

# **CITY OF BLACK DIAMOND HEARING EXAMINER RULES OF PRACTICE AND PROCEDURE**

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## **SECTION 1: GENERAL PROVISIONS**

### **1.01 APPLICABILITY**

These Hearing Examiner Rules (Rules) are adopted to supplement the ordinance requirements for matters within the Hearing Examiner's jurisdiction and govern administrative practice and procedure before the Hearing Examiner. In any case of conflict between a Hearing Examiner Rule (HER) and the City of Black Diamond code (Code), the Code shall control.

### **1.02 EFFECTIVE DATE**

These Rules shall apply to all matters filed with or otherwise properly before the Hearing Examiner on or after the effective date of adoption of these Rules by the Hearing Examiner.

### **1.03 INTERPRETATION OF RULES**

(a) The Hearing Examiner shall interpret the Hearing Examiner Rules of Practice and Procedure and determine how the Rules apply in specific instances. An affected party may petition the Hearing Examiner during the pendency of a matter under review to request a declaratory ruling regarding the applicability of these Rules to specific actual circumstances. Except during hearing, such request must be in writing and clearly identify the subject Rules and describe the circumstances for which the declaratory ruling is sought.

(b) Where questions of practice and procedure arise that are not addressed by these Rules, the Hearing Examiner shall determine the practice or procedure that she or he deems most appropriate and consistent with providing fair treatment and due process. In making such determinations, the Hearing Examiner may look to the current Civil Rules of Superior Court for guidance.

## **SECTION 2: RULES OF GENERAL APPLICATION**

### **2.01 SCOPE**

Rules in this section apply generally to all matters where the Hearing Examiner has authority to decide or recommend the outcome.

### **2.02 DEFINITIONS**

The following definitions shall apply unless the context or subject matter requires otherwise:

(a) "Affidavit" - a written or printed statement declared or certified to be true and correct under penalty of perjury under the laws of the state of Washington. "Affidavits" includes the declarations authorized under RCW 9A.72.085, as now or hereafter amended.

(b) "Appeal" - a challenge to a decision or other action where the BDMC or other authority authorizes the Hearing Examiner to review and decide.

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

(e) "Applicant" - the person(s), organization, association, corporation or other entity who files an application or otherwise formally requests a permit or other type of County action, interpretation, or authorization which is the subject of an appeal or other review by the Hearing Examiner.

(f) "Code" – City of Black Diamond Municipal Code (BDMC).

(g) “Code Enforcement Action” - Any civil proceeding the purpose of which is to stop a person or entity from violating any provision of the City of Black Diamond Municipal Code

(h) "Days" - calendar days.

(i) "Department" - the department, agency, board, commission or other County entity responsible for the recommendation, decision or other action that is subject to review by the Hearing Examiner.

(j) "Director" - the head of the department, agency, board or commission, or other unit of .County government or the department head’s designee responsible for the recommendation, decision or other action that is subject to review by the Hearing Examiner.

(k) "Examiner" - the Hearing Examiner, or a Deputy Hearing Examiner or an alternate Hearing who has been delegated responsibility by the Hearing Examiner or County Commissioners to conduct a hearing or otherwise preside over a particular matter.

(l) "Ex parte communication" - a communication between one party and the Examiner in the absence of the other party(s).

(m) "Hearing Examiner" – same as “Examiner”.

(n) "Interested person" - any individual, or public or private organization of any character, significantly affected by, or interested in proceedings before the Hearing Examiner, including any party.

(o) "Motion" - a request made to the Hearing Examiner, whether written or oral, for an order or other ruling.

(p) "Order" - a ruling, instruction, or other directive issued by the Hearing Examiner in response to a request or motion by a party, or on the Hearing Examiner's own initiative.

(q) "Party" - the person(s), group, organization, corporation, or other entity that has filed a development permit application or an appeal, or is granted right of appeal automatically by ordinance; the person(s), group, organization, corporation, or other entity granted party status

through intervention; City staff when the City is prosecuting a code enforcement action or has a decision subject to appeal before the Examiner; the person(s), group, organization, corporation, or other entity who filed the application, request, or petition for a permit or other type of City authorization or action which is the subject of the appeal; the owner(s) of the property subject to the City decision or other action.

(r) "Public hearing" - a hearing held by the Hearing Examiner for the purpose of developing a record to substantiate a recommendation or decision. Serves as the "open record hearing" as defined in the Regulatory Reform Act, Chapter 36.70B RCW.

(s) "Representative" - that individual designated by a party to be the official contact person and to speak for the party.

(t) "Rule(s)" - the Hearing Examiner Rules of Practice and Procedure, as currently amended.

(u) "Timely" - within the time prescribed by applicable ordinance or, in the absence of ordinance provision, the time prescribed by Hearing Examiner rule, or within the time determined by the Hearing Examiner.

(v) "Witness" – Any person who provides testimony (sworn or unsworn) at a hearing.

### **2.03 HEARING EXAMINER'S JURISDICTION**

The Hearing Examiner can only hear and make recommendations and decisions in those matters and on those issues where ordinance or other appropriate authority grants to the Hearing Examiner the authority to do so. The Hearing Examiner does not have the authority to rule on the validity of ordinances.

### **2.04 COMPUTATION OF TIME**

Except as otherwise provided by the Code, computation of any period of time prescribed or allowed for matters before the Hearing Examiner, shall begin with the first day following that on which the act or event initiating such period of time shall have occurred. When the last day of the period so computed is a Saturday, Sunday, or national, state or City holiday, the period shall extend to the end of the next day when the County offices are open for business.

### **2.05 FILING AND SERVICE OF DOCUMENTS**

(a) Documents shall be deemed filed with the Hearing Examiner on receipt at the City of Black Diamond Department of Community Development located at 24301 Roberts Drive Black Diamond, WA 98010.

(b) Documents shall be served personally or, unless otherwise provided by applicable ordinance, by first-class, registered, or certified mail, or by facsimile (fax) transmission. Service shall be regarded as complete upon the date of receipt by the City.

## **2.06 EXPEDITIOUS PROCEEDINGS**

To the extent practicable and consistent with requirements of law, hearings shall be conducted expeditiously. At every stage in the proceedings, all parties shall make every reasonable effort to avoid delay.

## **2.07 SCHEDULING HEARINGS**

The City of Black Diamond Department of Community Development shall promptly schedule hearings after consultation with the Hearing Examiner.

## **2.08 CONSOLIDATION**

Where practical, feasible, and consistent with ordinance requirements, all matters under the jurisdiction of the Hearing Examiner relating to the same matter, should be consolidated for hearing. The Hearing Examiner may order consolidation with or without a request from any party.

## **2.09 PRESIDING OFFICIAL**

(a) The Hearing Examiner shall preside over hearings held under these Rules.

(b) The Examiner conducting a hearing shall have the duty to ensure a fair and impartial hearing, to take all necessary action to avoid undue delay in the disposition of proceedings, and to maintain order. The Examiner shall have all powers necessary to these ends, including, but not necessarily limited to the following:

1. Determine the order of presentation of evidence;
2. Administer oaths and affirmations;
3. Rule on offers of proof and receive evidence;
4. Rule on procedural matters, objections and motions;
5. Question witnesses and request additional exhibits;
6. Permit or require oral or written argument or briefs and determine the timing and format for such submittals;
7. Regulate the course of the hearings and the conduct of the parties and others so as to maintain order and provide for fair hearing;
8. Make and issue the decision or recommendation.

## **2.10 DISQUALIFICATION OR RECUSAL OF AN EXAMINER**

(a) In the interest of fairness to the parties, an Examiner on his/her own initiative may recuse himself/herself from hearing a particular matter in the event of personal bias, prejudice, financial interest, or other substantial reason.

(b) Prior to hearing, a party may request that the Hearing Examiner assign a different Examiner to hear a particular matter. The request must be in writing, submitted at least seven (7) days prior to the day the hearing is to begin, with a copy of the request to each of the other parties. The request must set forth the reasons for the belief that personal bias, prejudice, financial interest, or other substantial reason for disqualification or recusal exists.

(c) In case of disqualification or recusal, the Hearing Examiner shall reassign the matter to a different Examiner.

## **2.11 WITNESSES**

(a) All witnesses except citizens expressing their opinion as identified in HER 4.03 are subject to cross-examination by the other party(s).

(b) The rules of privilege shall be effective to the extent recognized by law.

(c) Hearing Examiner hearings are open to the public. However, in code enforcement actions and the appeals thereof, persons who are not parties are generally not permitted to testify unless called as witnesses. In closed record appeals as defined by the Regulatory Reform Act, Chapter 36.70B RCW, only persons who previously contributed to the record are allowed to present argument.

(d) The Examiner may limit the length of testimony to expedite the proceedings and avoid the necessity to continue the hearing. Maximum practicable advance notice will be provided if such time limitations are to be imposed. If parties are unable to complete their arguments and testimony within the allotted time, an opportunity will be granted to submit written materials after the close of the hearing; other parties will be allowed an opportunity to offer written rebuttal to any such materials.

(e) At the discretion of the Examiner, or where the parties agree and the rights of the parties will not be prejudiced, the Examiner may allow testimony via telephone or television or similar electronic means if the County has the technology available. Each party to the proceeding shall have the opportunity to hear (or, if televised, to both hear and see) testimony given in this manner and to question the person giving such testimony.

## **2.12 EXPECTED CONDUCT**

(a) All persons appearing before the Hearing Examiner shall conduct themselves with civility and courtesy to all persons involved in the hearing.

(b) No party or other person shall communicate with an Examiner presiding over a matter or with any employee of the Hearing Examiner's Office in an attempt to influence the outcome or to discuss the merits of that matter.

(c) No party or other person, other than staff when not acting as a party, shall make or attempt ex parte communication with the Examiner regarding any matter under pending review by the Examiner. Procedural matters may be addressed by written correspondence, copied to all known parties. In all matters involving an open record hearing, prior to and during the hearing, the Examiner may ask County staff to submit additional information into the record.

(d) If a substantial prohibited ex parte communication is made, such communication shall be publicly disclosed by the Examiner: any written communications, and memorandums summarizing the substance and participants of all oral communications, shall promptly be made available to the parties for review and an opportunity to rebut those communications.

### **2.13 MOTIONS**

(a) All motions, other than those made during a hearing, shall be in writing, and shall state the order or relief requested and the grounds for the motion. Every motion and answering statement and accompanying papers, shall be served on each party representative on the day it is filed with the Hearing Examiner.

(b) Within seven (7) days after service of any written motion, or such longer or shorter period of time as may be designated by the Hearing Examiner, the other party(s) shall file a written answer. When the Hearing Examiner has received the answering statement(s), or the seven (7) days or other period of time designated by the Hearing Examiner has elapsed, the Hearing Examiner shall rule on the motion. Failure of a party to file a timely response, may be considered by the Hearing Examiner as evidence of that party's consent to the motion.

(c) The Hearing Examiner may call for oral argument prior to ruling if consistent with state law.

(d) For motions made at hearing or for motions made for the extension of time or the expedition of hearings, the Hearing Examiner may waive the requirements of this section and may also rule upon such motions orally.

### **2.14 EVIDENCE**

(a) Evidence, including hearsay, may be admitted if, in the judgment of the Examiner, it is relevant to the issue(s) on appeal, comes from a reliable source, and has probative (proving) value. Such evidence is that which would commonly be relied upon by responsible persons in the conduct of their important affairs.

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

(c) Opinion evidence of non-experts presented at public hearings is discouraged but may be admitted, although it need not be given weight by the Examiner.

(d) Documentary evidence may be received in the form of copies or excerpts. 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 by all parties.

## **2.15 OFFICIAL NOTICE**

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

(b) Parties must be notified during the hearing, or before issuance of decision, of the specified facts or materials noticed and the source thereof, and afforded an opportunity to contest or rebut the facts or materials so noticed if additional evidence may still be admitted as restricted by state law.

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

## **2.16 SITE INSPECTION**

Where it would assist the Examiner in clarifying or understanding the evidence adduced at hearing, the Examiner may inspect property subject to Examiner review prior to the close of the record.

## **2.17 CONTINUING OR REOPENING HEARING**

(a) A scheduled hearing may be continued for good cause as determined by the Hearing Examiner. Motions for continuance shall be served and received by all parties and the Examiner at least seven days prior to the hearing date, unless extraordinary circumstances justify a later date. Written notice of the date, time, and place of the continued hearing shall be provided to each party and the County. The notice of a rescheduled hearing need not observe the time requirements to which the original notice was subject.

(b) Prior to the issuance of the subject decision or recommendation, the Examiner may continue or reopen (if consistent with state law) proceedings for good cause and may permit or require written briefs or oral argument.

(c) If the Examiner determines at hearing that there is good cause to continue such proceeding and then and there specifies the date, time, and place of the new hearing, no further notice is required

(d) If a matter is reopened after conclusion of the hearing, parties shall be provided not less than ten (10) days notice of the reopened hearing.

### **2.18 LEAVING THE RECORD OPEN**

(a) The Examiner may leave the record of hearing open at the conclusion of a hearing in order to receive argument or for other good purpose. Parties shall be provided notice of the consideration of any evidence received after hearing and shall have an opportunity to review such evidence and to file rebuttal evidence or argument.

(b) Except as provided elsewhere in these Rules, information submitted after the close of the record shall not be included in the hearing record or considered by the Examiner making the decision or recommendation.

### **2.19 DISTRIBUTION OF DECISIONS AND RECOMMENDATIONS**

A copy of the Hearing Examiner's decision or recommendation shall be distributed to each party representative, to those persons who have specifically requested a copy, and to others as specified by applicable ordinance(s).

### **2.20 REMAND**

(a) Prior to the issuance of the Hearing Examiner's recommendation or decision, if the Examiner determines that information, analysis, or other material necessary to the Hearing Examiner's recommendation has not been provided, the matter may be remanded to the Department for the addition of that information, analysis, or other material if allowed by state law.

(b) Where the Hearing Examiner's decision is to remand the matter to the Department for additional information, analyses, or other material, the Hearing Examiner shall retain jurisdiction in order to review the adequacy of that information, analysis, or other material. The Examiner may then issue a final decision or recommendation using the additional information. The decision to remand shall expressly state that jurisdiction is retained and what information, analysis, or other material is to be provided, and it may indicate when it is to be submitted. A copy of that information, analysis, or other material shall also be provided to each party to the proceeding, except where the size or condition of the required materials make copying impractical, notification to the other parties of the submittal, shall be sufficient. The parties shall have an opportunity to review, comment upon, and submit rebuttal to the information, analysis, or other material submitted. At the discretion of the Examiner and consistent with state law, the hearing may be reopened following such submittal.

(c) Where the decision of the Hearing Examiner is to remand for the preparation of a new departmental decision, the Hearing Examiner's jurisdiction is terminated and Director's subsequent decision shall be issued and subject to appeal in accordance with applicable ordinance(s).

### **2.21 TERMINATION OF JURISDICTION**

The jurisdiction of the Hearing Examiner is terminated upon the issuance of the decision or recommendation except where jurisdiction is expressly retained, or as otherwise provided in ordinance or in these Rules, or when a matter is remanded to the Hearing Examiner by the County Commissioners.

## **2.22 CLERICAL ERRORS**

Clerical mistakes in decisions, recommendations, orders, or other parts of the record, and errors arising from oversight or omission, may be corrected by Order at the Hearing Examiner's initiation, or in response to the motion of any party.

## **2.23 PROCEEDINGS RECORDED**

All proceedings before the Hearing Examiner shall be electronically recorded. The recordings of hearings shall be part of the official case record. Copies of the recordings shall be made available to the public upon request, subject to payment of a reasonable fee for copying.

## **2.24 DISCLOSURE OF PUBLIC RECORDS**

Hearing Examiner decisions and recommendations, the hearing record, and associated official files, are public records and shall be available for public review.

## **2.25 TRANSCRIPT OF PROCEEDINGS**

(a) Anyone desiring a certified transcript of a hearing may obtain a duplicate copy of the hearing tapes from the City of Black Diamond Department of Community Development and shall be responsible for arranging and paying for the preparation of a verbatim transcript. The completed transcript must be returned to the Hearing Examiner for certification.

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

## **2.26 RETENTION OF RECORDS**

The case file, including the tape recording(s) and exhibits, shall be retained by the City of Black Diamond Department of Community Development consistent with the requirements of the Public Records Act (Chapter 42.17 RCW) and applicable retention schedules.

## **2.27 RECORDING DEVICES**

Photographic and recording equipment are permitted at hearings. The Examiner may deny or condition use of such equipment as she or he deems necessary to avoid disruption to the proceedings or prejudice to any party.

## **2.28 APPEARANCE OF FAIRNESS**

The appearance of fairness doctrine applies to proceedings under these Rules.

## **2.29 HEARING EXAMINER'S DECISION**

(a) Issuance. The Hearing Examiner shall issue a written decision and provide a copy of that decision to each party representative within the time required by the applicable ordinance.

(b) Contents. A decision or recommendation of the Hearing Examiner shall include, but not be limited to, a statement regarding the following:

- Background. The nature and background of the proceeding, including identification of party representatives participating in the hearing, prehearing determinations, and other similar information.
- Findings. The individual facts that the Examiner finds relevant, credible, and requisite to the decision, based on the evidence presented at hearing and those matters officially noticed. (This may include recitation of relevant provisions of ordinance, other regulation, or case law.)
- Conclusions. Legal and factual conclusions based upon specific provisions of law and the findings of fact.
- Decision or Recommendation. The Hearing Examiner's decision or recommendation based upon a consideration of the whole record and supported by substantial evidence in the record.
- Postscript. Information regarding subsequent procedural step(s), if any, for appealing the Hearing Examiner's decision.

(d) The decision may also include an order disposing of contested issues and/or directing parties to take actions consistent with the decision.

## **2.30 RECORD**

The record of an Examiner proceeding shall include:

1. All evidence received or considered;
2. Pleadings, procedural rulings, and other non-evidentiary materials that are part of the Hearing Examiner's file;
3. Statement of matters officially noticed, if any;
4. Findings, conclusions and decision of the Hearing Examiner;
5. Tape recording of the hearing.

## **SECTION 3: CODE ENFORCEMENT ACTIONS**

In addition to the Rules of General Application in Section 2, the Rules in Section 3 shall apply to code enforcement actions and the appeals thereof.

### **3.01 DISMISSAL**

(a) A code enforcement action or appeal thereof may be dismissed without a hearing if the Hearing Examiner determines that it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief, does not comply with filing requirements, or is without merit on its face, frivolous, or brought merely to secure delay.

(b) Any party may request dismissal of code enforcement action at any time with notice to all parties. The Hearing Examiner may make a ruling on a motion to dismiss based upon written arguments or may call for oral arguments.

(c) When an appeal is withdrawn by the issuing Department, the appeal becomes moot and shall be dismissed.

### **3.02 CLARIFICATION**

Specified parties shall provide clarification, additional information, or other submittals as the Hearing Examiner deems necessary in order that the code enforcement action or appeal thereof can be made complete and understandable. The Hearing Examiner shall rule on the request of any party for clarification of a code enforcement action or appeal thereof. Request for clarification must be made in a timely manner as to afford reasonable opportunity for other parties to prepare response(s) for hearing.

### **3.03 AMENDMENT**

The Hearing Examiner may allow, for good cause shown, an appeal to a code enforcement action to be amended within 10 days after it has been filed. In deciding whether to allow such an amendment, the Hearing Examiner shall attempt to ensure that the opportunity for a fair hearing by the other parties will not be prejudiced by the amendment.

### **3.04 WITHDRAWAL OF CODE ENFORCEMENT APPEAL**

- (a) An appeal to a code enforcement action may be withdrawn only by the appellant.
- (b) Where an appeal is made by several persons, a group, organization, corporation, or other entity, withdrawal shall be made by the person who had been designated as the party representative [See HER 3.05].
- (c) An appellant's request to withdraw shall be granted as a matter of right and the appeal dismissed.

### **3.05 PARTY REPRESENTATIVE REQUIRED**

When a party consists of more than one individual, or is a group, organization, corporation, or other entity, the party shall designate an individual to be its representative and inform the Hearing Examiner of the name, address and telephone number of that designated representative. The rights of such an appellant shall be exercised by the person designated as the party representative. Notice or other communication to the party representative, is notice or communication to party.

### **3.06 NOTICE OF APPEARANCE**

When a party is represented by an attorney, the attorney shall file a notice of appearance with the Hearing Examiner and send a copy of that notice to the other parties. Where the appellant's attorney filed the appeal and indicated his/her representative capacity, a notice of appearance does not need to be filed. The notice of appearance shall serve to designate the attorney as the party representative.

### **3.07 INTERVENTION**

- (a) Upon a showing of a substantial or significant interest that is not otherwise adequately represented, the Hearing Examiner may permit an interested person, group, organization, corporation, or other entity, who is not a party to a code enforcement action or appeal thereof, to participate in the code enforcement action.
- (b) A written request for intervention must be submitted to the Hearing Examiner at least five (5) days prior to the day on which the hearing begins. The intervention request must state the basis for the intervention and how the person, group, organization, corporation, or other entity making the request is affected by or interested in the code enforcement action or appeal thereof. In considering the requested intervention, the Hearing Examiner shall seek to ensure that intervention will not unduly delay the hearing process, will not expand the issues beyond those

within the appeal, and will not prejudice the rights of any of the original parties. In granting intervention, the Hearing Examiner may limit the nature and scope of the intervention.

(c) Intervention is not a substitute means of participating in a code enforcement action or appeal thereof for those who could have appealed but failed to do so.

### **3.08 PARTIES' RIGHTS AND RESPONSIBILITIES**

(a) Each party in an appeal proceeding shall have the right to: due notice of hearing, presentation of evidence, rebuttal, objection, cross-examination, argument, and other rights determined by the Hearing Examiner as necessary for the full disclosure of facts and a fair hearing.

(b) Parties have the right to be represented by an attorney. Representation by an attorney is not required.

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

(d) All parties, witnesses, and others participating in and observing hearings shall conduct themselves with civility and deal courteously with all persons involved in the proceedings.

### **3.09 DEFAULT**

The Hearing Examiner may dismiss an appeal to a code enforcement action by an order of default where the appellant, without good cause, fails to appear or is unprepared to proceed at a scheduled and properly noticed hearing. The Hearing Examiner may also dismiss a code enforcement action and the appeals thereof if the County fails to appear to prosecute its case.

### **3.10 HEARING FORMAT**

(a) Code enforcement hearings, although generally informal in nature, shall have a structured format and shall be conducted in a manner deemed by the Examiner to make the relevant evidence most readily and efficiently available to the Examiner and to provide the parties a fair opportunity for hearing.

(b) Where the Code provides that the defendant or appellant must overcome deference accorded the Director's decision being appealed, the order of hearing is generally as follows:

1. Examiner's introductory statement;
2. Parties' opening statements (optional);
3. Appellant/defendant's presentation of evidence;
4. Department's presentation of evidence;

5. Rebuttal;
6. Closing argument of parties.

(c) Where no deference is accorded the Director's decision, the order of hearing for a code enforcement action or appeal thereof is generally as follows:

1. Examiner's introductory statement;
2. Parties' opening statements (optional);
3. Department's presentation of evidence;
4. Appellant/defendant's presentation of evidence;
5. Rebuttal;
6. Closing argument of parties.

(d) Notwithstanding the order presented above, the order of hearing may be modified or a different order established as the Examiner deems necessary for the clear and fair presentation of evidence. The order of the hearing may also be modified as agreed upon by the parties with the Examiner's approval.

(e) The order of presentation at hearing shall not alter or shift any burden(s) or presumption(s) established by applicable law(s).

### **3.11 COMMUNICATIONS FROM NON-PARTIES**

(a) Written communications received from non-parties regarding a pending matter, shall be disclosed by the Examiner at hearing for the review of all parties.

(b) The Examiner, after considering the objections of the parties and determining that undue delay or prejudice will not result, may permit relevant oral or written statements or both, by persons who are not parties or called by parties as witnesses. Limitations may be imposed on the length of such statements and cross-examination by the parties shall be permitted.

### **3.12 BURDEN OF PROOF**

(a) Where applicable ordinance(s) or other applicable law so provide, the Hearing Examiner shall accord deference or other presumption as directed by the applicable ordinance(s).

(b) Where the applicable ordinance(s) provide that the code enforcement defendant or appellant has the burden, defendant/appellant(s) must show by the applicable standard of proof that the Department's decision or action is not in compliance with the ordinance(s) authorizing that decision or action.

(c) Where the applicable ordinance(s) do not provide that the code enforcement defendant or appellant has the burden, the Department shall make a prima facie showing that its decision or action is in compliance with the ordinance(s) authorizing that decision or action.

(d) Unless otherwise provided by applicable ordinance(s), statute, or case law, the standard of proof is a preponderance of the evidence.

### **3.13 RECONSIDERATION**

(a) Reconsideration of a Hearing Examiner code enforcement decision may be granted by the Hearing Examiner to the extent consistent with state law, if a moving party demonstrates one or more of the following:

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 that 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.

(b) Motions for reconsideration must be filed within 10 days of the date of the Hearing Examiner's decision. Unless otherwise specifically provided by the applicable ordinance(s), the filing of a motion for reconsideration shall not stop or alter the running of the period provided to appeal the Hearing Examiner's decision.

### **3.14 SUBSEQUENT APPEAL**

Hearing Examiner decisions may be appealed as provided for in applicable law. Information regarding subsequent appeal opportunities shall be provided as a postscript on the Hearing Examiner decision.

### **3.15 SUBPOENAS**

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

(b) A request for a subpoena for a person shall: include the person's name and address; show the relevance of that person's testimony; and, demonstrate the reasonableness of the scope of subpoena sought. A request for a subpoena for documents or other physical exhibits shall: include the name and address of the person who is to produce the documents or other physical

exhibit; specify the materials to be produced; indicate the relevance of the materials subpoenaed to the issues on appeal and, demonstrate the reasonableness of the scope of the subpoena sought.

(c) The party requesting the subpoena shall be responsible for serving the subpoena. An affidavit or declaration of personal service or of mailing shall be submitted to the Hearing Examiner as proof of that service.

(d) Except as otherwise allowed by the Hearing Examiner, subpoenas shall be served no less than seven (7) days prior to the appearance or production 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) Any motion to limit or quash (i.e., vacate or void) a subpoena shall be filed with the Hearing Examiner within seven (7) days of receipt of the subpoenas or such other time as specified by the Hearing Examiner.

(g) Requests for subpoenas and the rulings upon such requests may be made ex parte unless otherwise ordered by the Hearing Examiner.

## **SECTION 4: RECOMMENDATIONS TO COUNCIL**

In addition to the Rules of General Application in Section 2.0, the rules in Section 4 shall govern review of matters where the Hearing Examiner is to hold a public hearing and prepare a recommendation or final decision on land use permit applications or appeals of staff decisions on such applications.

### **4.01 NATURE AND PURPOSE OF PROCEEDINGS**

Public hearings shall generally be informal in nature, but conducted in such manner that the information and facts relevant to a particular proceeding will become the most readily and efficiently available to the Examiner. Irrelevant, immaterial, unreliable or unduly repetitious testimony, exhibits, or other information presented may be excluded by the Examiner.

### **4.02 RIGHTS OF PARTIES AND INTERESTED PERSONS**

Any party to a matter subject to a public hearing before the Hearing Examiner has the right to: to testify and present evidence; to ask questions of those testifying at hearing; and to receive a copy of the Hearing Examiner's recommendation or decision.

### **4.03 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. Testimony by the applicant or appellant;
4. Public comment in support of or in opposition to the application or appeal;
5. Opportunity for parties and Examiner to ask questions;
6. Opportunity for presentation of additional information as rebuttal.

(b) The Examiner may alter or modify the order of hearing if and as necessary to best provide for the presentation and understanding of information.

(c) Questions asked of citizens expressing their opinions shall generally be limited to clarification.

(d) Persons testifying as expert witnesses are subject to cross-examination.