

CITY OF MILL CREEK

HEARING EXAMINER RULES AND PROCEDURES

May 18, 2015

CHAPTER I

GENERAL

A. Introduction and Scope of Rules

These rules apply to all hearings that are required by the City of Mill Creek Municipal Code to be held before the Hearing Examiner and shall serve as guidance when the Hearing Examiner is given the duty to conduct hearings on other subjects. These rules may be modified as determined necessary and equitable by the Hearing Examiner in a prehearing order to address the circumstances of a specific case or as necessary to protect the due process rights of hearing participants or comply with other applicable law.

Public testimony is encouraged in all permit hearings but the Hearing Examiner is concerned not with the popularity of the proposal, but with whether it conforms to criteria for approval under the applicable ordinance. The Hearing Examiner decides matters on the merits, based on the preponderance of the evidence. The decisions of the Hearing Examiner are final unless appealed. Failure of the Hearing Examiner to follow these rules shall not serve as grounds for invalidation of the decision, but the Hearing Examiner is expected to apply these rules to the best of his or her ability.

B. Definitions

1. "Appellant" means a person, organization, association or other similar group who files a complete and timely appeal to the Hearing Examiner.
2. "Department" means the City of Mill Creek Community Development Department or its successor.
3. "Notice of-decision" means a written document that communicates a decision of the Hearing Examiner.
4. "Participant" means any individual, partnership, corporation, association, or public or private organization that has submitted public comment before the Hearing Examiner.
5. "Party of Record" means:
 - a. The permit applicant;
 - b. The appellant (if different than the permit applicant); and
 - c. The City (if different than the appellant); and
 - d. Any person or entity who has submitted timely written or verbal testimony.
6. "Record" means the oral testimony and written exhibits submitted at the hearing before the Hearing Examiner. The audio recording of the proceeding and/or an accurate written transcription thereof shall be included as part of the record.
7. "MCMC" or "Code" means the Mill Creek Municipal Code.

C. Organization Representative Required

When a group of people, organization, corporation, or other entity, participates in a hearing, one person is to be designated to be its representative and inform the Hearing Examiner in writing of the name, address and telephone number of that designated representative. The rights of such participant shall be exercised by the person designated as the representative. Except as otherwise provided in these rules, notice or other communication to the representative is considered to be notice or communication to the organization.

D. Powers of Hearing Examiner

The Hearing Examiner shall preside over the hearing. The Hearing Examiner shall have all of the authority and duties granted to the Hearing Examiner in state statutes, the City code, and other City ordinances. Included in the duties of the Hearing Examiner are the following: to conduct fair and impartial hearings; to take all necessary action to avoid delay in the disposition of proceedings; and, to maintain order. The Hearing Examiner has all powers necessary to that end, including the following:

1. To administer oaths and affirmations;
2. To rule upon offers of proof and receive evidence;
3. To regulate the course of the hearings and the conduct of the parties and their agents;
4. To consolidate matters under consideration for hearing whenever the interests of justice and efficiency will be served or as required by the Code;
5. To question any participant at the hearing;
6. To hold conferences for settlement, simplification of the issues, or any other proper purpose;
7. To require brief on legal issues;
8. To consider and rule upon all procedural and other motions appropriate to the proceedings including summary judgment motions; and
9. To make and file decisions and recommendations.

E. Conflict with City Code or State Law

These rules of procedure are adopted to supplement the requirements of the City code, state law and procedural due process. In the event that there are any conflicts between these rules and the provisions of the Code, state law or procedural due process, the applicable provisions of the Code, state law or procedural due process shall prevail.

F. Nature of Proceedings

1. Frequency. Hearings before the Hearing Examiner shall be held at the time and place specified in the notice of hearing. Each matter shall be noted to commence at a particular time. Once commenced, a hearing may be continued by the Hearing Examiner for good cause.
2. Format. The format for a hearing will be of an informal nature yet designed in such a way that the evidence and facts relevant to a particular proceeding will be easily ascertainable by a reviewing body. The format will allow development of a record consistent with these rules.

3. Site Visit. Site visits may be helpful in understanding evidence that has been or might be presented at a hearing. When deemed necessary by the Hearing Examiner, the Hearing Examiner may inspect the site before or after a hearing. If the Hearing Examiner intends to conduct a post-hearing inspection, he or she shall notify the Parties of Record.
4. Record of Hearing. Hearings shall be electronically recorded and such recordings shall be a part of the official case record. No minutes of the hearing will be required, except that the list of witnesses testifying and exhibits offered and/or entered shall be maintained throughout the proceedings. Written transcripts of recorded proceedings are the responsibility of the person desiring the transcript at his or her own cost.
5. Computation of Time. In the computation of any period of time prescribed or allowed in any manner by the Hearing Examiner or Code, the day from which the time period begins to run shall not be included. When the last day of the period so computed is a Saturday, Sunday or a City recognized holiday, the period shall run until the end of the next following business day.
6. Filing and Service
 - a. Filing occurs when documents are submitted to the Director of Community Development. Documents may be submitted by mail, personal delivery, fax, or e-mail. Filing is complete upon receipt. Courtesy copies may be sent directly to the Hearing Examiner. Service by mail will be deemed complete if postmarked three days before the due date.
 - b. Documents required to be served on another party of record may be delivered personally, transmitted by facsimile or e-mail, or sent by regular mail. Service must be complete by 4:30 p.m. on the day it is due. In the case of regular mail, service will be deemed complete if postmarked three days before the due date.
 - c. Except for final decisions, every Party of Record represented by another person and every participant represented by another person consents to service on the representative.
 - d. At least seven business days prior to the hearing, the staff member assigned to the matter shall file a written analysis ("Staff Report") with the Hearing Examiner, along with all documents from the file he or she determines are required for review of the matter. The Staff Report and an identification of the documents shall be mailed to the applicant and to the appellant(s), if different from the applicant. Any party may inspect the Department's file and submit additional documents to the Hearing Examiner.
7. Communications with Hearing Examiner. Any written or verbal communication, made directly or indirectly with or by the Hearing Examiner that occurs outside of the hearing and in the absence of other participants is an ex parte communication. Ex parte communications are prohibited, except those communications regarding written submissions that are copied to all other Parties of Record or procedural matters. If an ex parte communication is prohibited by these rules and is recognized after it occurs, a written statement of the communication shall be made or the statement shall be disclosed during the hearing with an opportunity for Parties of Record to respond. The examiner may communicate with City staff on matters of scheduling and similar administrative

matters.

8. Appearance of Fairness. Proceedings before the Hearing Examiner are quasi-judicial in nature and therefore the Appearance of Fairness Doctrine applies. At the commencement of the hearing or prior to commencement, if known, the Hearing Examiner and Parties of Record are required to disclose any fact that may affect the ability of the Hearing Examiner to issue a fair and impartial decision.
9. Hearing Examiner Pro Tem. In the event the Hearing Examiner is unable to serve, a "Hearing Examiner Pro Tem" will be assigned by the City.
10. Termination of Jurisdiction. The jurisdiction of the Hearing Examiner ends when the Hearing Examiner issues a final decision in the matter and the time limit for all appeals has been exhausted. All prehearing orders and non-final decisions of the Hearing Examiner are subject to reconsideration and correction.
11. Consolidation of Appeal Hearing with Permit Hearing. When an appeal hearing is consolidated with a permit hearing, the Hearing Examiner may segregate testimony in the hearing into appeal and permit testimony. The format for each of the segregated portions of the testimony may individually follow the formats applicable to permit and appeal hearings, as required below.

CHAPTER II

FEATURES COMMON TO ALL HEARINGS

A. **Oath**

All testimony may be taken under oath or affirmation

B. **Recording**

Hearings shall be electronically recorded and the recordings shall be made a part of the record. Copies of the electronic recordings shall be made available on the City's website.

C. **Evidence**

Technical rules of evidence will not be applied. The key requirements for evidence will be relevance and reliability. Relevant and reliable evidence will be admitted if it possesses probative value commonly accepted by reasonable persons in the conduct of their affairs. The Hearing Examiner may take judicial notice of facts generally known or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Personal attacks shall not be tolerated, unless it is demonstrated that there is no other manner in which relevant evidence can be presented.

D. **Exhibits**

Documents, photographs and physical evidence will be admitted as exhibits as determined by the Hearing Examiner and each will be assigned an exhibit number.

E. **Staff Report or Analysis**

The Staff Report produced by the Department will be admitted as an exhibit in every hearing.

F. **Testimony - How Presented**

Testimony may be presented orally, in writing, or both. Persons giving expert testimony shall be subject to questioning by both Parties of Record and by the Hearing Examiner. When testimony is presented only in writing, the Hearing Examiner has discretion to leave the record open for written responses by any Party of Record. The Hearing Examiner is granted discretion to allow or disallow testimony by telephone or other means that can be heard or reviewed by all Parties of Record.

G. **Limits on Testimony**

The Hearing Examiner may impose reasonable limitations on the nature and length of testimony. In so doing, the Hearing Examiner shall give consideration to:

1. The expeditious completion of the hearing.
2. The need to provide all Parties of Record a fair opportunity to present their cases.
3. Accommodating the desires of members of the public to be heard, when public testimony is taken.

At the Hearing Examiner's discretion, irrelevant or unduly repetitious testimony may be excluded. If all testimony cannot be presented in the time available, the hearing will be continued.

H. Burden of Proof

For an application to be approved, a preponderance of the evidence presented at the hearing must support the conclusion that the application meets the legal decision criteria that apply. The applicant shall have the burden of proof in a pre-decision hearing. The City shall have the burden of proof in a code enforcement hearing. For an administrative decision to be reversed or modified, the appellant has the burden by a preponderance of the evidence to show that the legal decision criteria are erroneously applied by the decision maker. In appeals of procedural matters under SEPA, the determinations of the responsible official shall be entitled to substantial weight.

I. Expert Testimony

Affidavits, declarations or letters containing expert opinion will generally be admitted without the presence of the expert absent objection from the parties of record. Objections must be made at the time the written expert testimony is made known to the objecting party. Upon the submittal of a timely objection, the Hearing Examiner may continue the hearing to require the expert to appear and be available for cross-examination.

J. Filing of Papers

All written submissions made in advance of hearing shall be filed with the Department, marked for the attention of the Hearing Examiner.

K. Form and Timing of Hearing Examiner's Decision

The Hearing Examiner's decision will be contained in a written decision document with supporting findings and conclusions. Normally this document will be issued about 10 working days after the record closes.

L. Substance of Hearing Examiner's Decision

The Hearing Examiner's decision shall be in writing and shall contain findings of fact and conclusions of law supporting the result reached. Any conditions included as part of an approval shall be set forth. The Hearing Examiner may approve or deny the application or appeal before him or her. In any decision which allows a project, the Hearing Examiner may impose reasonable conditions supported by the record.

M. Continuation or Reopening of Hearing

The Hearing Examiner may continue or reopen proceedings, as allowed by law, for good cause any time prior to the issuance of the decision.

N. Distribution of Decision

The Department will maintain a copy of the Hearing Examiner's decision, available for public inspection, in the official file of each application or appeal. The Department will promptly distribute to the Parties of Record the Hearing Examiner's decision and post the decision on the City's website. Any person may obtain a copy of a Hearing Examiner Decision upon request and payment of the costs of reproduction and postage as allowed by the Public Records Act, Chapter 42.56 RCW.

O. Correction of Hearing Examiner's Decision

Technical defects and manifest error of statements of fact, law or conditions of approval in the Hearing Examiner's decision may be corrected any time prior to the end of the appeal period.

P. Termination of Jurisdiction

The jurisdiction of the Hearing Examiner terminates upon the end of the appeal period for a decision.

CHAPTER III

PERMIT HEARINGS

A. Format of Permit Hearings

The public hearing will be informal in nature, but organized, so that testimony and evidence can be presented efficiently. The hearing shall include at least the following elements:

1. An introductory outline of the procedure by the Hearing Examiner.
2. Testimony by the Department staff which summarizes the written Staff Report and provides any additional exhibits or other information the staff believes should be brought to the Hearing Examiner's attention. The staff presentation shall include a recommendation for approval, approval with conditions, or denial.
3. Testimony by the applicant and the applicant's witnesses.
4. Testimony from others wishing to be heard.
5. Rebuttal testimony and closing argument from staff.
6. Rebuttal testimony and closing argument from the applicant.
7. Any participant in the hearing may present his or her testimony through witnesses, provided that such witnesses, including expert witnesses, must be personally present to so testify unless permission has been granted in advance by the Hearing Examiner to present such testimony by telephone.

B. Testimony for Organizations

Whenever the views of any formal or informal organization are to be presented, the organization shall designate a representative with authority to coordinate the presentation and to speak for the group. Any communications with the organization by the Hearing Examiner or by any Party of Record during the course of proceedings shall be through the designated representative.

C. Requiring Further Information

When the Hearing Examiner concludes that further information is necessary to reach a decision, the record may be kept open to allow time for such information to be supplied. When appropriate, an opportunity to reply to such information shall be provided to the Parties of Record specified by the Hearing Examiner, either in writing or through further hearings.

D. Content of the Record.

The record of a permit hearing shall include at least the following:

1. The application.
2. The staff report.
3. All documentary or physical evidence received and considered, including all exhibits filed.
4. Electronic recordings of the proceedings and/or an accurate written transcription thereof.

CHAPTER IV

APPEAL HEARINGS

A. Who May Appeal

Pursuant to MCMC 14.11.020, only the applicant, a party of record, or the city may appeal a recommendation or decision issued under the development code. A regulatory order under Chapter [14.13](#) MCMC may be appealed only by the person to whom it is directed.

B. Notice of Appeal

The contents of an appeal and the filing requirements thereof shall comply with applicable provisions of the Mill Creek Municipal Code. The content and filing requirements shall be considered jurisdictional. The Hearing Examiner shall have no authority to consider appeals that fail to comply with the content and filing requirements of the Mill Creek Municipal Code.

C. Clarification of Notice of Appeal

If the appeal is unclear and does not sufficiently explain the basis for the appeal, the Hearing Examiner may issue an order requiring that the appellant amend the appeal within 10 days of the date of the order. If the appeal is not satisfactorily amended within the time allowed, it shall be dismissed.

D. Motions

The Hearing Examiner shall dismiss an appeal, without hearing, when it is determined by the Hearing Examiner to be untimely, without merit on its face, incomplete, or frivolous.

Any application to the Hearing Examiner for an order shall be by motion which, unless made during a hearing, shall be in writing, stating the reasons for the request and setting forth the relief or order sought. Written motions shall be received at least five days in advance of the hearing.

E. Parties

The parties in appeal hearings shall be the City, the applicant, any member of the public who wishes to testify, and the appellant(s), if different from the applicant or the City. No other persons shall be allowed to testify unless serving as a witness to one of the parties.

F. Format of Hearing

The appeal hearing will be of an informal nature, but organized so that testimony and other evidence can be presented efficiently. An appeal hearing shall include at least the following:

1. An introductory outline of the procedure by the Hearing Examiner.

2. Presentation by the appellant, including any witnesses.
3. Cross-examination, if any, of appellant and appellant's witnesses.
4. Presentation by the Department staff, summarizing the Staff Analysis and including any witnesses for the City.
5. Cross-examination, if any, of Department staff and staff's witnesses.
6. Presentation by the project applicant, if different from appellant, including any witnesses.
7. Cross-examination, if any of the project applicant and applicant's witnesses.
8. Public testimony.
9. Rebuttal testimony and closing by staff.
10. Rebuttal testimony and closing by applicant, if different from appellant.
11. Rebuttal testimony and closing by appellant.

G. Prehearing Conference

The Hearing Examiner may schedule and hold a prehearing conference when it appears that the orderly and efficient conduct of the hearing will be served, or that settlement of the appeal through such a conference is likely. A prehearing conference may, among other things, consider:

1. Simplification of the issues.
2. The existence of undisputed facts to which the parties are willing to stipulate.
3. The identification of witnesses and documentary or other evidence to be presented at hearing.
4. Any reasonable needs any party may have for discovering the details of the case the other party intends to present.
5. The imposition of reasonable time limits.

Based upon the discussions and agreements at such a conference, the Hearing Examiner may enter a Prehearing Order, which shall govern subsequent proceedings. If the case is settled at such a conference, the Hearing Examiner shall enter an Order reciting the terms of the settlement and dismissing the appeal.

H. Content of the Record

The record of an appeal hearing conducted by the Hearing Examiner shall include at least the following:

1. The Notice of Appeal and any amendments.
2. The Staff Analysis responding to the appeal and all accompanying documents, including the papers that comprise the record of the decision subject to appeal.
3. Additional documentary or physical evidence received and considered, including all exhibits filed.
4. The Hearing Examiner's decision.
5. Electronic recordings of the proceedings and/or an accurate written transcription thereof.