(a) When the parties determine mediation is complete, they shall report the outcome of the mediation to the Examiner.

(b) The following applies if agreement is reached as a result of mediation or settlement:

(1) If the agreement resolves all appeal matters at issue, and calls for case dismissal, the Examiner shall order dismissal upon notification by the parties.

(2) If the agreement resolves all matters at issue in the appeal and is signed by all parties, but calls for additional action by the Examiner (e.g. the parties may request review of the agreement by the Examiner, or request that the Examiner modify or condition a department decision based on the parties' agreement), the parties shall file a copy of the agreement with the Examiner, and the Examiner shall convene a hearing to address the parties' request.

(3) If the agreement resolves only some matters at issue in the appeal, and calls for dismissal of those issues, the Examiner shall order dismissal of those issues. The hearing process shall resume as if no mediation had occurred with regard to the remaining issues. The agreement on the dismissed issues shall not be used as evidence or proof of anything except that an agreement has been reached, unless all parties signed the agreement or agreed to waive the privilege.

(4) If the agreement resolves only some matters at issue in the appeal, and calls for additional action by the Examiner (See HER 5.10.~~03~~06.(b~~a~~).(2) above), the parties shall file a copy of the agreement with the Examiner, and the Examiner shall convene a hearing to address the parties' request. As to the remaining issues on appeal, the hearing process shall resume as if no mediation had occurred with regard to those remaining issues. The agreement on the dismissed issues shall not be used as evidence or proof of anything except that an agreement has been reached, unless all parties signed the agreement or agreed to waive the privilege.

(c) The following applies if no agreement is reached:

(1) The hearing process shall resume as if no mediation or settlement discussion had occurred; and

(2) Information exclusively shared by parties at a mediation may not be used as evidence in the hearing process, unless all parties agree to waive their privilege.

**5.11 NOTICE OF HEARING**

(a) Contents. The notice of hearing shall include:

(1) Hearing time, place, and nature;
(2) The legal authority and jurisdiction for the hearing;
(3) The file number, address, or other identifying information for the underlying decision or action appealed;
(4) Identification of the matter to be considered;
(5) Reference to the applicable Code section.

(b) Time. Hearing notice shall be given as legally required. If the time for notice of hearing is not specified, or there are conflicting notice requirements, minimum notice shall be 20 days, as SMC 3.02.090 provides in contested cases. A hearing may be set on shorter notice where substantial injury to a party would result, or all parties agree to a shorter notice period (SMC 3.02.090).

(c) Method of Notice. Unless otherwise required or requested by a party, notice of hearing shall be given to each party in person, U.S. mail, or electronic mail. For City departments, notice shall be provided by regular interoffice mail service or electronic means. Hearing dates will also be posted on the Office of Hearing Examiner website at www.seattle.gov/examiner.

(d) Record of Notice. A copy of the notice of hearing and certificate of service shall be made part of the case record.

**5.12 DISCOVERY**

(a) Discovery is the process of prehearing fact-finding through the use of certain methods commonly used in civil litigation, including but not limited to written interrogatories, deposition of witnesses (oral and written), requests for documents, and requests for admissions. Parties who wish to utilize this process ~~should~~ must do so at the earliest possible time to avoid later delay in the hearing process. Discovery should be limited to relevant, non-duplicative material and not overburdensome to other parties.

(b) The record supporting a decision appealed to the Examiner is developed by the City office or department responsible for the decision. Parties ~~should~~ are encouraged to obtain necessary documents through department websites or a Public ~~Disclosure~~ Records Act request to the relevant department at the earliest opportunity.

(c~~b~~) The Examiner typically is not involved in the discovery process and is not copied on documents produced, or on correspondence and electronic mail about discovery matters.

(d) In response to a motion, or on the Examiner's own initiative, the Examiner may compel discovery, or prohibit or limit discovery (for example where it is overly burdensome, harassing, or unnecessary).

(e) Discovery is presumed unnecessary for documents available via the Seattle Department of Construction and Inspections public online document file.

**5.13 SUBPOENAS**

(a) A motion may be made in writing for a subpoena to require a person to appear and testify at a deposition or hearing, or for a person to produce specified documents or other physical exhibits at a prehearing conference, deposition, or at hearing.

(b) A motion for a subpoena to require a person to testify shall include the person's name and address, demonstrate the relevance of that person's testimony, non-duplicative nature of the testimony sought, and ~~demonstrate~~ the reasonableness of the scope of subpoena sought. A request to subpoena documents or other physical exhibits shall include the name and address of the person producing the documents, identify the materials to be produced, state their relevance, and demonstrate the reasonableness of the scope of the subpoena sought.

(c) The party requesting the subpoena shall be responsible for serving it. An affidavit or declaration of personal service or mailing shall be filed with the Examiner and served on all parties.

(d) Unless otherwise allowed by the Examiner, subpoenas shall be served no later than ~~seven~~ ten business days prior to the date the appearance or production is ordered.

(e) A subpoena may be issued with like effect by an attorney of record in the proceeding. The issuing attorney must sign the subpoena.

(f) Unless otherwise allowed by the Examiner, any motion to limit or quash (*i.e.,* vacate or void) a subpoena shall be filed with the Examiner no later than five days after the date the subpoena was received.

(g) Requests for subpoenas and the rulings on such requests ~~may be made *ex parte* unless the Examiner orders otherwise~~must be served on opposing parties on the same date they are filed. Subpoena requests require three business days for the Office to process.

**5.14 PARTIES' RIGHTS AND RESPONSIBILITIES**

(a) Each party in an appeal proceeding has the right to hearing notice, presentation of evidence, rebuttal, objection, cross-examination, argument, and other rights the Examiner determines necessary for the full disclosure of facts and a fair hearing (except where a matter has been dismissed as a result of pre-hearing motion or otherwise).

(b) Parties have the right to attorney representation but it is not required.

(c) Where a party has designated a representative, the representative shall exercise the rights of the party.

(d) Unless otherwise provided by Examiner order, if a party expects to offer a document as an exhibit at the hearing, the party shall supply a copy of the document to each party either before or at the hearing.

### 5.15 DEFAULT

The Examiner may dismiss an appeal without a hearing by an order of default where, without good cause, the appellant fails to appear, is unprepared to proceed at a scheduled and properly noticed hearing, ~~fails to meet prehearing order deadlines,~~ or where the appellant otherwise fails to pursue their case in a timely manner.

### 5.16 HEARING FORMAT

(a) Appeal hearings have a structured format to elicit relevant evidence efficiently and fairly.

(b) Where the Code provides the appellant must overcome deference accorded the decision appealed, the order of presentation is generally:

(1) Examiner's introductory statement;
(2) Parties' opening statements (optional);
(3) Appellant's presentation of evidence;
~~(4) Department's presentation of evidence;~~
(4~~5~~) Applicant's presentation of evidence (if applicant is not the appellant);
(5~~4~~) Department's presentation of evidence;

(6) Rebuttal (if any); and
(7) Parties' closing arguments (See HER 5.18~~20~~).

(c) Where no deference is accorded the decision appealed, the order of hearing is generally:

(1) Examiner's introductory statement;
(2) Parties' opening statements (optional);
(3) Department's presentation of evidence;
(4) Appellant's presentation of evidence;
(5) Applicant's presentation of evidence (if applicant is not the appellant);
(6) Rebuttal (if any); and
(7) Parties' closing arguments (See HER 5.18~~20~~).

(d) The Examiner may modify the order of presentation to promote clear and fair evidence presentation. With the Examiner's approval, the order of presentation may be modified by agreement of the parties. Recesses will be set by the Examiner.

(e) The order of presentation does not alter any legally established burden or presumption.

### 5.17 BURDEN AND STANDARD OF PROOF

(a) The Examiner accords deference or other presumption to the decision being appealed where directed by law.

(b) Where the applicable law provides that the appellant has the burden of proof,~~Where the appellant has the burden of proof~~, the appellant must show by the applicable standard of proof that the Department's decision or action does not comply with the law~~is not legally compliant with the law authorizing the decision or action~~.

(c) Where the applicable law does not provide that the appellant has the burden of proof, the Department must make a *prima facie* showing that its decision or action complies with the law authorizing the decision or action. In this context, a *prima facie* showing requires the introduction of evidence sufficient to compel a conclusion in the absence of contradicting evidence.

(d) Unless otherwise provided by applicable law, the standard of proof is a preponderance of the evidence.~~The burden of proof provided by law shall apply; however, if none is stated, the applicant or appellant shall establish by a preponderance of the evidence that the request is consistent with applicable legal standards.~~

(e) Where an ~~party~~ appellant fails to present evidence or argument at hearing (including in closing arguments) concerning an issue raised in its notice of appeal, such issue is generally considered abandoned, and will be dismissed.

### 5.18 CLOSING BRIEFS AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS

(a) The Examiner may request that parties to submit closing briefs, written arguments, or proposed findings and conclusions.

(b) When a brief, written argument, or proposed findings and conclusions are filed, copies shall be served concurrently on all named parties.

### 5.19 HEARING EXAMINER'S DECISION

(a) Issuance. The Examiner shall issue a written decision and provide a copy to each party representative within the legally required time, or if none stated, 21 days from record closure. If more than one time limit applies, absent party agreement, the shorter period controls. A copy of the decision and the certificate of service shall be made part of the case record.

(b) Decision on Relief Requested. In accordance with applicable law, the Examiner's decision may affirm, reverse, modify, or remand the Department's decision or other action appealled.

(c) Contents. A decision of the Examiner on an appeal shall include, but not be limited to, a statement regarding the following:

(1) Background. Proceeding background, including identification of party representatives at the hearing, prehearing determinations, and other similar information.
(2) Findings. Facts the Examiner finds relevant, credible, and requisite to the decision, based on the evidence presented and matters officially noticed. (This may include recitation of relevant provisions of applicable law.)
(3) Conclusions. Legal and factual conclusions based on the law and the findings of fact.
(4) Decision. The Examiner's decision on the outcome of the appeal (affirm, modify, reverse, or remand).
(5) The name and address of the applicant for the permit or approval at issue and the name and address of the owner of the property at issue.

(d) The decision may also include an order directing parties to take actions consistent with the decision.

**5.20 RECORD**

(a) The record of an appeal includes:

(1) Department's decision or action being appealed;
(2) Appeal statement;
(3) Evidence received or considered;
(4) Pleadings, procedural rulings, and other non-evidentiary materials;
(5) Examiner findings, conclusions, and decision ;
(6) Hearing recording.

(b) The Examiner's administrative file may include other information or materials that are not part of the record.

**5.21 RECONSIDERATION**

(a) Any party may request reconsideration of the Examiner's final decision on an appeal, only if it can demonstrate one or more of the following grounds:

(1) Irregularity in the proceedings by which the moving party was prevented from having a fair hearing;

(2) Newly discovered evidence of a material nature which could not, with reasonable diligence, have been produced at hearing;

(3) Error in the computation of the amount of damages or other monetary element of the decision;

(4) Clear mistake as to a material fact.

A motion for reconsideration may not repeat arguments the Examiner's decision rejected. If a motion for reconsideration fails to show one of the above criteria is met, the Examiner may ~~dismiss~~ deny the motion.

(b) Motions for reconsideration must be filed no later than 10 days after the date of the Examiner's decision. When a timely motion for reconsideration has been filed, the period provided by law to appeal the Examiner's decision is tolled. The Examiner's decision in such cases occurs on the date a decision is entered on the motion for reconsideration.

### 5.22 SUBSEQUENT APPEAL

Examiner decisions may be appealed as the law provides. The party seeking to appeal an Examine~~en~~r decision has the responsibility to consult Code sections and other appropriate sources, to determine their rights and responsibilities.

## SECTION 6 RULES FOR SPECIFIC CASE TYPES

### 6.01 FLOATING HOME MOORAGE FEE INCREASES

Sections ~~2-3~~3, 5, and Section 6.01 govern moorage fee rate increase petitions pursuant to Chapter 7.20, Seattle Municipal Code.

(a) Petition for Review:

(1) Jurisdiction. The Examiner shall review a moorage rate increase where at least one-half of the floating home owners in the floating home moorage who are subject to a moorage fee increase in the same percentage amount, within one percent, collectively file a petition for review.

(2) Withdrawal. Petitioners have the right to withdraw a petition.

(3) Timely Filing. A petition for review shall be filed with the Examiner within 15 days of the moorage site lessee's receipt of written notification of the moorage fee increase.

(4) Filing Fee. The petition shall be accompanied by the filing fee specified in SMC 3.02.125. The fee is non-refundable but shall be returned if no hearing is held.

(5) Petition Filing and Service. The petitioners shall serve the moorage owner with the petition no later than 3 business days after the petition is filed with the Examiner. The petitioners shall submit evidence to the Examiner that the moorage owner was served a copy of the petition.

(6) Petition Contents. The petition must be in writing in the form of a sworn statement that includes the information required by SMC 7.20.080.

(7) Signature. Each petitioner must sign and date the petition.

(b) Moorage Owner Submittal. As soon as practicable, and in no case later than 30 days after the petition is filed with the Examiner, the moorage owner shall file with the Examiner and serve on the petitioners a memorandum, affidavits and other documentation in support of the proposed increase.

(c) Petitioner's Response. Within 15 days of receipt of the moorage owner's submittal, petitioners shall file with the Examiner and serve on the moorage owner a responsie memorandum and declarations.

(d) Hearing Examiner's Notice. The Examiner shall provide written notice of hearing to the party representatives at least 15 days prior to the date of the hearing. The notice shall include the time and place for hearing, a brief statement of the legal and factual issues to be resolved, the amount of time each party will have to present his or her case, and a statement of the basis for the Examiner's jurisdiction. The hearing date will also be posted on the Office of Hearing Examiner website at www.seattle.gov/examiner.

(e) Duty to Provide Information. The Examiner may require the petitioners or owner to provide information to assist the Examiner in determining whether the proposed fee increase is reasonable per Chapter 7.20 SMC. A party's failure to provide information required by the Examiner may result in a finding against that party.

(f) Hearing Format:

(1) Examiner's introductory statement;
(2) Parties' opening statements;
(3) Moorage owner's presentation of evidence;
(4) Petitioners' presentation of evidence;
(5) Rebuttal; and,
(6) Parties' closing arguments.

(g) Hearing Purpose. The Examiner shall conduct the hearing for the purpose of making a factual determination as to whether a demanded moorage fee increase is necessary, as provided in Chapter 7.20 SMC.

(h) Decision On Petition

(1) Time requirement. The Examiner shall issue a written decision which shall be provided to each party representative within 30 days of the close of the record. A copy of the decision and the certificate of service shall be made a part of the case record.

(2) Decision contents. The decision shall include:

i~~a~~. Background. The nature and background of the proceedings.

ii~~b~~. Findings. Facts that the Examiner finds relevant, credible, and/or necessary to the decision, based on the evidence presented in the hearing and those matters officially noticed.

iii~~c~~. Conclusions. The legal conclusions based upon the law and the facts adduced in the proceedings.

iv~~d~~. Decision. The Examiner's decision as to the appropriate rule, order, relief, or denial.

(i) Petition Dismissal. On motion of the respondent moorage owner, the Examiner may dismiss a petition without fact finding where the requested increase does not exceed the factors specified by law. The Examiner may call for oral or written argument and/or additional information, in order to make a determination on dismissal. The Examiner shall dismiss a petition if the parties reach a settlement of the issues.

(j) Offers. As provided by law, where parties have submitted offers, the Examiner shall examine those offers and in a separate decision, assess reasonable attorney fees if applicable.

(k) Record. The record shall include, but need not be limited to:

(1) Petition by the floating home owners;
(2) Response of the moorage owner;
(3) Exhibits considered;
(4) A statement of any matters officially noticed;
(5) Pleadings, rulings, and other documents that are part of the file;
(6) Examiner's findings, conclusions and decision(s);
(7) Hearing recording;
(8) Hearing Examiner's decision on attorney fees, if any.

## 6.02 AUTOMATIC HEARINGS

Rules in Sections 1-3, 5, and 6.02 apply to automatic hearings.

(a) Scheduling Hearing. The Department shall contact the Office and schedule a hearing date and time before issuing its order or other communication providing notice of action.

(b) Notice of Hearing. The Department shall provide notice to the person subject to the Department's action consistent with HER 5.11 and as legally required/ Where notice requirements are not legally prescribed, the Department shall provide at least 20 days advance hearing notice by first-class, registered, or certified mail. The hearing date will also be posted on the Office website at www.seattle.gov/examiner.

### 6.03 CIVIL SERVICE APPEALS

Matters delegated or referred to the Examiner for decision, recommendation, certification or other authorized action by the Civil Service Commission are governed by the Rules of Practice and Procedure adopted by the Civil Service Commission.

### 6.04 DISCRIMINATION COMPLAINTS

Rules for matters coming before the Examiner pursuant to SMC Title 14, Human Rights, are under separate cover entitled *Hearing Examiner Rules for Discrimination Cases.*