



Office of Hearings Administration

Public Meeting

on

Hearing Examiner Procedures

August 17, 2023

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Table of Contents

- I. Summary 3
- II. Background 4
- III. Comments 4
 - A. Conditions 4
 - B. Hybrid Hearings..... 5
 - C. Miscellaneous Rules..... 6
 - D. Perjury..... 7
 - E. Consistency of Code and Rules re Issuance of Decisions..... 7
 - F. Code Amendments..... 8
 - G. Exhibits..... 8
- IV. Conclusion..... 8

I. SUMMARY

The Hearing Examiner invited parties of record from the first half of 2023 and other potentially interested participants to a public meeting on August 17, 2023 to discuss suggestions for procedural improvements. More than a dozen people attended the meeting and several commented by email. The following table summarizes the subjects, comments, and responses by the Hearing Examiner.

| Subject | Comments | Response |
|---|---|--|
| <u>Land Use Conditions</u> | Conditions should be clear and enforceable | The Hearing Examiner agrees and will continue to endeavor to write conditions that are clear and enforceable. The Hearing Examiner does not have the authority to enforce the conditions, however. |
| <u>Hybrid hearings</u> (combined in-person and electronic internet attendance) | Consider mandating physical attendance instead of electronic presence | Electronic presence will continue to be allowed for the public because it allows participation or observation by those who otherwise might not attend. Physical presence of PDS staff (planners and code enforcement) and Auditor Animal Services staff will be strongly encouraged. Physical attendance by applicants and subject matter experts (whether from PDS or applicants) will continue to be optional. |
| <u>Perjury</u> | Perjured testimony should be excluded | Witness credibility is always evaluated to determine the weight to be given testimony. Criminal prosecution for perjury is beyond the authority of the Hearing Examiner. |
| <u>Inconsistent regulations</u> regarding issuance of decisions | County code and rules of procedure are inconsistent regarding the mechanics of decision issuance. | The Hearing Examiner will work with County Council and relevant departments and offices to amend county code and Hearing Examiner rules to be consistent regarding issuance of decisions. |

| | | |
|--|---|---|
| County Code Amendments | The Hearing Examiner should advise County Council regarding amendments to county code | The Hearing Examiner will coordinate with County Council, departments, and elected offices to improve methods for communicating possible amendments to county code. |
| Hearing exhibits | Link references in decisions to the underlying exhibits | While not currently technically feasible, this ability will be considered in terms of functionality of a potential case management system. |

The Hearing Examiner thanks all who commented, provided constructive criticism, and suggested improvements. The Hearing Examiner web page now solicits suggestions, ideas, or comments from the public.

II. BACKGROUND

Hearing Examiner proceedings are quasi-judicial and the prohibition on substantive contact outside the hearing room impedes feedback on hearing procedures. The Hearing Examiner therefore scheduled a public meeting and solicited comments from the public, parties of record to proceedings for the prior six months, and county departments and offices who regularly appear in hearings. Thirteen people commented at the public meeting on August 17, 2023 and four sent comments by email. The public meeting was a hybrid of in-person and electronic (internet) participation.

III. COMMENTS

A. CONDITIONS

Commenters noted that conditions on approval of land use applications generally work well, but suggested improvements. First, PDS and applicants typically negotiate and agree on conditions prior to reaching the hearing before the Hearing Examiner.¹ They therefore ask that the Hearing Examiner be careful when modifying or changing a proposed condition already agreed upon by PDS and the applicant.

The Hearing Examiner intends conditions to be clear to the public, the applicant, and county staff and that they are listed in a practical sequence that aligns with the typical life cycle of a project. In addition, he tries to draft conditions that are grammatical and good prose. He also may add conditions based upon public comments.

¹ While agreement is common, it is not uncommon for an applicant to object to one or more conditions proposed by PDS, either in format or substance.

Although the Hearing Examiner is not required to accept the text of conditions negotiated between the applicant and PDS, the Hearing Examiner gives due and serious consideration to conditions proposed by PDS and any comments by the applicant.

The comment raises a related issue—neither county code nor the rules of procedure contain an explicit mechanism for an applicant, staff, or party of record to seek clarification of a condition. Although the Hearing Examiner is amenable to creating such a mechanism (with public input), providing an explicit clarification mechanism might create uncertainty regarding reconsideration and appeal deadlines or would be held to extend the deadlines during the pendency of the motion to clarify. The Hearing Examiner invites further comment and suggestions regarding creation of a mechanism to obtain clarification.

Another commenter said conditions were ambiguous and therefore not enforceable. The Hearing Examiner agrees that conditions should be clear and provide objective criteria to the extent possible. The Hearing Examiner has no role in enforcing conditions, however.

B. HYBRID HEARINGS

Prior to the pandemic, the Hearing Examiner conducted open record hearings entirely in-person. During the pandemic, the Hearing Examiner conducted the hearings entirely electronically on the internet using the Zoom platform. Post-pandemic, the Hearing Examiner conducts “hybrid hearings” in which he and the clerk are present in the hearing room and others may participate or observe either by attending in-person or by attending remotely on the Zoom platform.

Some public comments focused on the current practice of hybrid hearings. Some supported the current practice. Others felt it should be revisited and revised to encourage or require in-person attendance, especially PDS staff.

The Hearing Examiner feels strongly that electronic attendance generally benefits the public by allowing them to observe or participate without the impediments of traffic, parking fees, childcare arrangements, or mobility challenges.

He also agrees that in-person attendance is beneficial. For example, PDS staff and the applicant can confer during or at a break in a hearing to answer the Hearing Examiner’s questions or resolve public concerns.² The Hearing Examiner often encourages the public to talk to PDS staff and the applicant to satisfy their curiosity about the proposed project. Such public interaction with PDS staff is easier if PDS staff are physically present; the public can confer with PDS staff immediately after the hearing. In a recent appeal from a county administrative enforcement hearing, the county staff member testified remotely, even though they were in the next building. The connection was poor, and the testimony did not proceed as smoothly as if the

² Where an impromptu conference between PDS and an applicant is appropriate during a hearing, the Hearing Examiner will recess the hearing to allow the conference, whether in-person or by a breakout room in Zoom if both the planner and applicant attend remotely. Breakout rooms can be implemented in Zoom webinars.

staff member had walked the few hundred feet from one building to the hearing room in the next building. The hearing would have benefited from the staff member being physically present in the hearing room.

Significant efficiencies are achieved by allowing subject matter experts (whether from the public, PDS, or the applicant) to participate remotely. Those experts are available to speak and answer questions as needed during the hearing, but they do not spend time traveling or waiting and therefore cause additional expense. The Hearing Examiner believes allowing subject matter experts to attend electronically has been beneficial to everyone with no significant disadvantages.

Considering the comments and experience with hybrid hearings, the Hearing Examiner will continue to hold hybrid hearings in the following manner:

| Participant | Manner of Participation |
|--|--------------------------------|
| Public | Electronically or in-person |
| Principal county participants ³ | In-person strongly encouraged |
| Applicants and appellants | Electronically or in-person |
| Subject matter experts | Electronically or in-person |

The Hearing Examiner subsequently conferred with the director of Planning and Development Services, who advises that PDS policy is for its planner to attend the hearing in-person, absent unusual circumstances. The Hearing Examiner will encourage Animal Services' management to have a policy of in-person participation absent unusual circumstances. The Hearing Examiner encourages further comment via the electronic suggestion box on the Hearing Examiner web page.

A city planner asked for guidance for municipalities to provide for consistent procedures throughout the county. Neither the county nor the Hearing Examiner have authority over municipal hearing examiner proceedings, but the Hearing Examiner is willing to discuss county procedures (and the reasons for them) with responsible city officials.

C. MISCELLANEOUS RULES

One commenter suggested amending the rules of procedure to allow for an appellant to move for affirming an appeal at the close of the county's presentation of evidence during an open record appeal hearing. In Superior Court practice, a defendant can ask the court to rule at the close of the plaintiff's case that the plaintiff did not carry its burden of proof and defendant

³ PDS planners, code enforcement officers, and animal services officers.

should be granted judgment without the need to put on evidence. The Hearing Examiner agrees this would be useful rule.

In addition, the commenter proposed that department reports be available to appellants in sufficient time to allow the appellant to respond. Currently, county code requires a department to submit its report seven calendar days prior to the hearing, though exhibits may have been disclosed and exchanged well before then. The Hearing Examiner agrees that SCC 2.02.130 and any other affected code sections should be amended to require submission of the department report at the same time as other documentary evidence provided by the county.

A commenter suggested allowing depositions of county staff in code enforcement cases. Current county code and Hearing Examiner rules do not allow for any discovery, including depositions.⁴ Administrative appeals are intended to be expeditious, inexpensive compared to court litigation, and available without the need to engage legal counsel. Adding discovery tools common to court litigation tends to increase cost, delay proceedings, and encourage “lawyering up.” The Hearing Examiner therefore does not recommend allowing discovery in appeals of agency administrative decisions.

D. PERJURY

One public member expressed concern that there appeared to be no penalty for offering allegedly false testimony under oath in open record hearings. The Hearing Examiner has no authority to prosecute or punish perjury. However, the Hearing Examiner evaluates witness credibility and weighs the evidence in the context of the legal issues.

E. CONSISTENCY OF CODE AND RULES RE ISSUANCE OF DECISIONS

A comment pointed out inconsistencies within county code and between county code and the rules of procedure with respect to the mechanism for issuance of decisions. These inconsistencies can create confusion regarding the deadline for appeals. The Hearing Examiner agrees that county code and the rules of procedure establish different methods of issuing decisions of administrative actions subject to chap. 2.02 SCC, administrative land use decisions subject to chap. 30.71 SCC, code enforcement actions subject to chap. 30.85 SCC, and land use decisions subject to chap. 30.72 SCC. The Hearing Examiner will confer with the relevant departments and offices to seek agreement on a single method for issuance and propound amendments to county code and rules of procedure to implement the agreement. Consistency will benefit the public, parties, and county staff.

⁴ The Hearing Examiner may issue subpoenas to attend or produce documents at some appeal hearings such as animal control code violations and code enforcement violations. Such subpoenas are not authorized in SEPA appeals, a land use application hearing, or appeal of a PDS type 1 decision.

F. CODE AMENDMENTS

Another commenter requested that the Hearing Examiner advise County Council of issues in county code, such as inconsistencies or gaps that are uncovered in hearings. The Hearing Examiner agrees and will work with Council staff.

G. EXHIBITS

A commenter suggested including hyperlinks to exhibits in the Hearing Examiner's decisions. When the Office of Hearings Administration obtains a case management system, the Hearing Examiner hopes that the record will be visible on the internet and linking exhibits to references in the decisions may be feasible.

IV. CONCLUSION

Future feedback

The Hearing Examiner will create an electronic suggestion box on his web page and periodically report to the public and Council regarding suggestions received and the Hearing Examiner's response.

Conditions

The Hearing Examiner will continue to try to write clear, enforceable conditions. Although he gives due regard to conditions negotiated between an applicant and PDS, he is not bound by them.

Hybrid Hearings

Hearings will continue to be a hybrid of in-person and electronic participation. The Hearing Examiner will strongly encourage principal county staff (e.g., PDS planners and Animal Service officers) to attend in-person. The public, appellants, applicants, and subject matter experts will continue to have the option of attending online or in-person.

Perjury

The Hearing Examiner evaluates testimony, giving it weight consistent with his determination of its credibility.

Decision Issuance Inconsistencies

The Hearing Examiner will work with relevant departments and offices and propose amendments to county code to bring consistency to code requirements for the mechanics of decision issuance.

County Code Amendments

The Hearing Examiner will advise County Council of inconsistencies or gaps in county code revealed in the hearings.

Decision Hyperlinks to Hearing Exhibits

The ability to hyperlink references in decisions to exhibits will be included as possible function in a future case management system.