

**CITY OF KENNEWICK
HEARING EXAMINER RULES OF PROCEDURE
FOR PUBLIC HEARINGS ON
LAND USE PERMIT APPLICATIONS AND APPEALS**

Pursuant to KMC 4.02.110(2) the following Rules of Procedure shall apply in the City of Kennewick Hearing Examiner's public hearings on land use permits applications and administrative appeals.

1. APPLICABILITY

- 1.1 The procedures established in these rules shall apply to public hearings on land use permit applications and appeals of administrative decisions. The Hearing Examiner Rules of Procedure are adopted to supplement the requirements set forth in the KMC. Any conflicts between these rules and the provisions of the City code will be decided consistent with the provisions of the City code.

2. DEFINITIONS

- 2.1 "Administrative Decision" means a decision issued by the Director of the Community Planning Department or a threshold determination issued by the Responsible Official for State Environmental Policy Act (SEPA) review.

"Appellant" means a person, organization, or other similar group who files a complete and timely appeal of a decision or other appealable action.

"Applicant" means the person, organization, or authorized representative seeking City approval of one or more permits over which the Examiner has jurisdiction.

"Comprehensive Plan" means the Comprehensive Plan that has been adopted by City of Kennewick.

"Council" means the Kennewick City Council.

"City" means City of Kennewick, Washington.

"Decision" means the written document of the Hearing Examiner that communicates the outcome of a matter decided by the Hearing Examiner.

"Department" means the City of Kennewick Community Planning Department.

"Ex Parte Communication" means written or oral communications to the Hearing Examiner about a matter pending before the Hearing Examiner not included in the public record and/or made outside of a public hearing.

"Hearing" means the open record public proceeding at which testimony and exhibits of evidence are presented to the Hearing Examiner on a land use permit application or appeal.

"Hearing Examiner" or "Examiner" means the Hearing Examiner or the Hearing Examiner Pro Tem of the City of Kennewick.

"Interested Person" means any individual, partnership, corporation, association, or public or private organization that may be affected by proceedings before the Hearing Examiner. The term shall include any party in a contested case.

"Jurisdiction" means the legal authority of the Examiner to consider and decide the correct outcome of a given matter.

"KMC" means the Kennewick Municipal Code.

"Motion" means a written request made to the Hearing Examiner for an order or other ruling.

"Notice of Decision" means the letter or coversheet prepared by City Staff that accompanies the Decision upon issuance.

"Open Record Hearing" is a proceeding on a land use permit request or a hearing on an administrative appeal in which evidence is offered and the complete record on which the City's decision is based is created.

"Party" means the Applicant, and/or Appellant, and City representatives involved in a given matter before the Examiner. It can also include persons with property interest in the subject property.

"Party of Record" means:

- a. Any person who testifies at a hearing;
- b. Persons submitting written testimony about a matter pending before the Examiner; and/or
- c. Persons who have signed a sign-up sheet at the hearing.
- d. "Party of record" includes the Applicant, Appellant, and City Staff.

"Record" means the oral testimony and written exhibits admitted in evidence before or at a hearing. Occasionally, at the Examiner's discretion, documents not available at the time of hearing are identified prior to adjournment and admitted in the record. The audio recording of the proceeding shall be included in the record.

"Staff" means any staff member of the City of Kennewick who participates in a hearing or the preparation of hearing before the Hearing Examiner.

"Subject property" means the real property that is the subject of the land use permit application or appeal.

3. JURISDICTION

- 3.1 The Hearing Examiner's jurisdiction is limited to those issues expressly identified by City of Kennewick Ordinance, or other appropriate delegations of authority from the City's legislative body to the Hearing Examiner as established by KMC 4.02.080 and other sections of the KMC.
- 3.2 Timely filing of an appeal is required for the Examiner to acquire jurisdiction in an appeal.
- 3.3 Any party may challenge the Examiner's legal authority to hear any case on jurisdictional grounds, or the Examiner may independently raise the jurisdictional issue. If the Examiner lacks jurisdiction, the matter cannot be heard and decided by the Examiner.

4. EX PARTE COMMUNICATION

- 4.1 Except as provided in 4.4 below, no person, nor agent, employee, or representative of any person who is an interested party in a matter currently pending before the Examiner shall communicate *ex parte*, directly or indirectly, with the Hearing Examiner concerning the merits of the matter or any factually related issues.
- 4.2 The Examiner shall not communicate *ex parte* directly or indirectly with any person, agent, employee, or representative of any person who is an interested party in an application currently pending before the Examiner concerning the merits of the pending application or any factually related application.
- 4.3 If a prohibited *ex parte* communication is made to or by the Examiner, such communication shall be publicly disclosed at hearing. The Examiner shall exercise proper discretion as to whether to disqualify himself or herself as Examiner for that particular hearing.
- 4.4 Communications regarding scheduling and logistics are permitted on an *ex parte* basis. Permitted *ex parte* procedural communications should be directed to the Examiner via the Community Planning Department.

5. NATURE OF PROCEEDINGS

- 5.1 Expeditious Proceedings. To the extent practicable and consistent with the requirements of law, public hearings shall be conducted expeditiously. In the conduct of all proceedings, the Hearing Examiner, City staff, and all parties, agents, and witnesses shall make every effort at each stage of a proceeding to avoid delay.
- 5.2 Frequency of Hearings. Hearings will be scheduled to occur on the second Monday of each month. Additional hearing dates may be scheduled by arrangement as appropriate. If more than one matter is to be heard in a given docket, the Hearing Examiner shall have discretion in setting the agenda.

- 5.3 Site Visit (or Inspection). The Hearing Examiner may visit the site of the proposed development before or after the hearing, at his/her discretion. The site visit is not part of the record. Failure to inspect the site will not render the Hearing Examiner's decision void. The Examiner shall not discuss the property or the pending matter with any person during any site visit.
- 5.4 Record of Hearing.
- a. Hearings shall be electronically recorded and such recordings shall be part of the official case record. Copies of the electronic recordings of a proceeding shall be made available to the public within three business days of a request. The reasonable cost of such copying shall be paid by the requester. No minutes of the hearing will be kept.
 - b. Copies of written materials in the record may be obtained by any interested person who shall be responsible for paying the cost of reproducing such material.
- 5.5 Computation of Time. Computation of any period of time prescribed or allowed by these rules, the ordinances of the City of Kennewick, and the laws of the State of Washington shall begin with the first day following the day on which the act or event initiating such period of time shall have occurred. If the last day of the period so computed is a Saturday, Sunday, or holiday, the period shall run until the end of the next business day.

6. RIGHTS AND RESPONSIBILITIES OF PARTIES

- 6.1 Rights of City Staff. The City staff shall be allowed to present evidence and testimony, to object, make motions, arguments, recommendations, to cross examine witnesses and shall have all other rights essential to a fair hearing consistent with local and state law.
- 6.2 Rights of Applicant and Appellant. Applicants and Appellants shall receive adequate notice, and be allowed to cross examine witnesses, present evidence, objections, motions, arguments, and all other rights essential to a fair hearing consistent with local and state law. The Applicant shall have timely access to the City's staff report.
- 6.3 Rights of Interested Persons. Every interested person shall be allowed to present relevant evidence and testimony at a hearing. The Hearing Examiner may impose reasonable limitations on the number of witnesses heard and the nature and length of their testimony. The rights of interested persons to cross examine, object, submit motions and arguments shall be at the discretion of the Hearing Examiner.
- 6.4 Responsibilities of City Staff. The City Staff shall: provide notice of Hearing consistent with City Code; provide a staff report and other relevant documentation, including submittals from the Applicant and/or Appellant, to the Hearing Examiner and the Applicant or Appellant at least seven (7) days prior to the scheduled hearing; shall be responsible for electronically recording the proceedings; and shall maintain possession of

the official record in each matter. The City Staff shall provide all Interested Parties with access to these Rules of Procedure.

- 6.5 Responsibilities of Applicant. The Applicant or his/her representative shall, prior to the hearing, familiarize himself/herself with the criteria for review; provide the Hearing Examiner with any material that supports his/her case; be prepared to present his/her case; and, to be prepared to answer questions from the Hearing Examiner and other parties.
- 6.6 Responsibilities of Appellant. An Appellant has the same responsibilities as an Applicant, with the following additional responsibilities. The Appellant shall provide City Staff a concise and comprehensible written statement of the issues on appeal prior to the hearing.
- 6.7 Responsibilities of All Parties. Parties, witnesses, and observers at any hearing shall conduct themselves with civility and deal courteously with all persons involved in the proceedings. Cheering, clapping, booing, and calling out from the audience are discouraged, as they are unnecessary and disruptive. Failure to conduct oneself in a civil and courteous manner may result in ejection from the hearing.
- 6.8 Time Limits on Witness Testimony. If the Hearing Examiner determines that testimony is repetitious or irrelevant to the issues of the case, the Examiner may impose reasonable limitations on the number of witnesses and on the nature and length of testimony. The Hearing Examiner shall control the amount and style of cross-examination in situations where it is permitted for full disclosure of the facts.

7. PRESIDING OFFICIAL

- 7.1 The Hearing Examiner shall preside over hearings and shall have the authority and duties granted to him/her in state of Washington statutes, the KMC, and other City ordinances. Included in the duties of the Hearing Examiner are:
 - a. to conduct fair and impartial hearings;
 - b. to take all necessary action to avoid delay in the disposition of proceedings;
 - c. to maintain order;
 - d. to administer oaths;
 - e. to rule upon offers of proof and receive evidence;
 - f. to regulate the course of the hearing and the conduct of the parties and their agents;
 - g. to question any party presenting testimony at the hearing;
 - h. to hold conferences for settlement, simplification of the issues, or any other proper purpose;
 - i. to consider and rule upon all procedural and other motions appropriate to the proceedings; and,
 - j. to make and file recommendations or decisions, consistent with the KMC and laws of the State of Washington.

7.2 Freedom from Interference. In the performance of adjudicative functions, the Hearing Examiner shall not be subject to direct or indirect influence from any elected official, officer, employee, or agent of any City department.

8. APPEAL HEARINGS

8.1 Pre-hearing Conference.

- a. The Hearing Examiner, at his/her own order discretion or at the request of a party, may hold a conference prior to the hearing to consider:
 - (1) Identification, clarification, and simplification of the issues;
 - (2) Disclosure of witnesses to be called and exhibits to be presented;
 - (3) Motions; and/or
 - (4) Other matters deemed by the Hearing Examiner appropriate for the orderly and expeditious disposition of the proceedings.
- b. Pre-hearing conferences may be held by telephone conference call.
- c. The Applicant, Appellant, and City Staff shall receive notice of any pre-hearing conference. Notice may be written or oral.
- d. The Applicant, Appellant, and City Staff shall participate in any pre-hearing conference unless they waive the right to be present and are granted permission by the Hearing Examiner not to attend.
- e. Following the pre-hearing conference, the Hearing Examiner may issue an order reciting the actions taken or ruling on motions made at the conference. The pre-hearing Order will be made part of the record.
- f. Pre-hearing orders may not be appealed until the Hearing Examiner issues an appeal decision.

8.2 Timeliness. To be considered timely filed, an appeal must be received no later than 4:30 p.m. on the last day of the appeal period. The appeal must be filed with the Kennewick Planning Department at 210 W. 6th Avenue, Kennewick, Washington 99336-0108.

8.3 Fee. Any filing fee as required by the City of Kennewick Fee Schedule shall accompany an appeal for it to be timely filed.

8.4 Contents of Appeals. An appeal must be in writing and contain the following:

- a. A brief statement as to how the Appellant is significantly affected by or interested in the matter being appealed;
- b. A brief statement of the Appellant's issues on appeal, noting Appellant's specific objections to the decision or action being appealed;

- c. The specific relief requested, such as reversal or modification;
 - d. Signature, address, and phone number of the Appellant, and name and address of Appellant's designated representative, if any.
- 8.5 Briefs. Briefs or other memoranda of law, limited to the specific issues set forth in the Appellant's statement of appeal, may be submitted by the parties in support of or in response to an appeal. Each party is permitted one primary brief not exceeding fifteen (15) double-spaced pages in length. In addition, the Appellant may submit a reply brief not exceeding ten (10) pages in length. The Hearing Examiner may, in his/her discretion, waive or modify these page limits at the request of either of the parties in order to accommodate complex legal and factual issues.
- 8.6 Motions. Motions and responses to motions are not to exceed fifteen (15) double-spaced pages in length without prior approval of the Hearing Examiner.
- 8.7 Designated Appellant Representative. If an appeal is filed by several individuals or a group, one individual shall be designated to be its representative, who shall be made known to the Hearing Examiner. Notice or other communication to the party representative shall be considered notice to the party.

9. PROCEDURE FOR OPEN RECORD HEARINGS

- 9.1 Notice Requirements of Hearing and Filings.
- a. All notice and time requirements and methods of notification for open record hearings shall be consistent with the provisions as set forth in KMC 4.17.
 - b. Affidavit of Notice: An affidavit signed by the City Staff attesting to the notice given of a public hearing (including dates and places of publication, posting and list of those mailed to shall be part of each official case record.
- 9.2 Oath or Affirmation. All testimony before the Hearing Examiner shall be given under oath or affirmation to tell the truth.
- 9.3 Development of Record at the Permit Application Hearing. A permit application hearing will include the following:
- a. A brief introductory statement of the hearing process by the Hearing Examiner;
 - b. City staff presentation of: a summary of the request; staff analysis as to compliance with applicable City criteria and development standards; technical testimony from City departments, as appropriate; and a recommendation by the staff;
 - c. Applicant presentation, including testimony and evidence to support the request, including expert witnesses when appropriate. It is at this point of the hearing that

the Applicant/Appellant presents comments and/or objections to the staff recommendation;

- d. Public testimony; and
- e. City staff's and Applicant's response to public testimony.

9.4 Content of the Record. The record of a permit application hearing conducted by the Hearing Examiner shall include (but is not necessarily limited to):

- a. The application for permit and all items submitted in support of the application by the Applicant;
- b. Departmental staff reports and supporting information;
- c. All evidence received, including oral testimony given at the hearing and all documents admitted in evidence;
- d. A statement of matters officially noticed;
- e. An environmental determination made pursuant to the State Environmental Policy Act of 1971 (SEPA), as appropriate;
- f. A recommendation by Community Planning Staff; and
- g. The audio recording of the proceeding.

9.5 Content and Form of Staff Reports on Permit Applications. The staff report shall be distributed to the Hearing Examiner and the Applicant, and made available to the public, and shall include the following:

- a. Names and addresses of the Applicant(s). If the Applicant is not the owner, the staff report must include documentation of the owner's permission to proceed with the proposal and a statement identifying the Applicant's property interest in the property;
- b. A summary of the requested action, including citations to the ordinances applicable to the requested action;
- c. The following information about the subject property:
 - 1. The address and legal description of the subject property;
 - 2. The zoning and Comprehensive Plan designations of the subject property;
 - 3. A description of existing development on the subject property;
 - 4. A description of surrounding land uses;
 - 5. Any scientific, environmental, or engineering information germane to the case; and

6. A description of critical areas identified or suspected to exist on site;
- d. An in-depth analysis of the project's consistency with the criteria for approval. The Staff Report shall refer to all applicable ordinances wherever appropriate;
- e. A summary of the reports or recommendations of any other agencies, including City Departments and State reviewing agencies;
- f. Appropriate maps of the subject property. If photographs of the site are available, the Applicant is encouraged to provide color reproductions that shall be part of the staff report;
- g. The State Environmental Policy Act threshold determination, if any; and
- h. Staff's conclusions and recommendations, including any recommended conditions of approval.

9.6 Development of Record at an Appeal Hearing. Open record appeal hearings include, but are not limited to:

- a. A brief introductory statement of the hearing process by the Hearing Examiner;
- b. Background information provided by the departmental staff of the appealed administrative decision;
- c. A detailed presentation by the Appellant, including witnesses and exhibits, if any, on the merits of the appeal from the Appellant;
- d. Departmental staff response to Appellant's arguments, including witnesses and exhibits if any; and
- e. Appellant's response.

9.7 Continuances.

- a. By Hearing Examiner. During the course of proceedings, if the Hearing Examiner determines that more information is necessary in order to make a decision, or if he/she is unable to hear all testimony on the matter within a reasonable time, the hearing may be continued to a specified date. If the matter is continued to a specific time and place, and posted on the door of the hearing room, no further notice of that hearing need be published, posted, or mailed. Continuances shall be consistent with the provisions of KMC 4.02.010.
- b. At the Request of a Party. Any party of record may request continuance of a hearing. The request, if made prior to the hearing, must be in writing and state reasonable grounds for a continuance. A request for continuance made orally at

hearing must be based on reasonable grounds. The Hearing Examiner shall have discretion to grant or deny any party's request for continuance.

9.8 Evidence.

- a. Burden of Proof. In each proceeding, the Applicant/Appellant shall have the burden of proof to show compliance with applicable laws and regulations of Washington State and City of Kennewick.
- b. Admissibility. The Hearing Examiner shall have discretion on the admissibility of all evidence. Relevant evidence, including hearsay, shall be admitted if, according to the Examiner's judgment:
 1. It possesses probative value in determining compliance with applicable code criteria such as would be commonly accepted by reasonably prudent persons in the conduct of their affairs; and
 2. In the opinion of the Examiner, it is the best evidence reasonably obtainable, having due regard for its necessity, availability, and trustworthiness.
 3. In ruling on the admissibility of evidence, the Examiner shall give consideration to, but shall not be bound by the rules of evidence governing civil proceedings before the superior courts in the state of Washington. The Examiner shall exclude evidence that is excludable on the basis of evidentiary privilege in the courts of this state.
 4. If any party or interested person submits voluminous written material as evidence, the Hearing Examiner, at his/her discretion, can order the submitting party or interested person to provide an abbreviated summary statement of the documents with citations and/or table of contents.
- c. Objections to admissibility of evidence will be noted in the record. All parties will be allowed opportunity to make a record of evidence admitted or denied during the course of the hearing. This record may include offers of proof. The Hearing Examiner may grant continuing objections to lines of questioning and/or testimony that have been objected to.
- d. Copies.
 1. Documentary evidence may be received in the form of copies if the original is not readily available. At the Examiner's discretion, parties may be given an opportunity to compare the copy with the original upon request.
 2. Any party bringing documentary evidence to hearings should provide:
 - a. In permit application hearings, four (4) copies (one each for the official record, Examiner working copy, City Staff, and an extra for witness and/or public reference);

- b. In appeal hearings, five (5) copies (one each for the official record, Examiner working copy, City Staff, the Applicant if different from Appellant, and an extra for witness and/or public reference).
- e. Judicial notice. The Hearing Examiner may take judicial notice of judicially cognizable facts, applicable federal and state laws, general, technical, or scientific facts within his or her specialized knowledge. The Hearing Examiner shall not take notice of disputed adjudicative facts.
- f. Record held open. The Hearing Examiner may request, on his/her own motion or at the request of a party, that a document to be submitted after adjournment of the hearing. In such cases, only those documents specifically requested by the Hearing Examiner on the record during public hearings shall be admitted.
- g. Submission of additional evidence after close of record. After the close of the record in a given matter, additional evidence may only be submitted upon one of the following:
 - 1. During deliberations, prior to issuance of a decision, the Examiner may reopen the record to receive specific information he/she has deemed necessary for the complete consideration of the matter.
 - 2. After the close of the record in a given matter, additional evidence may only be offered by a party upon a Request for Reconsideration. Only new evidence not available at the time of the public hearing will be considered, upon a showing of significant relevance and good cause for delay in its submission. All parties of record will be given notice of the Request for Reconsideration and granted an opportunity to review such evidence and submit rebuttal arguments.

9.9 Presence of Legal Counsel at Public Hearings

- a. Although representation by legal counsel is not required at the hearing, all parties participating in the hearing may be represented by legal counsel of their choice.
- b. At the request of any department and/or at discretion of the Hearing Examiner, a representative of the Kennewick City Attorney's Office may be present at public hearings to advise on matters of law and procedure.
- c. All forms of legal authority including briefs, staff reports, and other legal memoranda upon which a party of record will be relying or presenting at the hearing must be submitted to the Hearing Examiner's clerk at least one (1) week before the scheduled hearing date. The above-mentioned documents shall be available to the public at least one week before the hearing.

10. WITHDRAWAL

10.1 Withdrawal of Permit Application

If the Applicant notifies the City, prior to the public hearing, of an intent to withdraw the pending request for permit approval, the withdrawal shall be automatically permitted. If a request to withdraw an application is made at the public hearing or at any later time, the Hearing Examiner shall use discretion in allowing or disallowing the request.

10.2 Withdrawal of Appeal

Any appeal may be withdrawn only by the Appellant. Where the appeal is filed by several persons or a group, withdrawal shall be made by the person designated as the party representative.

10.3 The Hearing Examiner may dismiss an appeal 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.

11. DECISIONS

11.1 Written Decisions

A written report of findings, conclusions, and decision shall be issued and sent by City Staff to all parties of record. The Hearing Examiner decision shall be issued within ten (10) working days or within the time allowed by law or agreed to by the Applicant and City of Kennewick. The findings, conclusions, and decision shall indicate how the decision carries out the goals, policies and requirements of the KMC and other relevant laws and plans.

11.2 Content of Decision

At a minimum, each decision shall include the following:

- a. The nature and background of the proceeding, and a complete description of the record;
- b. Findings. The findings shall be a statement of the facts that are the basis of the conclusions and decision of the Examiner and shall be based exclusively on the evidence entered into the record and any matters officially noticed. The findings shall consist of concise statements of each fact found upon each contested issue. The source of each finding shall be identified.
- c. Conclusions. Whenever practical, the conclusions shall reference specific provisions of the law and regulations or both, together with reasons and precedents relied upon to support the same.
- d. Decision or order. The decision shall be based upon a consideration of the whole record and supported by reliable, probative and substantial evidence. All decisions may include conditions of approval.

11.3 Procedure for Reopening Hearing

- a. During deliberations, prior to issuance of a decision, the Examiner may reopen the record to receive specific information, including but not limited to documents, declarations, or memoranda containing argument, that the Examiner deems necessary for the complete consideration of the matter. All parties of record shall be given notice of the consideration of such evidence and granted an opportunity to review such evidence and file comments. All submittals and responses shall become part of the record.
- b. If, within five (5) working days after the Public Hearing, any party of record petitions the Hearing Examiner to reopen the hearing, the Hearing Examiner shall have discretion to reopen the hearing to consider new testimony or new documentary evidence that was unavailable at the time of the hearing. If the hearing is reconvened, all parties of record shall be given notice.

11.4 Reconsideration. Motions for Reconsideration are processed pursuant to KMC 4.02.130. The Community Planning Director, or an interested party affected by the final decision of the Examiner, may request reconsideration of a decision of the Examiner. Requests for reconsideration shall be considered if a party argues that the Hearing Examiner based the decision in question on: erroneous procedure; errors of law or fact; errors in judgment; or the discovery of new evidence which could not have been reasonably available at the time of hearing. Requests for reconsideration must be submitted to the City within seven (7) calendar days of issuance of the Examiner decision. Requests for reconsideration shall set forth the specific errors alleged in the decision. The Examiner may, after review of the record, take further action as the Examiner deems proper. In determining requests for reconsideration, the Examiner may request further information by Order. Parties shall have ten (10) calendar days to submit the additional information. The Examiner's written decision on the request for reconsideration shall be transmitted to all parties of record within ten (10) calendar days of receipt of the request for reconsideration or receipt of the additional information, whichever is later.

12. APPEALS OF HEARING EXAMINER DECISIONS

All appeals of Hearing Examiner Decisions shall be done in the manner as set forth in the KMC.