Should Your City Change to a Hearing Examiner System?

by
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In many cities, quasi-judicial land use project permit applications (conditional use permits, variances, preliminary plats, site specific rezones, etc.) are first given an open record hearing before the planning commission or board of adjustment. A final decision is made by the commission/board, and any appeals are handled by the city council in a closed record hearing.

[1] Or, if the board makes a recommendation instead of a final decision, the city council considers it in the closed record hearing and makes the final decision.

However, many cities have opted for a hearing examiner system, which allows a hearing examiner (usually an attorney) to hold the open record hearing on the quasi-judicial land use application.[2] The hearing examiner's decision may take the form of either a recommendation to the city council or a final decision. If the examiner has made a recommendation, the city council will hold a closed record hearing and then render the final decision. Or, if the examiner has made the final decision, there may be a procedure allowing for reconsideration of the examiner's decision and/or a closed record appeal hearing before the city council.

There are many reasons to consider switching from a citizen board (like the planning commission or board of adjustment) to a hearing examiner system for quasi-judicial project permit applications:

1. Most planning commissions/boards of adjustment operate without legal guidance and have trouble understanding complicated land use laws. The city's processing of permit applications involves consideration and integration of many different laws, including but not limited to the Growth Management Act (ch. 36.70A RCW), the Regulatory Reform Act (ch. 36.70B RCW), the State Environmental Policy Act (SEPA) (ch. 43.21C RCW), critical areas regulations, the Shoreline Management Act (ch. 90.48 RCW), the Subdivision Act (ch. 58.17 RCW), as well as federal/state constitutional provisions. Not all of these are reflected in the city's codes. For example, the city's code may address the issue whether or not a particular application is subject to the vested rights doctrine, but most codes do not describe how the doctrine works. Codes do not describe how to fashion individual conditions on permits to address environmental impacts within constitutional constraints. Therefore, the decision-makers must have a comprehensive understanding of these laws in order to make correct decisions.

To make things even more complicated, these laws are constantly changing. Many cities are able to rely upon their city attorneys to guide the process, but in too many financially strapped cities, the planning commission, board of adjustment and city council

must make decisions on land use applications with minimal legal advice. An attorney hearing examiner should be aware of the latest court decisions affecting land use/zoning, and should be able to draft a decision that will be upheld on appeal.

2. The courts will not apply a lesser standard of review to the land use decision, merely because it is written by a citizen board. The courts have established a high standard for administrative land use decision-making. In one case, the court held that: "findings of fact by an administrative agency are subject to the same requirements as finding of fact drawn by a trial court."[3] Statements of the positions of the parties and a summary of the evidence presented, with findings which consist of general conclusions drawn from "indefinite, uncertain undeterminative narration of general

conditions and events" are not adequate."[4] In many instances, the courts have reversed and remanded (sent back) the final decision of the municipality due to poorly written findings of fact and conclusions of law.[5] An attorney hearing examiner should have more experience and knowledge of the law to be able to draft findings of fact and conclusions that can be successfully meet this sufficiency standard.[6]

3. Appeals of land use decisions are frequently accompanied by damage claims. While all cities must meet deadlines for SEPA threshold decisions and final decisions on subdivisions, many cities planning under GMA are also required to establish deadlines for processing other types of permits.[7] It usually takes longer to process an application before a board because of scheduling the public hearing(s). For example, the board may only meet once a month, there may be a lack of a quorum for vacations, recusals, etc., or the board may simply take more time to review each application (causing a backlog). Significant exposure to liability may arise from even minor delays in permit processing.[8] A hearing examiner may be more flexible in his/her schedule, because a hearing examiner is paid, and will usually schedule additional hearings as needed to ensure that the decision timely issues.

4. The city, *staff and the individual decision-makers* have exposure to liability for land use decision-making.[9] There are several state and federal statutes that allow claims to be brought against the city and/or individual decision-makers for arbitrary, capricious, illegal or unconstitutional actions.[10] Most boards and commissions do not understand the tests used by courts to determine validity or constitutionality of the board's action/decisions. Action on the least complicated permit application may result in an appeal involving enormous damages claims due to construction delays and the resulting increase in project costs and attorneys' fees.[11] An experienced land use hearing examiner should be able to avoid many of the common mistakes made by boards and commissions.

Furthermore, some property owners file lawsuits against the individual decision-makers (and their spouses) just to place pressure on the individuals, believing that the city will be more likely to settle the case in the developer's favor. This tactic may or may not succeed, but it could also have a chilling effect on the willingness of citizens to serve on the planning commission, board of adjustment or city council. On the other hand, it is rare for a developer to file a lawsuit for damages against a hearing examiner personally.

5. With an attorney hearing examiner, there is less likelihood of appearance of fairness problems. Most small cities have planning commissions, boards of adjustment and city councils charged with the responsibility to make decisions on permit applications that may be submitted by their relatives, friends and business associates. Sometimes, these boards may not be aware of the breadth of the appearance of fairness doctrine or how conflict of interest issues impact their decision making. Some boards/councils may not seek, or decide to simply ignore, the legal advice of the city attorney on appearance of fairness issues that arise during the hearing.[12] While the remedy for an appearance of fairness violation is invalidation of the decision and not damages, the city may still incur significant expense with an appeal of the decision and remand after invalidation – after all, the entire process must be repeated. An attorney hearing examiner usually will not encounter the types of appearance of fairness challenges that are met by a board of citizens from the community, and should have the experience and knowledge to observe the appearance of fairness doctrine and correct hearing procedure.

6. Use of the hearing examiner system does not mean the city council no longer has a say in local decision-making. One reason city councils may give in opposition to the hearing examiner system is the anticipated lack of receptivity the examiner will have to citizen concerns. However, no decision-maker, whether it is a hearing examiner, planning commission, board of adjustment or city council, can approve or deny a project permit application based on public sentiment.[13] All

decision-makers must analyze the facts with regard to the city's codes when making quasi-judicial decisions, and apply the facts to the law (the criteria for approval of the permit).

Keep in mind that with the hearing examiner system, the council may still opt for a procedure that allows them to make the final decision (on the permit or on any appeal). While the council usually doesn't accept new evidence during a closed record hearing or appeal, it may still have an opportunity to correct the examiner's decision. However, if the examiner is an attorney, it is less likely that the examiner will make an error of law/procedure, act unconstitutionally, or issue a decision that is not based on substantial evidence in the record. Even if the attorney hearing examiner makes the final decision on a development permit, the council can adopt an ordinance that allows them to reconsider the final decision.

7. The hearing examiner system may be more expensive than a citizen board, but this should be weighed against the cost involved in land use appeals and damage claims. The planning commission and board of adjustment are comprised of volunteers, and their time is donated to the city. An attorney hearing examiner is not free, and usually bills hourly. However, hiring a hearing examiner with experience usually is less expensive to the city overall, considering reduced demands on staff and the city attorney. A hearing examiner should act professionally and impartially, treating everyone with courtesy and respect — thereby reducing misunderstandings that may occur when the applicant is personally known to the citizen board. If the hearing examiner is an attorney who is knowledgeable on land use law, his/her decisions will be less likely to be appealed or to expose the city to liability.

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[1] For those cities required to plan under RCW 36.70A.040 (GMA), only one open record hearing may be held on a project permit application. No more than one closed record hearing (or appeal) may be held after the open record hearing. RCW 36.70B.060(6).

[2] The authorization for a hearing examiner system is in RCW 35.63.130 and RCW 35A.63.170.

[3] *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 35, 873 P.2d 498 (1994).

[4] *Id.*, 124 Wn.2d at 36.

[5] *Citizens for Responsible and Organized Planning v. Chelan County*, 105 Wash. App. 753, 21 P.3d 265 (2001) (commissioners adopted findings and conclusions prepared by planning staff which did not address the central question in dispute, nor did the findings specify any reasons for the conclusions, so the court reversed and remanded the decision); *Levine v. Jefferson County*, 116 Wn.2d 575, 807 P.2d 363 (1991).

[6] However, in the case cited for the standard to be applied to administrative decisions, the court found that the decision of the county's hearing examiner was inadequate. *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 873 P.2d 498 (1994).

[7] *See*, RCW 36.70B.080, which requires cities planning under RCW 36.70A.040(GMA) to include a deadline for issuance of a final decision in their codes (usually 120 days). Otherwise, all cities are required to follow state law in the issuance final decisions for short plats, final plats and preliminary plats. RCW 58.17.140.

[8] *See*, *Mission Springs v. Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998) (delay of three weeks for grading permit issuance after council ordered traffic study to be prepared).

[9] *See*, *Westmark v. Burien*, 140 Wash. App. 540, 166 P.3d 813 (2007) (over ten million dollars in damages awarded against city under several claims, including a three year delay in the issuance of a SEPA threshold decision, several city employees and city attorney sued personally in separate federal court action). *See also*, *Hunt Skansie v. Gig Harbor*, Slip Copy, 2010 WL 1981040, W.D. Wash. 2010, May 17, 2010; councilmembers, their spouses and marital communities were sued (in addition to the city) because they filed judicial appeals of the city hearing examiner's decision approving development permits. The developer claimed that the judicial appeals alone prevented it from developing, even though the city did not request a stay. The court dismissed all claims against the individuals, and eventually dismissed all claims against the city in *Hunt Skansie v. Gig Harbor*, Slip Copy 2010 WL 5394991, W.D. December 23, 2010 (No. C10-5027 RBL).

[10] RCW 64.40.020; 42 U.S.C. Sec. 1983, 1988.

[11] In the *Mission Springs* case, the city, individual council members and city officials were sued personally because of their decision to withhold a grading permit until a traffic study was performed.

[12] *See*, *Mission Springs v. Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998).

[13] *Maranatha Mining v. Pierce County*, 59 Wash. App. 795, 801 P.2d 985 (1990).