

**SULTAN CITY COUNCIL
AGENDA ITEM COVER SHEET**

ITEM: D-1
DATE: March 13, 2008
SUBJECT: Council's Quasi-Judicial Role
CONTACT PERSON: Deborah Knight, City Administrator *D. Knight*

ISSUE

The issue before the City Council is to review its procedures for quasi-judicial closed record hearings on preliminary plat applications, preliminary planned unit development (PUD) applications, variances, and conditional use permits.

STAFF RECOMMENDATION

1. Review the City's procedures for quasi-judicial close record hearings on preliminary plat applications, preliminary planned unit development (PUD) applications, variances, and conditional use permits.
2. Discuss the pros and cons of various levels of public comment in the close record hearing process.
3. Direct staff on Council preferences.

The question for the City Council seems to be the amount and timing of public comment that should be taken during closed record hearings. The Council has a range of options to consider with the understanding that no, or only limited new evidence or information may be presented during a close record hearing:

1. Allow all members of the public present at the meeting to comment
2. Allow only "parties of record" to comment
3. Do not allow public comment during a closed record hearing.

The risk in allowing any public comment during a closed record hearing is that the record may be compromised leaving City open to a Land Use Petition Act (LUPA) appeal from the applicant. The Land Use Petition Act is codified in chapter 36.70C RCW,

The State Legislature decided in the Land Use Policy Act (LUPA) that the public was best served by having a single point of public testimony in quasi-judicial

matters. This specifically is not the case for legislative and other policy-making matters where there are no limitations on public discourse with elected and appointed officials.

However, for quasi-judicial matters the public is invited to one public hearing to make it easier for everyone to get what they want to say on the only record that counts for making the decision. Citizens don't have to repeatedly keep track of multiple meeting dates, get out a show of support for or against a project, and subject themselves to numerous public speaking events for which most are not comfortable doing. For those who like to express themselves more often, the process allows for ample written testimony opportunities.

SUMMARY

The issue before the City Council is to review its procedures for taking public comment (Attachment A) during the closed record hearing. State law requires one open record hearing and closed record hearing. State law is clear that no, or only limited, new evidence or information may be presented (the record is closed). Basically, all that can be presented would be oral argument based on the record. (RCW 36.70B.020(1))

The purpose of the hearing is to give the public an opportunity to present evidence to be included in the official record. Participation by everyone with an interest is highly encouraged. The official record becomes the source for making the final decision.

The final decision must meet the legal criteria, which comes from applying city's ordinances and state statutes. If the legal criteria are satisfied, the decision must be to approve, even if popular opinion is contrary. If the criteria are not satisfied, the decision must be not to approve.

The City Council discussed its involvement in the land use process and directed staff to propose changes to remove the City Council from most land use actions. This work was partially completed by former Community Development Director, Rick Cisar. This work is on hold until a new Community Development Director is hired by the City.

The City has a new Mayor, Carolyn Eslick and a new City Attorney, Kathy Hardy with Kenyon Disend. At the closed record hearings held on January 24, 2008, there was some confusion about taking public comments on quasi-judicial actions prior to the City Council actually taking action on the matter.

The Mayor is requesting a review and discussion of the City's closed record hearing procedures (Attachment A) to ensure compliance with State law and City code.

Under the city's process, these applications first go to the Hearing Examiner for an open record hearing. The Hearing Examiner then makes a recommendation to the City Council that either recommends approval, approval with conditions, or denial of the application. The Hearing Examiner can also deny with prejudice which means the applicant cannot apply with the same project under the same circumstances.

The City Council holds a quasi-judicial closed record hearing where it can accept the recommendation, reject the recommendation, or remand the application back to the Hearing Examiner for further proceedings.

The City's process is somewhat confusing because Sultan Municipal Code 2.26.140 and 2.26.150 (Attachment B) which describes the Hearing Examiner and appeal process was not amended following Regulatory Reform in 1995 (see Attachment C for more information).

BACKGROUND

Open and Closed Record Hearings

Under Regulatory Reform, all cities and counties (GMA and non-GMA) must have established a project permit process to do the following (RCW 36.70B.050):

1. Combine SEPA review process with process for review of project permit applications (see above), and
2. Provide for no more than one open record hearing and one closed record appeal on a project permit application.

What is an open record hearing?

It is the traditional public hearing in which testimony, evidence, and other information (reports, studies, etc.) is presented, where the record for the decision on the project permit is developed. It may be held prior to the decision on the project permit or it may be held on an appeal (such as from an administrative decision). (RCW 36.70B.020(3))

What is a closed record hearing?

It is a proceeding (typically this would be before the legislative body) held after an open record hearing on a project permit application. No, or only limited, new evidence or information may be presented (the record is closed). Basically, all that can be presented would be oral argument based on the record. (RCW 36.70B.020(1))

Defining Quasi-judicial

The City Council acts as the quasi-judicial board on limited land use matters. Quasi-judicial generally relates to site specific land use action affecting specific parties and includes evidence for or against the proposal. These types of decisions are different than legislative actions, such as adopting new zoning ordinances, which tend to affect a much wider area and involve many more people. (Note: planning matters involving legislative action go through the Planning Board and require City Council approval.)

Due Process

Quasi-judicial decisions, as a matter of law, require constitutional guarantees of due process. When the City fails to follow proper due process, exposure can occur to court orders requiring payment of monetary damages to the applicant. In Washington State, proper due process includes the following:

- Appearance of fairness by the decision maker (Chapter 42.36 RCW);
- Proper notice of the hearing;
- A proper hearing process;
- A complete record; and
- A decision or recommendation based on the record that meets legal requirements.

Role

The Hearing Examiner and City Council serve in a role similar to that of a judge. The Hearing Examiner ensures that parties receive proper due process; and issues final decisions on some land use applications and makes recommendations to the City Council on others.

The Public's Role in the Quasi-judicial Process

Anyone interested in the outcome of project approval process has a right to be heard during the open record hearing. The public can present oral and/ or provide written testimony for or against the proposal.

Public testimony ensures that a complete record is available for a decision. When providing testimony, it is very important to present facts because facts are the foundation for issuing a decision.

The decision must meet the legal criteria, which comes from applying city's ordinances and state statutes. If the legal criteria are satisfied, the decision must

be to approve, even if popular opinion is contrary. If the criteria are not satisfied, the decision must be not to approve.

Prohibited Ex Parte Communications

Because the Hearing Examiner hearings are quasi-judicial, all persons are prohibited from contacting the examiner outside the public hearing for the purpose of influencing a decision. Any contacts made, must be publicly disclosed at the hearing. Similarly, contacting a member of the City Council for the purpose of influencing a decision on a quasi-judicial action before them can lead to disqualifying that councilmember from the decision. If a person believes that ex parte communications have occurred, it should promptly be brought to the attention of the affected official.

ALTERNATIVES

The City Council can decide the amount and timing of public comment during a closed record hearing. The desire to allow public comment needs to be weighed against state law as defined by the Land Use Petition Act and the need to ensure that the process is not compromised by public comments.

The Council has a range of options. The following options provide a starting point for discussion:

1. Allow all members of the public present at the meeting to comment
2. Allow only "parties of record" to comment
3. Do not allow public comment during a closed record hearing

STAFF RECOMMENDATION

1. Review the City's procedures for quasi-judicial close record hearings on preliminary plat applications, preliminary planned unit development (PUD) applications, variances, and conditional use permits.
2. Discuss the pros and cons of various levels of public comment in the close record hearing process.
3. Direct staff on Council preferences.

ATTACHMENTS

- A – Sultan Closed Record Hearing Procedures
- B – SMC 2.26 Hearing Examiner
- C – Regulatory Reform
- D – Public Hearings and How to Hold Them
- E – Appearance of Fairness Doctrine
- F - RCW 36.70B.020

CITY OF SULTAN
Quasi-Judicial
Closed Record Hearing Procedure

The Closed Record Hearing for consideration of the Hearing Examiner's recommendation on the Greens Preliminary Planned Unit Development Subdivision is now open.

- 1) This closed record hearing will proceed in an orderly fashion and I would like to ask your cooperation in the following procedures. This is a Closed Record Hearing. There has been an Open Record Hearing before the Hearing Examiner. Under state law, there is only one Open Record Hearing allowed in this proceeding. A Closed Record Hearing means that the Council bases its decision on the record developed at the Open Record Hearing before the Hearing Examiner. Therefore, only limited testimony is allowed at tonight's hearing. Comments from speakers must be in the nature of argument only, based on and limited to facts in the written and oral record developed before the Hearing Examiner. If a speaker presents comments that are not based on facts in the record, anyone may make an objection. If an objection is made, the person speaking will stop until the issue of the objection is resolved.
- 2) All comments should be made from the speaker's rostrum and each speaker is reminded to begin by giving his or her name and address. Please speak clearly and slowly.
- 3) If anyone requires special accommodations in order to speak, please let me know and we will make arrangements.
- 4) Staff will introduce the subject of tonight's hearing by summarizing the Hearing Examiner's recommendation. The Applicant will then be allowed ___ minutes to make a presentation based on the record that was before the Hearing Examiner. Following the presentations, the Council will discuss the matter. Council may ask questions of staff or the applicant if necessary. The questions, however, should be designed only to elicit evidence from the record. When discussion is concluded, the hearing will be closed.
- 5) Because this is a quasi-judicial hearing, the law known as the "Appearance of Fairness Doctrine" requires Councilmembers to disclose information that might affect their ability to be fair and impartial. I will now ask the Council a series of questions so that we may comply with the requirements of the law. 1) Does any Councilmember have any interest in the property that is the subject of the hearing? [[Ask each Councilmember, e.g. Councilmember Blair, etc, and have them answer

- “yes” or “no.” This gives us a good record in the event of an appeal.]] 2) Does an Councilmember stand to gain or lose financially as a result of the outcome of this hearing? [[Again, ask each Councilmember.]] 3) Has any Councilmember engaged in any oral, written, or electronic communication, outside this hearing, with opponents or proponents on the matter to be heard? If so, I ask you to state the substance of such communication so that other interested parties may have the right at this hearing to rebut the substance of the communication. [[Again, ask each Councilmember.]]
- 6) [[Addressing the audience.]] Does anyone object to any Councilmember participating in these proceedings? [[If someone objects, ask them to state their reasons. After hearing the reasons, the Councilmember will have to decide whether to participate in the hearing, and may consult with the City Attorney if necessary.
 - 7) The Staff Report will now be presented.
 - 8) The Applicant may now present argument based upon the record and recommendation.
 - 9) Does staff wish to respond to any subjects raised?
 - 10) At this time the Council may discuss the matter and ask questions of any speaker or staff.
 - 11) The closed record hearing is closed at this time.

Now that we have heard the public comments and you have reviewed the documents (staff report, prior hearings, letters) concerning this rezone request this subject is open for discussion and finding of fact and conclusions by the Council. If you are in agreement with the staff report, you may use them as basis for the findings and conclusions or you may state your own findings and conditions.

Chapter 2.26
HEARING EXAMINER

2.26.110 Public hearing.

A. Before rendering a decision or recommendation on any application, the examiner shall hold at least one public hearing thereon.

B. Notice of the time and place of the public hearing shall be given as provided in the ordinance governing the application. If none is specifically set forth, such notice shall be given no less than 10 days before the public hearing.

C. The examiner shall have the power to prescribe rules and regulations for the conduct of hearings under this chapter and also to administer oaths, and preserve order. (Ord. 821-03 § 1; Ord. 550, 1990)

2.26.120 Examiner's decision.

The examiner shall render a written decision within 10 working days of the conclusion of a hearing, unless a longer period is agreed to in writing by the applicant. The decision shall include at least the following:

A. Findings of fact and conclusions of law based upon and supported by the record;

B. A decision on the applicant to grant, deny or grant with such conditions, modification and restrictions as the examiner finds reasonable to make the application compatible with its environment, zoning ordinance, comprehensive plan, other official policies and objectives, and land use regulatory enactments. Examples of the kinds of conditions, modifications and restrictions which may be imposed include, but are not limited to, additional setbacks, screenings in the form of fencing or landscaping, easements, dedications or additional right-of-way and performance bonds;

C. No application for a variance shall be granted unless the examiner finds:

1. The variance shall not constitute a grant of special privilege inconsistent with the limitation upon uses of other properties in the vicinity and zone in which the property on behalf of which their application was filed is located; and

2. That the granting of such variance will not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which the subject property is situated; and

3. That such variance is necessary:

a. Because of special circumstances set forth in the findings relating to size, shape, topography, location or surroundings of the subject property, to provide it with use rights and privileges permitted to other properties in the vicinity and in the zone in which the subject property is located; and

b. Because for reasons set forth in the findings, the variance as approved would contribute significantly to the improvement of environmental conditions, either existing or potentially arising from the proposed improvement;

D. All decisions or recommendations of the hearing examiner are subject to reconsideration, unless reconsideration is waived. Reconsideration is waived unless within seven calendar days of the date of mailing of the decision or recommendation, the applicant, the city or a party of record submits a written request for reconsideration in accordance with rules issued by the hearing examiner. Pending reconsideration by the hearing examiner, a decision or recommendation shall not be deemed final for the purpose of commencement of the period of time in which to commence an appeal. If reconsideration is waived because no timely request for reconsideration is made, the initial decision or recommendation of the hearing examiner, subject to any right of appeal, shall be deemed final as of the eighth calendar day after the date of mailing of the decision or recommendation. If a timely request for reconsideration is made, the hearing examiner shall grant or deny reconsideration within 10 calendar days of the date of receipt of the request for reconsideration. All periods of time provided for in this code for filing an appeal of a hearing examiner's decision, or for council consideration of a hearing examiner's recommendation, shall commence to run from the later of the eighth calendar day after mailing of the hearing examiner's decision or recommendation or the date of the hearing examiner's order granting or denying reconsideration.

E. All fees associated with the reconsideration shall be set by council resolution.

F. A statement of the date the decision will become final unless appealed, together with a description of the appeal procedure. (Ord. 764-01; Ord. 550, 1990)

2.26.130 Notice of examiner's decision.

Not later than three working days following the rendering of a written decision, copies thereof shall be mailed to the applicant and to other parties of record in the case. "Parties of record" shall include the applicant and all other persons who specifically request notice of decision by signing a register provided for such purpose at

the public hearing, or otherwise provide written request for such notice. (Ord. 550, 1990)

2.26.140 Appeal from examiner's decision.

A. The grounds for filing an appeal of an examiner's decision shall be limited to the following:

1. Newly discovered evidence which is material to the examiner's decision and which could not reasonably have been produced at the examiner's hearing;
2. The examiner exceeded his jurisdiction;
3. The examiner failed to follow the applicable procedure in reaching his decision;
4. The examiner committed an error of law or misinterpreted the applicable zoning ordinance, comprehensive plan, provisions of the city's code or other city or state law or regulation; or
5. The examiner's findings and conclusions are not supported by the record.

B. 1. Where the examiner's decision is final and conclusive with right of appeal to the council, any such appeal shall be filed by the applicant, a department of the city, or other aggrieved person or agency with the city clerk/treasurer within 10 calendar days following the rendering of the examiner's decision pursuant to SMC 2.26.120. In computing the time in which to file an appeal with the council, the date the examiner's decision is rendered shall not be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday or a legal holiday.

2. Appeals filed with the city clerk/treasurer shall be in writing, shall contain a detailed statement of grounds for appeal and the facts upon which the appeal is based, and shall be accompanied by a fee of \$50.00; provided, that such appeal fee shall not be charged to a department of the city or to other than the first appellant. All council proceedings shall be limited to those matters expressly raised in a timely written appeal or appeals.

3. The timely filing of an appeal shall stay the effective date of the examiner's decision until such time as the appeal is adjudicated by the council or withdrawn.

C. 1. If the appeal is to the council, the timely filing of an appeal shall stay the effective date of the examiner's decision until such time as the appeal is adjudicated or withdrawn.

2. Within seven calendar days following the timely filing of an appeal with the city clerk/treasurer, notice thereof and of the date, time and place for council consideration shall be mailed by the clerk's office to the applicant, to the examiner and to all other

parties of record. Such notice shall additionally indicate the deadline for submittal of written comments as prescribed in SMC 2.26.150.

D. Where the examiner's decision is final and conclusive, with right of appeal to court, the procedures for appeal are as set out in the underlying ordinance or statute governing the land use permit or other quasi-judicial hearing. (Ord. 550, 1990)

2.26.150 Council consideration.

A. An examiner's decision which has been timely appealed pursuant to SMC 2.26.140 shall come on for council consideration in open public meeting no sooner than 21 nor longer than 35 calendar days from the date the appeal was filed. The council shall consider the matter based upon the record before the examiner, the examiner's decision, the written appeal statement and any written comments received by the council before closure of the city clerk/treasurer's office seven days prior to the public meeting date set for council consideration.

B. At the public meeting, the council may concur with the findings and conclusions of the examiner and affirm the examiner's decision; remand the matter to the examiner for further proceedings in accordance with the council's findings and conclusions; or the council may determine to hear the appeal at public hearing. In those instances in which the council affirms the examiner's decision or remands the matter to the examiner, the council's decision shall be reduced to writing and entered into the record of the proceeding within 15 days of the public meeting. Copies of the decision shall be mailed to all parties of record.

C. In those instances in which the council determines to conduct a public hearing, notice of the hearing shall be given by publication in the city newspaper no less than 10 days prior to the date set for the hearing and written notice shall also be given by the council by mail to all parties of record before the hearing examiner.

D. All council hearings conducted pursuant to this section shall be de novo and shall be limited to those matters raised in the appeal. The council shall consider the appeal based upon the record before the examiner and all written and oral testimony presented at the council hearing. All testimony at any public hearing shall be taken under oath.

E. At the conclusion of the public hearing, the council shall enter its decision which shall set forth the findings and conclusions of the council in support of its decision. The council may adopt any or all of the findings or conclusions of the examiner which support the council's decision. The council may affirm the decision of the examiner, reverse the decision of the examiner either wholly or in

part, or may remand the matter to the examiner for further proceedings in accordance with the council's findings and conclusions.

F. The council's decision shall be reduced to writing and entered into the record of the proceedings within 15 days of the conclusion of the hearing. Copies of the decision shall be mailed to all parties of record. (Ord. 550, 1990)

2.26.160 Effect of council action.

The council's decision to affirm an examiner's decision or remand a matter to the examiner pursuant to SMC 2.26.150(B), or the council's decision after public hearing on an appeal, shall be final and conclusive with right of appeal to the Superior Court of Snohomish County by writ of certiorari, writ of prohibition or writ of mandamus within 15 calendar days of the council's decision. The cost of transcription of all records ordered certified by the court for such review shall be borne by the applicant for the writ. (Ord. 550, 1990)

Regulatory Reform (ESHB 1724) Overview

The 1995 Legislature adopted "regulatory reform" legislation (ESHB 1724) for the purpose of simplifying and integrating the various state land use and environmental regulations. Most of this legislation is embodied in chapter 36.70B RCW. All of this legislation's requirements apply to cities and counties planning under the Growth Management Act (GMA), while only part of its requirements apply to non-GMA cities and counties. Cities and counties were required to implement locally the requirements that apply to them by March 31, 1996. What follows is a summary of the major provisions of this legislation, including amendments adopted since 1995.

I. Provisions of most significance:

A. Coordination/consolidation of local permit process with State Environmental Policy Act (SEPA) review (RCW 43.21C.075(3)).

1. Before regulatory reform: SEPA review of threshold determination appeal hearings (if provided for) occurred before hearing(s) on underlying land use permit. Some cities and counties allowed a threshold determination appeal hearing (such as before a hearing examiner) and then an appeal of that decision to the legislative body (city council, board of county commissioners). [Emphasis Added – this seems to be the origin on **Sultan Municipal Code 2.26**] Problem with this procedure - length of permit process, duplication of review.
2. Regulatory reforms: Apply to all cities and counties, GMA and non-GMA
3. SEPA appeal hearing (if any is provided) on negative threshold determination (DNS) must occur at the same hearing in which a hearing body (e.g. planning commission) or officer (hearing examiner) makes a recommendation (to legislative body) or decision on the underlying land use permit. This is the "open record hearing," discussed below.
4. SEPA appeal hearing (if any is provided) on DS (requiring that an EIS be prepared) may occur before any hearing on the underlying land use permit. (As in pre-regulatory reform days, any appeal of a SEPA determination is to superior court along with the appeal on the underlying permit.)

B. Project permit process.

3. Definition of project permit (RCW 36.70B.020): any land use or environmental permit or license required by a city for a project action, including building permits, subdivisions, planned unit developments, shoreline permits, site-specific rezones. (Some of these project permits may, however, be excluded from most project permit process requirements; see below.) Does not include: comprehensive plan adoption or amendment; area-wide zoning.

4. All cities and counties (GMA and non-GMA) must have established a project permit process to do the following (RCW 36.70B.050):
 - o Combine SEPA review process with process for review of project permit applications (see above), and
 - o Provide for no more than one open record hearing and one closed record appeal on a project permit application.

What is an open record hearing? It is the traditional public hearing in which testimony, evidence, and other information (reports, studies, etc.) is presented, where the record for the decision on the project permit is developed. It may be held prior to the decision on the project permit or it may be held on an appeal (such as from an administrative decision). (RCW 36.70B.020(3))

What is a closed record appeal? It is an appeal proceeding (typically this would be before the legislative body) held after an open record hearing on a project permit application. It is not a hearing, because no, or only limited, new evidence or information may be presented (the record is closed). Basically, all that would be presented would be oral argument based on the record. (RCW 36.70B.020(1))

5. GMA cities and counties must have established an integrated and consolidated project permit process. This is the requirement that causes the most sweat and fuss for GMA cities and counties. (RCW 36.70B.060)

This integrated and consolidated process includes the following requirements (these are not all of them, but they are the most significant):

- o A determination of completeness of a project permit application. This must be done within 28 days of a city or county receiving a project permit application. This determination must state that the application is complete or that it is not complete and indicate what is needed to complete the application. (RCW 36.70B.070)
- o A notice of application that is to be provided to the public and any agencies with jurisdiction. It must be provided within 14 days of the determination of completeness. There are many requirements for this notice. (RCW 36.70B.110). Note that this statute was amended in two different ways in two separate bills passed by the 1997 Legislature. Under statutory rules for resolving conflicts between bills on the same subject, the amendments that were part of chapter 429, Laws of 1997 control.)
- o An optional consolidated project permit review process. This process is to be available when there are two or more project permits relating to a proposed action. The determination of completeness and the notice of application would include all of the project permits addressed by the consolidated procedure.

- A determination of consistency. (RCW 36.70B.030, 36.70B.040) During project permit review, the city or county must determine the proposed project's consistency with its development (zoning) regulations or, in the absence of such regulations, with the comprehensive plan adopted under the GMA.
- The one open record hearing and one closed record appeal limitation is again referenced here.
- A decision on the application within the time period established by local ordinance for that decision, which time period should not exceed 120 days. (RCW 36.70B.080, as amended by ESHB 1458 (Chapter 322, Laws of 2001)). The time period for local government action may exceed 120 days only if the local government makes written findings that a specified period of additional time is necessary for processing. Local governments are subject to potential liability under RCW 64.40.020(1) for failure to make a decision on an application within the time period they have established for making that decision.
- Other requirements relating to the project review process. (RCW 36.70B.030) One important element of this review process is the authorization to determine that the environmental analysis conducted for and the mitigation measures included in applicable development/zoning regulations provide adequate mitigation of a project's adverse impacts. One of the important regulatory reform policies that is implemented here is to avoid duplication in environmental review. This policy recognizes that the environmental analysis of a comprehensive plan and of specific development regulations may adequately address the impacts of certain developments/projects permitted under the plan and regulations.
- Exclusions allowed. (RCW 36.70B.140) A local government may exclude certain project permits from most of the above provisions. A city or county may by ordinance or resolution exclude landmark designations, street vacations, other approvals relating to the use of public areas or facilities, and other project permits that the city or county determines present special circumstances that warrant a different review process.

A city or county may also exclude certain project permits from some of the above provisions. Such excludable project permits include boundary line adjustments, building permits, and similar approvals that are categorically exempt from SEPA.

II. Selected other elements of regulatory reform:

A. Shoreline Management Act (SMA) changes, including integration of SMA planning and GMA planning. The goals and policies of a local government's

shoreline master program now function as an element of its comprehensive plan adopted under the GMA. (RCW 36.70A.480)

B. Optional "development agreements" authorized (for all cities and counties). (RCW 36.70B.170 - .210) A development agreement, consistent with development regulations, may be agreed to between a local government and a developer that would define the development standards and environmental mitigations that would apply to the development project.

C. A local government may now delegate to a hearing examiner the authority to hear and make final decisions on all project permit applications, with the exception of site-specific rezones, for which the legislative body must make the final decision. Thus, a city council or board of county commissioners may take itself almost entirely out of the land use permit appeal process, with that one exception.

D. New rules for judicial appeals of local land use decisions. The "Land Use Petition Act," codified in chapter 36.70C RCW, establishes a uniform procedure for appealing land use decisions to the superior court. A party now has 21 days from the issuance of a land use decision to appeal to the superior court. The new rules include uniform procedures for such appeals.

Public Hearings When and How to Hold Them

**by Bob Meinig, MRSC Legal Consultant
August 1998**

Public bodies, such as city councils, boards of county commissioners, and planning commissions, are sometimes required by state law to hold public hearings. Since the issues addressed in these public hearings are frequently contentious, may involve due process rights of private parties, and generate litigation, it is important to know and follow proper hearing procedures. Because these procedures are not generally spelled out in the statutes that require hearings, there is no ready guide for public bodies to follow when conducting hearings. This Focus issue discusses what is legally required for public hearings, with an emphasis on quasi-judicial hearings, and summarizes the basic procedures that should be followed. While following proper hearing procedures may not eliminate litigation over the issues addressed in hearings, it will help prevent having the decisions made following public hearings overturned by the courts on procedural grounds. Following proper procedures also helps insure that public hearings are conducted fairly.

What is a public hearing and how it is different from a public meeting?

A public meeting generally occurs whenever a quorum of a public body, and sometimes less than a quorum, meets together and deals in any way with the business of that body. Public meetings, whether regular or special meetings, are governed by the procedures of the Open Public Meetings Act in chapter 42.30 RCW. Although the public often is allowed to participate in regular or special meetings, public participation is not required by state law. Two basic legal requirements of a public meeting are that the public be notified and be allowed to attend.

Although a public hearing is also a public meeting, the main purpose of most public hearings is to obtain public testimony or comment. A public hearing may occur as part of a regular or special meeting, or it may be the sole purpose of a special meeting, with no other matters addressed. An "open record hearing" under 1995 regulatory reform legislation (chapter 36.70B RCW) is a public hearing, while a "closed record appeal" is a public meeting.

There are two types of public hearings, legislative and quasi-judicial, and it is important to understand the distinction between them. The purpose of a **legislative public hearing** is to obtain public input on legislative decisions on matters of policy. Legislative public hearings are required by state law when a city or county addresses such matters as comprehensive land use plans or the annual or biennial budget. Legislative public hearings are generally less formal than quasi-judicial public hearings. They do not involve the legal rights of specific, private parties in a contested setting, but rather affect

a wider range of citizens or perhaps the entire jurisdiction. The wisdom of legislative decisions reached as a result of such hearings is not second-guessed by the courts; if challenged, they are reviewed only to determine if they are constitutional or violate state law. For example, a court will not review whether the basic budgetary decisions made by a city council or county commission were correctly made. On the other hand, comprehensive plans in Growth Management Act (GMA) counties may be reviewed by a growth management hearings board, and maybe later by a court, for consistency with the GMA.

The Importance of Public Process

On certain controversial legislative issues, it can be important to conduct a thoughtful public process in advance of any public hearing. Hearings often occur late in the process and may leave citizens with the impression that local officials do not want to hear their ideas. Council or board chambers are formal and can be intimidating to citizens who are not accustomed to public speaking. The format of hearings often leaves little, if any, room for reasonable discussion, give or take, or response to prior testimony.

While beyond the scope of this Focus issue, here are some brief thoughts on public process. Involve citizens in the early stages of the policy development process. Small group processes work well for truly involving interested citizens. Make sure that there is plenty of opportunity for people to get answers to questions; this usually does not happen at a formal public hearing. Consider using a trained facilitator to facilitate discussion on really controversial issues. Good public process can be time consuming and expensive. However, these processes increase the potential to arrive at solutions that have strong support in the community.

Quasi-judicial public hearings, unlike legislative ones, involve the legal rights of specific parties, and the decisions made as a result of such hearings must be based upon and supported by the "record" developed at the hearing. Quasi-judicial hearings are subject to stricter procedural requirements than legislative hearings. Most quasi-judicial hearings held by local government bodies involve land use matters, including site specific rezones, preliminary plats, variances, and conditional uses.

When are public hearings required?

A public hearing is required only when a specific statute requires one. Of course, a local government may hold a public hearing in other instances, such as when it desires public input on a sensitive or controversial policy issue. If you have any question as to whether a public hearing is required for a particular matter, we recommend that you consult with your city attorney or county prosecutor.

What procedural requirements apply to public hearings?

Notice (legislative and quasi-judicial public hearings). Some form of public notice is required for all public hearings. If the statute that requires a public hearing in a particular instance identifies the type of notice to be provided, those notice requirements must be followed. Such notice requirements may include publication in a newspaper, posting on and/or near real property that may be affected by the matter being addressed in the hearing, and mailing notice to specific parties. Since all public hearings are considered public meetings under the Open Public Meetings Act, the notice requirements of that law must be followed. A city or county may, of course, choose to provide any additional notice beyond whatever statutory notice requirements may exist.

If the statute requiring a public hearing does not specify the type of public notice to be provided, a good general rule to follow is to provide notice designed to alert those who may be affected by the proposed action, to inform them of its nature, and to allow them enough time to prepare for and attend the public hearing. The method of providing notice can include publication in the official newspaper, posting, mailed notice, and other means that a jurisdiction typically employs. The notice should be provided a number of days before the hearing, and a week to 10 days generally is sufficient. In some circumstances, notice of less than a week may be adequate. Ideally, each city and county should enact an ordinance that sets out the notice to be provided for public hearings, when notice provisions are not identified in the statute requiring the hearing.

Appearance of fairness (quasi-judicial hearings). The appearance of fairness doctrine applies to quasi-judicial hearings, not to legislative hearings. It is permissible, even expected, that members of a public body will have biases and will be lobbied by constituents when the matter is legislative. Different rules apply to quasi-judicial hearings, where a decision maker is not permitted to prejudge or have biases regarding or a matter. Ex parte communications are prohibited in quasi-judicial proceedings. More information on the appearance of fairness doctrine can be found in the MRSC publication, *The Appearance of Fairness Doctrine in Washington State*, Report No. 32 (January 1995), which is also viewable on MRSC's Web site at <http://www.mrsc.org/textafd.htm>.

Decision based on the record (quasi-judicial hearings). A public body's decision on a quasi-judicial matter must be based on and supported by the "record" in that matter. The "record" consists of all testimony or comment presented at the hearing and all documents or exhibits that have been submitted in connection with the matter being considered. All documents, including maps, drawings, and staff reports, should be admitted as numbered exhibits during the public hearing.

All quasi-judicial hearings should be tape recorded. If a quasi-judicial decision is appealed, the court will require a transcript of the hearing, which can be made from the tape. Tape recording of legislative hearings is not required.

How should a public hearing be held?

The setting. Council or commission chambers where public meetings are usually held will often be the best place to hold a public hearing. If a large crowd that cannot be accommodated in those chambers is anticipated, a larger room should be found. Whatever room is used should be well lighted and ventilated. A microphone (on a podium, if available) should be provided to help insure that all testimony is heard and, if necessary, adequately recorded.

Legislative hearings. State statutes do not specify how public hearings, whether legislative or quasi-judicial, should be conducted. Because legislative hearings are generally informal, the main concern is to provide an opportunity for all attending members of the public to speak if they so desire. Time limits should be placed on individual comments if many people are intending to testify, and the public should be advised that comments must relate to the matter at hand. Order and decorum should be maintained at all times. The "ground rules" for the conduct of the hearing should be stated by the chairperson or presiding official at the beginning of the hearing.

Open Record Quasi-judicial hearings. Because due process protections apply to quasi-judicial matters, quasi-judicial hearings are more formal than legislative hearings. However, they should not be as formal as a court proceeding. Keep in mind that quasi-judicial decisions may be overturned by a court if proper procedures are not followed, even if the decision itself is a "correct" one. Thus, it is important to establish in advance written procedures to guide the conduct of quasi-judicial hearings, both for the sake of the public body holding the hearing and for the attending public. Copies of the procedural rules should be made available prior to the hearing to members of the public.

Agenda. The adopted procedures should include a standard agenda. MRSC has numerous examples of public hearing agendas that can be provided upon request. A typical agenda for quasi-judicial land use hearings might include the following:

- *Introduction.* The presiding officer introduces the matter being heard and announces the ground rules for the hearing. The presiding officer should also address the appearance of fairness doctrine by asking if any members of the hearing body have any interest, conflict, or bias that would preclude their participation and if any members have had ex parte communications regarding the matter at issue. See the discussion below concerning a "script" for the presiding officer to follow.
- *Staff report.* Planning staff describe the application being considered; identify and discuss and technical studies; describe possible alternatives; and, if appropriate, make a recommendation concerning the proposal. Members of the decision-making body should ask questions of staff at this point.
- *Applicant presentation.* The applicant, who has the burden of proof to show compliance with applicable laws, presents testimony and evidence to support the application. The applicant may have expert witnesses, who should speak at this point. The applicant should address any issues raised by staff-proposed conditions. Members of the decision-making body should ask questions.

Should testimony be taken under oath? Testimony at a quasi-judicial hearing should be taken under oath. However, it is not necessary that individual oaths be taken. A group oath given by the clerk or the presiding officer is sufficient and saves time.

- *Public Testimony.* Both proponents and opponents of the proposal are allowed to speak. Typically, proponents speak first, followed by opponents, pursuant to ground rules previously announced (either at the beginning of the hearing or at the beginning of the public testimony stage). People testifying should give their names and addresses. Some jurisdictions also require speakers to provide this information in writing at the beginning of the hearing, and speakers are called according to the order on the sign-up sheet. Speakers should be given time limits and cautioned to avoid repetitious or irrelevant comments. They should not be allowed to make personal attacks.

Note that quasi-judicial bodies are not governed by the formal rules of evidence established for the courts. Comments and exhibits should be allowed as long as they have some relevance to the matter at hand. However, attempts to exercise too much control over seemingly irrelevant comments or exhibits could be perceived as censorship of legitimate public comment. If in doubt about an exhibit, admit it and decide about its reliability or relevance later.

Should cross-examination be allowed? As a general rule, cross-examination is not appropriate in a quasi-judicial hearing before a local government body. However, there may be instances where it should be allowed. Where the hearing assumes a distinctly adversarial posture, the proponents and opponents are represented by legal counsel, expert witnesses are called, or complex technical information is presented, cross-examination should be permitted if requested. Cross-examination can be conducted by one representative, presumably legal counsel, from each side of the matter. When requested by a party, cross-examination of planning staff who wrote and presented the staff report should also be permitted.

- *Rebuttal testimony.* Some jurisdictions allow the applicant to respond to any testimony presented. Some also allow rebuttal by staff and by opponents. Rebuttal preferably should not include new testimony or evidence.
- *Questions from the hearing body.* The hearing body may wish to direct questions to speakers either during testimony, or at the close of public testimony.
- *Close the hearing.* Sometimes it becomes necessary to continue a hearing to another day if there are more people wishing to testify than can be accommodated in one evening or afternoon. A hearing should not be allowed to last too late into the night since many of the public participants will find it necessary to leave before its conclusion. The record is closed at the conclusion of the hearing, and no other testimony or evidence should be considered by the hearing body. Deliberations and the vote on the application can take place immediately after the close of the public hearing or at some future meeting.

Hearing Script (quasi-judicial hearings). The presiding officer may find it helpful to have a written "script" to follow for opening and presiding over the hearing. A typical script might include the following:

- Call to order; open the hearing.
- Introduce self, hearing body, and staff.
- State the purpose of the hearing, including a brief description of the application and the action that the hearing body may legally take on the application.
- Address appearance of fairness issues; explain briefly what the appearance of fairness doctrine requires; ask the members of the hearing body:
 - *if they have any interest in the property or the application, or if they own property within a certain distance (e.g., 300 feet) of the property subject to the application;*
 - *if they stand to gain or lose any financial benefit as a result of the outcome of the hearing;*
 - *whether they can hear and consider the application in a fair and objective manner;*
 - *if they have engaged in any ex parte communications with either proponents or opponents of the application, and, if so, ask them to place on the record the substance of any such communications so that interested parties have the opportunity at the hearing to rebut the communications.*

Ask members of the audience if they wish to challenge on appearance of fairness grounds participation in the matter by any member of the hearing body, including the reasons for the request. (Any member challenged should be given the opportunity to either disqualify or refuse to disqualify him- or herself.)

Any member disqualified based on appearance of fairness grounds must leave the hearing room and must not participate further concerning the application.

- State the ground rules for the hearing and the manner in which it will proceed.
- Administer the oath to all those who may testify, as a group (or have clerk or other appropriate official administer the oath).
- Ask for staff to give a report on the application; insure that all documents, charts, maps, etc. are introduced as exhibits, with a number assigned to each exhibit.
- Ask for applicant to comment on the application, followed by the testimony of any technical experts in support of the application.
- Ask for any public testimony on the application (first by proponents and then by opponents) and state any rules regarding public testimony, such as:
 - *all speakers must speak into the microphone and give their names and addresses;*
 - *all comments should be addressed to the hearing body, should be relevant to the application, and should not be of a personal nature;*
 - *identify time limits, if any, on speaking;*
 - *avoid repetitive comments;*

- *if there are a large number of speakers, including many who are part of groups or organizations, ask for a representative to speak on behalf of the organization or group;*
- *unruly behavior, such as booing or hissing or harassing remarks, is prohibited.*
- Ask if everybody understands these rules.
- Ask for closing or rebuttal comments from the applicant, and, if desired, from the public.
- Ask for additional staff comments.
- Ask for questions from members of the hearing body (these questions may also be authorized to occur as testimony is presented).
- Close the hearing and state what steps are to occur next regarding the application.

MRSC has numerous examples of such scripts that will be provided upon request.

Deliberations. Deliberations on a quasi-judicial matter can occur following the public hearing or at some other time. If the matter is a complex one, it is best to postpone deliberations until members of the hearing body have had time to review the exhibits and perhaps listen again to some or all of the recorded testimony. Be careful not to delay the deliberations and eventual decision beyond any applicable statutory timelines.

Although it is recommended that the deliberations occur in open session, the Open Public Meetings Act exempts from its coverage that part of a meeting which relates to quasi-judicial matters between named parties. If the deliberations are held in an open meeting, comments from the audience should not be permitted. Deliberations by the hearing body are not considered part of the record for purposes of judicial review of the decision.

Vote/decision. The vote on the application must occur in open session. After the vote is taken, the hearing body should direct the staff or legal counsel to prepare, based upon instructions from the hearing body, findings of fact and conclusions of law in support of the decision. After preparation of the findings and conclusions, the hearing body must vote to approve them or to send them back for modification.

Tips For A Successful Public Hearing

The following should be kept in mind to help insure that a quasi-judicial public hearing runs smoothly, is error-free, and is fair:

- Be prepared! Don't come to the hearing cold. Review the application and supporting documentation, including SEPA documents, and any staff-prepared documents and recommendations prior to the hearing.
- Prior to the hearing, make sure that timely and proper notice was provided.
- Have clear ground rules for conducting the hearing, and make printed copies available to the public.

- Make sure that all appearance of fairness issues are addressed.
- Be sure that the recording equipment is working properly and that there is an ample supply of blank tapes. Stop any testimony during tape changes.
- Keep order in the hearing, limit testimony where necessary, but maintain an impartial attitude.
- Make sure all witnesses identify themselves on the record and that all exhibits are properly identified for the record. Testimony that references an exhibit should identify the exhibit number.
- Make sure that every person or group (via a spokesperson) that wishes to speak has that opportunity.
- If the hearing is going on too long, adjourn it and continue it to another day.
- Ask questions, ask questions . . . of staff, legal counsel, the applicant, and people who testify.
- Make sure your decision is clear and understandable, is based on evidence included in the record, and is consistent with the legal standards that apply to the application.

The Appearance of Fairness Doctrine

Updated 4/07

The appearance of fairness doctrine is a rule of law that requires government decision-makers to conduct quasi-judicial hearings and make quasi-judicial decisions in a way that is both fair in appearance and in fact. A matter is quasi-judicial when the legal rights, duties, or privileges of specific parties are decided in a contested case proceeding by non-judicial decision-makers, such as city or county councils, planning commissions, boards of adjustment, and hearing examiners. The doctrine has been applied primarily to quasi-judicial land use decisions, and its purpose is to bolster public confidence in the fairness of such decisions by

the elimination of actual bias, prejudice, improper influence or favoritism, but also in the curbing of conditions which, by their very existence, tend to create suspicion, generate misinterpretation, and cast a pall of partiality, impropriety, conflict of interest or prejudgment over the proceedings to which they relate.

Chrobuck v. Snohomish County, 78 Wn.2d 858, 868 (1971).

The doctrine as applied to quasi-judicial land use decisions, developed by Washington Supreme Court in the late 1960's, was codified by the state legislature in 1982. See Chapter 42.36 RCW. Land use decisions to which it has been applied include site-specific rezones, preliminary plat approvals, conditional use permits, variances, and shoreline substantial development permits. The doctrine does not apply to legislative or policy-making decisions, such as the adoption or amendment of comprehensive plans or zoning decisions of area-wide significance. RCW 42.36.010

In practice, the doctrine should work to disqualify from the quasi-judicial decision-making process those decision-makers who have prejudged the issues, who have a bias in favor of one side in the proceeding, who have a conflict of interest, or who cannot otherwise be impartial. Also, it prohibits "ex parte" communications between a decision-maker and a proponent or opponent of the matter being decided. RCW 42.36.060. Nevertheless, it does not apply to statements made while campaigning for elective office and it is not implicated by the receipt of campaign contributions. RCW 42.36.040, .050.

If a decision-maker's participation in a quasi-judicial decision violates the appearance of fairness doctrine and that participation was challenged in a timely manner, a court can invalidate the decision. A new hearing and decision will then need to be made without the disqualified decision-maker.

RCW 36.70B.020

Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Closed record appeal" means an administrative appeal on the record to a local government body or officer, including the legislative body, following an open record hearing on a project permit application when the appeal is on the record with no or limited new evidence or information allowed to be submitted and only appeal argument allowed.

(2) "Local government" means a county, city, or town.

(3) "Open record hearing" means a hearing, conducted by a single hearing body or officer authorized by the local government to conduct such hearings, that creates the local government's record through testimony and submission of evidence and information, under procedures prescribed by the local government by ordinance or resolution. An open record hearing may be held prior to a local government's decision on a project permit to be known as an "open record predecision hearing." An open record hearing may be held on an appeal, to be known as an "open record appeal hearing," if no open record predecision hearing has been held on the project permit.

(4) "Project permit" or "project permit application" means any land use or environmental permit or license required from a local government for a project action, including but not limited to building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, site-specific rezones authorized by a comprehensive plan or subarea plan, but excluding the adoption or amendment of a comprehensive plan, subarea plan, or development regulations except as otherwise specifically included in this subsection.

(5) "Public meeting" means an informal meeting, hearing, workshop, or other public gathering of people to obtain comments from the public or other agencies on a proposed project permit prior to the local government's decision. A public meeting may include, but is not limited to, a design review or architectural control board meeting, a special review district or community council meeting, or a scoping meeting on a draft environmental impact statement. A public meeting does not include an open record hearing. The proceedings at a public meeting may be recorded and a report or recommendation may be included in the local government's project permit application file.

