

## RESOLUTION NO. 632

### A RESOLUTION OF THE CITY OF GIG HARBOR, WASHINGTON, ADOPTING THE RULES OF PROCEDURE TO BE USED BY THE GIG HARBOR HEARING EXAMINER.

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WHEREAS, the City Council has decided that the rules to be used by the Gig Harbor Hearing Examiner shall be formally approved by the Council, and available for the public upon request from the City; Now, Therefore,

BE IT RESOLVED BY THE GIG HARBOR CITY COUNCIL AS FOLLOWS:

Section 1: The Council hereby resolves that the following Rules of Procedure shall be used by the Gig Harbor Hearing Examiner for the conduct of the Examiner's proceedings:

#### RULES OF PROCEDURE GIG HARBOR HEARING EXAMINER

**A. Practice. Who may appear before the Examiner.** Practice before the Hearing Examiner shall be open to the following persons who have met the standing requirements of Gig Harbor Municipal Code Section 19.06.003, or any other code provision allowing an appeal to the Examiner by the aggrieved person:

1. A party or participant to a case may appear personally or by a duly authorized representative;
2. Attorneys at law practicing before the Examiner must be duly qualified and entitled to practice in the courts of the state of Washington; or
3. Other persons permitted by law.

**B. Rules of Professional Conduct.** All persons appearing before the Examiner in a representative capacity shall conform to the rules of professional conduct required of attorneys before the court of Washington. If any such person does not conform to such rules, the Examiner may decline to permit such person to appear in a representative capacity in any current or future proceeding before the Examiner or impose any other appropriate sanctions.

**C. Ex parte Communications.** See, GHMC Section 19.05.004. No opponents or proponents of any matter before the Examiner shall make or attempt to make any improper ex parte communications with the Examiner regarding any issue in the proceeding that is prohibited by the Appearance of Fairness Doctrine, chapter 42.36 RCW. Exceptions for such ex parte contacts shall be handled as

set forth in RCW 42.36.060 and GHMC Section 19.05.004. Communications on purely procedural matters such as scheduling and logistics are permitted on an ex parte basis.

**D. Signing of Pleadings, Motions and Legal Memoranda.** Every pleading, motion and legal memorandum of a party shall be dated and signed by the party or the party's attorney or other authorized representative and shall include an address and telephone and FAX numbers.

**E. Teleconference Proceeding.** At the discretion of the Examiner, or where the parties agree and where the rights of the parties will not be prejudiced, all or part of any hearing, prehearing or motion hearing may be conducted by telephone or other electronic means. Each party in the proceeding must have an opportunity to participate effectively in and to hear the proceeding.

**F. Hearing Examiner's Duties and Powers.** The Examiner shall have the authority set forth in GHMC Section 17.10.070, and the following:

1. To administer oaths and affirmations;
2. To issue subpoenas and examine witnesses, provided that no witness shall be compelled to divulge information that he or she would not be required to divulge in a court of law;
3. To rule on all procedural matters, objections and motions;
4. To rule on all offers of proof and receive relevant evidence;
5. To question witnesses called by the parties in an impartial manner to develop any facts deemed necessary for a fair and adequate decision;
6. To secure and resent in an impartial manner such evidence, in addition to that presented by the parties, as deemed necessary to decide the matter fairly and equitably;
7. To take appropriate disciplinary action with respect to representatives of the parties appearing before the Examiner;
8. To issue orders joining other parties, on motion of any party, or on the judgment of the Examiner, when it appears that such other parties may have an interest in, or may be affected by, the proceedings;
9. To consolidate matters for hearing when such consolidation will expedite disposition of matters and avoid duplication of testimony and when the rights of the parties will not be prejudiced thereby;

10. To hold prehearing and settlement conferences;
11. To permit and regulate the taking of discovery;
12. To dismiss an appeal or take other appropriate action when the Examiner determines that he/she has no jurisdiction, or where a party or representative fails to appear at a hearing; and
13. To take any other action necessary and authorized by these rules and law.

#### **G. Prehearing Practice.**

**1. Dismissal of Appeals on Jurisdictional Grounds.** Timely filing of the appeal is required for the Examiner to acquire jurisdiction. Any party may challenge the Examiner to hear an appeal/matter on jurisdictional grounds. The Examiner may independently raise the jurisdictional issue. If the Examiner is satisfied that he/she does not have jurisdiction, he/she may dismiss the appeal/matter.

**2. Correction or Amendment of Appeal.** Within 7 days of receipt of an appeal by the Examiner, if any appeal is found to be deficient or insufficient, the Examiner may require the party filing the appeal to clarify, correct or amend the same to conform to any requirements for the appeal, as the same exist in the Gig Harbor Municipal Code.

**3. Joinder of Parties.** The Examiner may order the joinder of the permittee or any other interested person or entity in accordance with Civil Rule 19. The Examiner may also permit the joinder of persons who are necessary to the determination of the appeal in accordance with Civil Rule 20.

**4. Prehearing Conferences.** Any party or the Examiner may request a prehearing conference. The purpose of a prehearing conference shall be:

a. To prepare a case for hearing by scheduling prehearing deadlines and by identifying the issues, and if possible, witnesses, exhibits, stipulations and admissions.

b. If a prehearing conference is ordered by the Examiner, appearance at the prehearing conference by the party or by the party's representative is mandatory. If a party fails to attend a prehearing conference that is not justified by good cause, the Examiner may dismiss the appeal/matter or take other appropriate action.

**5. Prehearing Orders.** After a prehearing conference, the Examiner shall enter a prehearing order, which may include a statement of issues, a

schedule for filing motions and briefs and lists of witnesses and exhibits, as well as other matters which may bear on the preparation for hearing.

**6. Motions.**

a. An application to the Examiner for an order shall be by motion which, unless made during a hearing, shall be in writing, state with particularity the grounds therefore and set forth the relief sought. Each written motion shall have appended to it a proposed order which the motion seeks.

b. For motions for continuance or for schedule changes, or other motions that are likely to be uncontested, the moving party shall affirmatively seek the stipulation of all parties and present a stipulated order wherever possible.

c. If the motion is contested, any party may request that the Examiner hold a motion hearing. The Examiner has the discretion to decide whether a motion hearing is required. If the Examiner decides to hold a motion hearing, he/she will issue an order setting the dates for briefing and hearing. At a motion hearing, the Examiner will consider the arguments of the parties but will not take evidence, and will decide the motion exclusively on the parties' written submissions.

**7. Postponements and Continuances of Hearings.** Postponement or continuance of a hearing is at the discretion of the Examiner, whether contested or uncontested by the parties. The Examiner may postpone or continue a hearing on its own motion. The postponement or continuance of a hearing by a party shall be sought by written motion.

**8. Dismissal or Withdrawal of Appeal.**

a. If a party fails to attend or participate in a hearing or other stage of an adjudicative proceeding, the Examiner may serve on all parties a default or other dispositive order which shall include a statement of grounds for the order. Within seven days after service of a default or dismissal order for failure to attend or participate, the party against whom it was entered may file a written motion requesting that the order be vacated and stating the grounds relied upon.

b. An appellant may request to withdraw an appeal. The City may request to withdraw any issued Notice of Violation.

**9. Hearing Briefs.** Hearing briefs, if filed, must be submitted to the Examiner at least seven days before the time of the hearing or other such time as the Examiner may prescribe. The Examiner may permit the filing of additional briefs.

**10. Procedures at Hearings.** All hearings shall be conducted by the Examiner who shall conduct the hearing in an orderly manner and rule on all procedural matters, objections and motions.

a. Testimony under oath. The Examiner has the authority to administer oaths.

b. Recording. An official recording of all evidentiary hearings shall be made by electronic recording device. If the hearing is not electronically recorded for any reason, the Examiner shall have the authority to require a new hearing. Unofficial use of recording devices at hearings is permitted, however, the Examiner shall be consulted first and may impose conditions on such recording.

c. Order of Presentation of Evidence.

1. The Examiner shall determine the proper order of presentation of evidence. As a general rule, the City staff shall initially introduce the matter, and the Examiner will follow the procedures in GHMC Section 19.05.007.

2. The opposing party shall introduce its evidence after the appellant has rested. Rebuttal and surrebuttal evidence will be received only at the discretion of the Examiner.

3. Witnesses may be called out of turn in contravention of this rule by agreement of all parties.

d. Objections and Motions to Strike. Objections to the admission or exclusion of evidence shall be in short form, stating the legal grounds of objection relied upon.

e. Rulings. The Examiner, on objection or independently, shall exclude all irrelevant or unduly repetitious evidence and all rulings upon objections to the admissibility of evidence.

**11. Scope, Standard of Review and Burden of Proof.**

a. Hearings on permits/approvals or appeals of land use decisions or Notices of Violation shall be quasi-judicial in nature. The scope and standard of review shall be *de novo* unless otherwise required by law.

b. Applicants for permits or appeals of land use decisions shall have the burden of proof in the matter, as set forth in GHMC Section 19.05.006. The City shall have the initial burden of proof in cases involving penalties or Notices of Violation.

## **12. Rules of Evidence.**

a. Evidence, including hearsay evidence, is admissible if in the judgment of the Examiner, it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. All relevant evidence is admissible which, in the opinion of the Examiner, is the best evidence reasonably obtainable, having due regard for its necessity, availability and trustworthiness. In passing on the admissibility of evidence, the Examiner shall give consideration to, but shall not be bound to follow, the rules of evidence governing civil proceedings before the superior courts in the state of Washington.

b. The Examiner shall exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege in the courts of this state.

c. Evidence that is material and relevant to a determination of the matter consistent with the standards set forth herein, subject to these rules, shall be admitted into the record whether or not such evidence had been submitted to the City staff.

d. The Examiner will officially notice: (i) federal law, the constitution; (ii) state law; (iii) governmental organization; (iv) City organization.

e. The Examiner may notice a fact if it is one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the City of Gig Harbor or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. (See, ER 201.)

**12. Additional Evidence.** The Examiner may, when all parties have rested, present such evidence, in addition to that presented by the parties, as deemed necessary to decide the issues fairly and equitably. Any such evidence shall be received subject to full cross-examination by the parties. If a party desires to present rebuttal evidence, the Examiner shall allow an opportunity for such to take place.

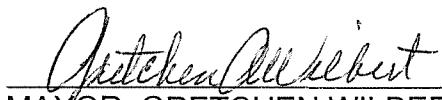
**13. Contents of the Record.** The record before the Examiner in any proceeding shall consist of the decision or order appealed from, the appeal, responsive pleadings, if any, notices of public hearing or appeals. The notice provided to the public of the public hearing shall also state that copies of the administrative record presented to the Examiner shall be available for review and copying (under Public Disclosure Requests). The City shall present its record to the Examiner on or before the public hearing. Any party may raise objection to or challenge any document in the record presented to the Examiner, or provide additional information to refute any document in such record.

14. **Preparation of Findings and Conclusions/Orders.** Upon request by the Examiner, the parties shall prepare findings and conclusions or orders, based on the Examiner's oral or memorandum opinion. In the alternative, the Examiner may prepare his/her own Findings and Conclusions/Orders, or adopt, in whole or in part, the findings, conclusions or orders from the drafts proposed by the parties.

15. **Final Decision.** The Examiner shall issue a final decision within ten working days as set forth in the Gig Harbor Municipal Code. Copies of the Examiner's decision shall be sent to all parties and all other persons requesting a copy of the decision from the Examiner's office.

RESOLVED by the City Council this 25<sup>th</sup> day of October, 2004.

APPROVED:

  
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MAYOR, GRETCHEN WILBERT

ATTEST/AUTHENTICATED:

  
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MOLLY M. TOWSLEE, CITY CLERK

FILED WITH THE CITY CLERK: 10/20/04  
PASSED BY THE CITY COUNCIL: 10/25/04  
RESOLUTION NO. 632