

MEMO

DATE: January 25, 2013

TO: City Council
Planning Commission

FROM: Mike Smith, Community Development Director



RE: Hearing Examiner System Background Information

In response to several Councilmember requests for information regarding the Hearing Examiner system I have attached several background documents as well as some brief discussion of issues.

Use of Hearing Examiner by Cities and Counties in Washington, 1999 publication by the Municipal Research Services Center (MRSC) *(an older discussion but it explains things in a more non-legal manner)*

Should Our City Change to a Hearing Examiner System?, Carol Morris, Attorney at Law, who served as our former land use attorney under the AWC insurance coverage. *Unsure of the date, but it was prepared in the past few years. It offers a much more legal explanation of the Hearing Examiner System and its pro's and con's*

Memorandum from Carol Morris RE: Hearing Examiner. *Unsure of the date, but was prepared within the past few years. It offers a shorter explanation of the Hearing Examiner System and its pro's and con's*

EXCEL Spreadsheet from Carol Tobin at MRSC, Providing Information on the Hearing Examiner System in Cities of approximately 20,000 Population and also from Larger and Smaller Cities. *Good breakdown of systems from similar sized cities including hourly rates charged*

Question: Will our insurance carrier charge less if we use a Hearing Examiner System?

- Lisa Roberts, Risk Services Manager for Washington Cities Insurance Authority (WCIA) has indicated she is unaware of any insurance company that includes the use of a Hearing Examiner in its rate-making. She indicates that WCIA endorses "the use of a Hearing's Examiner as the best way to reduce a city's land use exposure, which in turn, ultimately reduces its insurance assessment by resulting in fewer claims."

Question: What have our land use attorneys recommended regarding a Hearing Examiner?

- Our former land use attorney through AWC, Carol Morris, has strongly recommended the Hearing Examiner system. (SEE her two documents attached to this memo)
- Our new land use attorney through WCIA, Mike Connelly, will be sending me his formal recommendation, but in talking to him he has indicated he has the same position that Ms. Morris has recommended.

Question: What are the costs of using a Hearing Examiner?

The Hearing Examiner question involves a number of cost issues that will need to be further researched prior to fully understandin those cost issues. Staff is working on an analysis of the following:

- **Cost associated with Hearing Examiner system** (This would be determined through a contract based on responses to a Request for Proposal)
 - **SEE** the attached MRSC spreadsheet for examples of costs in other jurisdictions
 - The Examiner used by Kittitas County for the past two years is out of Wenatchee and charges \$100 per hour for travel time plus \$130 per hour for professional services. He is also the Hearing Examiner for a number of local jurisdictions in this region including the City of Kittitas. Other options would be from Yakima or perhaps a local attorney.
 - The number of permits for the past 7 years that a Hearing Examiner would be involved in for Ellensburg (Preliminary Plat approvals, Conditional Use Permits (an estimate), Variances and Rezones) are set forth below. The numbers reflect periods of both low and high permit activity, which is primarily driven by the local economy.

	PLATS	CONDITIONAL USES	VARIANCES	REZONES
2012	1	2 TO 3	6	1
2011	0	2 TO 3	2	1
2010	0	2 TO 3	5	0
2009	0	2 TO 3	7	2
2008	1	2 TO 3	2	1
2007	2	2 TO 3	10	5
2006	6	2 TO 3	10	9

Based on County example, at 2 hours of travel time (\$200) and 3 hours of work (\$390) for each hearing, the cost per year would run from approximately 8 hearings x \$590 = \$4,720 to a high of 28 hearings X \$590 = \$16,520

- **Cost recovery mechanism**
 - **SEE** some preliminary research from other jurisdictions on the expense of going to the Hearing Examiner system is set forth in the attached MRSC spreadsheet
 - Staff is developing a breakdown of each of the permit processes to determine an approximate amount of time involved with each in order to provide a better estimate of what a hearing examiner would cost. And the County is also working on providing their actual Hearing Examiner costs for the past several years.
 - Most Hearing Examiner jurisdictions have rolled the costs into their permit fees.
 - The question of appropriate permit fees to offset or recover costs of permit processing, including the cost of the Hearing Examiner, will need further discussion and likely require a study over a number of months to come up with an accurate time for each permit process.
 - In 2010 the County performed an analysis of staff time involved in its permit processing to determine an accurate “cost recovery” fee schedule. They also determined that the average Hearing Examiner cost was \$1,035 per hearing and built that into their fee structure.
 - Without making any judgment on the County’s methodology for determining their “cost recovery” fee amounts or the average Hearing Examiner cost, the current fees for a County permit are substantially higher than the fees for an identical City permit.

	<u>County</u>	<u>City</u>
Plats (excluding SEPA fees)	\$5,186	\$1,200
CUP	\$2,547	\$ 346
Rezone (excluding SEPA fees)	\$3,765	\$1,200
Variance	\$ 873	\$ 500
SEPA	\$ 560	\$ 800

More to come later.

Hearing Examiner Information from Cities of 20,000 Population
Compiled by Carol Tobin, MRSC, March 2011

	A	B	C	D	E	F	G	H	I	J	K
	City	2010 Population	Average Annual Cost	Annual Applications	Staff Time	Number Hrgs/Month	Decision Time (days)	Hours per Case	Hourly Rate	Related Expenses	Other Comments
1											
2											
3											
4											
5											
6											
7											
8											
9	Anacortes	16,800	N/A								
10	Arlington	17,280									
11	Bainbridge Island	23,380		2.67		7.3 per year	10-12 days (approx.)	varies; see email	\$150		
12	Battle Ground	17,400	\$6,529.18	6	N/A	2-13; 6 average	13.3		\$160/hr.	\$0.55/mi.	
13	Bonney Lake	16,690	\$4,211.35	4.67	4.19/hrs.	0.39	14.5 days	6.3 hours	\$100/hr.	\$8.86/case	
14	Camas	17,210	\$2,914.81	3	2-3 hrs./hrg.	3 per year	2-24 days	7	\$150/hr.	\$0.55/mi.	
15	Covington	17,640	\$5,280	2-3/year	1-2 hrs./hrg.	0	10 days (approx.)	6-8 hours	\$110/hr.		
16	Ellensburg	17,326	N/A								
17	Kenmore	20,650									
18	Maple Valley	23,130									
19	Mercer Island	22,890	\$2,053.05	<1/year		1 in 2010	21 days		\$95/hr.	\$20 per trip	Contract w/Seattle
20	Mill Creek	18,700							\$175/hr.		
21	Monroe	16,680							\$210/hr.		
22	Moses Lake	19,460									
23	Mountlake Terrace	20,960	\$3,121.98	3/year	130.5 hrs/year	1 every 4 months	10 days (approx.)	8.43	\$135-\$145/hr.	1 hr. per round trip	
24	Mukilteo	20,150	\$10,000 - \$12,000	7/year average		4 total in 2010	14-21 days (approx)				
25	Oak Harbor	23,420	\$18,000	8.8		0.5 average	7 days	15 hours	\$1,500/mo.		
26	Tukwila	18,190									
27	Tumwater	16,770									
28											
29											
30											
31											
32	Carnation	1,915							\$140/hr.		
33	Cashmere	3,005							\$130/hr.		
34	Chelan	4,105							\$130/hr.		
35	Cheney	10,680							\$75/hr.		Spokane agreement Spokane County agreement
36	Deer Park	3,480							\$93.23/hr.		
37	Gig Harbor	7,520							\$180/hr. in 2000		
38	Lake Stevens	26,670							\$135/hr.		
39	Puyallup	38,900							\$105/hr.		
40	Sammamish	41,070							\$110/hr.		
41	Shoreline	54,580							\$105/hr.		Seattle agreement
42	Snohomish	9,320							\$175/hr.		
43	Sultan	4,570							\$110/hr.		
44	Sunnyside	15,410							\$140/hr.		
45	Woodinville	11,350							\$125/hr.		Spokane agreement

Hearing Examiner Information from Larger and Smaller Cities

Use of Hearing Examiners by Cities and Counties in Washington

What is a Hearing Examiner and Hearing Examiner System?

Local governments in Washington State have the option of hiring or contracting with a hearing examiner to conduct required quasi-judicial hearings, usually in place of local bodies such as the planning commission, the board of adjustment, the board of county commissioners, or the city council. A hearing examiner is an appointive officer who acts in a manner similar to a judge and typically is an attorney. The basic purpose of having a hearing examiner conduct these hearings is to have a professionally-trained individual make objective quasi-judicial decisions that are supported by an adequate record and that are free from political influences. Using a hearing examiner system allows local legislative and advisory bodies that might otherwise conduct these hearings to better concentrate on policy-making, and it can reduce local government liability exposure.

A board of county commissioners or a city council has considerable discretion in drafting an ordinance creating a local hearing examiner system. The position of hearing examiner, the type of issues the hearing examiner is authorized to consider and decide, the effect of the hearing examiner's decision, and whether an appeal of any final decision is provided should all be determined by the local legislative body and set out in the enabling ordinance. A hearing examiner's decision, as defined by the local legislative body, can have the effect of either a recommendation to or a decision appealable to the ultimate decision-maker (typically the board of county commissioners or the city council), or it can be a final decision (appealable to superior court).

Counties and cities use hearing examiners, often in place of planning commissions, primarily for hearing and deciding land development project applications and/or administrative appeals of land use decisions. Hearing examiners are particularly useful where the rights of individual property owners and the concerns of citizens require formal hearing procedures and preparation of an official record. State land use planning and growth management laws provide cities and counties with specific

authority to establish a hearing examiner system to conduct hearings and make recommendations or decide a variety of land use issues. Hearing examiners may also conduct hearings and make recommendations or decisions on other local matters.

This focus paper describes the use of a hearing examiner, the pros and cons of such systems, and options available to Washington counties and cities. References are provided for further information available from the MRSC library and through our Web site.

Establishing a Hearing Examiner System

The office or position of hearing examiner must be established by ordinance. That ordinance should identify what matters the examiner is empowered to hear and what will be the effect of the examiner's decision on those matters. A common approach in such an ordinance is to establish the framework for the hearing examiner system, while leaving it to the examiner to adopt specific, detailed rules for the conduct of hearings. Hearing examiner ordinances typically address: the appointment and term of the hearing examiner; qualifications of the examiner; conflicts of interest and freedom from improper influence; powers and duties, including matters heard; hearing requirements; effect of decisions; reconsideration of decisions, if allowed; and appeals. MRSC has many examples of hearing examiner ordinances and has a compilation of articles and ordinances relating to the hearing examiner system in this state. See <http://www.mrsc.org/library/compil/cphearex.htm>.

Use of the Hearing Examiner System for Land Use, Environmental, and Related Decisions

Most commonly, hearing examiners are used to hear and decide land use project permit applications where a hearing is required, such as in the case of applications for subdivisions, shoreline permits, conditional use permits, rezones, and variances. The recent trend in state law, particularly in conjunction with regulatory reform, has been to allow local governments to give more authority to the hearing examiner to make final decisions on quasi-judicial project permit applications. For example, RCW 58.17.330, as amended by 1995 regulatory reform legislation, provides that the local legislative body can specify that the legal effect of a hearing examiner's decision on a preliminary plat approval is that of "a final decision of the legislative body."

The hearing examiner's role in the project permit process can include:

- open record hearings on project permit applications;

- appeals of administrative SEPA determinations, which in most cases are combined with the open record hearing on the application;
- closed record appeals of administrative decisions made by the local planning staff, including appeals of SEPA determinations where an administrative appeal is provided;
- land use code interpretations to satisfy the statutory requirement that cities and counties planning under the Growth Management Act adopt procedures for such "administrative interpretations" (RCW 36.70B.110(11));
- land use code enforcement proceedings.

Other Issues Assigned to Hearing Examiners

The local legislative body may, by ordinance, authorize a hearing examiner to hear other types of contested matters, in addition to land use permit applications and code enforcement. Examples of other types of decisions and/or administrative appeals that could be handled by a local hearing examiner include:

- discrimination complaints under local personnel policies;
- employment decisions and personnel grievances;
- ethics complaints by citizens or employees;
- local improvement districts — formation hearing and/or assessment roll determinations;
- public nuisance complaints;
- civil infractions;
- property forfeiture hearings under the Uniform Controlled Substances Act (RCW 69.50.505(e));
- tax and licensing decisions and appeals;
- whistleblower retaliation claims.

Pros and Cons of Using Hearing Examiners

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- . More professional and timely decisions insuring fairness and consistency.

A professional hearing examiner prepares for and conducts hearings in a manner insuring procedural fairness. Hearings are less emotional and more expeditious. Hearing examiners develop a high level of expertise and specialization, saving time in making decisions and improving their quality and consistency.

- . Time-saving for legislative body, freeing legislators to focus on legislative policy and other priority issues.

Conducting public hearings and making quasi-judicial decisions is time-consuming. Local legislators can free themselves from many of their hearing duties by delegating them to a hearing examiner. The local legislative body can still choose to make final decisions or to hear appeals of the examiner's decisions, and those appeals will be facilitated by a thorough and organized record. The use of hearing examiners is especially time-saving for routine decisions and for complex land use decisions requiring formal hearings, citizen participation, and subject matter expertise.

- . Separation of policy-making or advisory functions from quasi-judicial functions.

Use of hearing examiners for quasi-judicial hearings separates legislative and administrative functions from quasi-judicial functions. This can improve decision-making by clarifying roles and avoiding conflicts. For jurisdictions with planning commissions, use of a hearing examiner system allows the planning commission to function as an advisory body. The legislative body can focus on policy-making while the planning department concentrates on administration. For counties with three-member boards of commissioners, use of a hearing examiner to conduct quasi-judicial proceedings can greatly assist commissioners who already responsible for a number of legislative and administrative functions.

- . Improved compliance with legal requirements, including due process, appearance of fairness, and record preparation.

Hearing examiners have special expertise in managing legal procedural requirements and avoiding appearance of fairness and conflict of interest

issues. The hearing examiner assures procedural fairness, especially in cases where one side is represented by an attorney while the other side is not. Participants are often more satisfied with the proceedings, regardless of the outcome. A properly conducted hearing also results in a complete and well organized written record.

- Reduced liability relating to land use decisions and/or procedural challenges to decisions.

Using a hearing examiner system has been shown to reduce land use liability exposure. Improved hearing procedures, better records, and more consistent and documented decisions are typical of professional hearing examiners. At least one local government insurance authority has officially endorsed the use of hearing examiners for land use decisions based on a survey providing evidence of a lower risk profile for jurisdictions using a hearing examiner system for land use proceedings.

- Improved land development review integration under chapter 36.70B RCW (ESSB 1724).

A number of jurisdictions have adopted hearing examiner systems since the 1995 regulatory reform legislation mandating integration and consolidation of environmental and land use regulatory review for development projects. Use of a specialized land use hearing examiner is an effective method of consolidating and coordinating multiple review processes. For jurisdictions with a mandatory board of adjustment, adoption of a hearing examiner system eliminates the requirement for a board of adjustment.

- Opportunity for feedback to improve plans and regulations from professional hearing officer familiar with comprehensive plans and development regulations.

A professional hearing examiner has familiarity with the local comprehensive plan and development regulations and possibly those of other jurisdictions. Areas where plans, regulations, and policies are weak or inconsistent can be identified and referred to the planning staff, planning commission, or legislative body, providing feedback for continuous improvement.

- . Removal of quasi-judicial decision-making from the political arena.

It may be difficult for elected local government officials to entirely eliminate political considerations from their quasi-judicial decision-making. Professional hearing examiners should be immune from political pressures.

Cons

- . Cost to county or city for hiring a hearing examiner and staff.

There are costs in hiring hearing examiners and, if necessary, support staff. Counties and cities should consider whether savings in council and commission time, improvements in decision-making, and reduced liability justify the costs. Alternatives such as use of personal service contracts for hearing examiners can reduce costs.

- . Increased cost to the parties due to more formal decision-making procedures.

Hearing examiners can increase the formality of the hearing process, although many of the procedural requirements and formalities are already required under state law. This formality can provide the advantage of increased appearance of fairness and impartiality in decision-making.

- . Lack of accountability to voters for appointed hearing examiner making decisions or hearing administrative appeals.

Some people maintain that important decisions should be made by elected officials who are accountable to the voters. However, these concerns can be addressed by making the hearing examiner's decision a recommendation to the council or commissioners or by providing for an administrative appeal to the legislative body.

Options for Efficient and Effective Use of Hearing Examiners for Smaller Counties and Cities

Smaller local governments may be reluctant to establish a hearing examiner system because of cost considerations and concerns about whether there will be enough occasions to justify using a hearing examiner. Here are some ideas about addressing these concerns:

- Contract for hearing examiner services. Counties and cities may establish a contractual relationship with a hearing examiner in which the examiner is compensated, on an hourly or other basis, only as needed.
- Share use of a hearing examiner with other jurisdictions. Some local governments in the state have entered into interlocal agreements to contractually share the services of a hearing examiner.
- Increase the number of matters heard by hearing examiner. Doing this could reduce costs relating to use of staff that would otherwise be occupied with those matters.
- Fund the hearing examiner system from permit review fees. Local governments can add and/or increase permit fees and appeal fees to help cover the cost of maintaining a hearing examiner system.

Qualifications of Hearing Examiners

There are no state statutes that establish the minimum qualifications of hearing examiners. As noted above, hearing examiners are often attorneys; however, a law degree is not required. A background in the area in which the examiner will perform would obviously be helpful. Since hearing examiners operate mostly in the land use arena, some local governments use examiners with a planning, rather than legal, background. Keep in mind that the land use decision-making process requires a thorough knowledge of legal procedures, and relevant statutes, local ordinances, and case law. In the ordinance establishing the office of hearing examiner, it is a good idea to identify the minimum qualifications that the legislative body deems necessary for a hearing examiner.

Support, Resources, and Training for Hearing Examiners

- Washington Association of Professional Hearing Examiners; Jim Driscoll, President; 101 Yesler, Suite 607; Seattle, WA 98104; (206) 628-0039. This organization provides periodic training conferences and maintains a list of hearing examiners in the state.

MRSC Library Resources

The following MRSC Library resources provide more detailed information concerning use of hearing examiners and the land use hearing examiner system, including sample ordinances and rules of procedure:

- "Hearing Examiner System in Washington State: A Compilation of Articles and Ordinances," MRSC, July 1997.
- "A Citizen Guide to the Office of Hearing Examiner," City of Seattle, revised 1994.
- "The Hearing Examiner in Washington State: A Reference Manual for Local Government," Washington State Planning and Community Affairs Agency (no longer in existence), June 1980.
- A Short Course on Local Planning, Planning Association of Washington and the Washington Department of Community, Trade and Economic Development, Version 3.2, March 1997.
- "You Be the Judge: A Handbook for the Land Use Decision Maker," by Jim Driscoll and Ted Hunter, prepared for the Association of Washington Cities (1993).
- Other MRSC Library resources, including sample ordinances establishing the office of hearing examiner, hearing examiner rules of practice and procedure, hearing examiner job descriptions, hearing examiner contracts, and citizens' guides to the hearing examiner process.

SHOULD OUR CITY CHANGE TO A HEARING EXAMINER SYSTEM?

By Carol A. Morris

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

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 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.

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 or board of adjustment. 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.

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).

Hearing Examiner Information from Cities of 20,000 Population
 Compiled by Carol Tobin, MRSC, March 2011

	A	B	C	D	E	F	G	H	I	J	K
	City	2010 Population	Average Annual Cost	Annual Applications	Staff Time	Number Hrs./Month	Decision Time (days)	Hours per Case	Hourly Rate	Related Expenses	Other Comments
7											
8	Anacortes	16,800	N/A								
9	Arlington	17,280					10-12 days	varies; see email			
10											
11	Bainbridge Island	23,380		2.67		7.3 per year	(approx.)		\$150		
12	Battle Ground	17,400	\$6,529.18	6	N/A	2-13; 6 average	13.3	\$160/hr.	\$0.55/mi.		
13	Bonney Lake	16,690	\$4,211.35	4.67	4.19/hr.	0.39	14.5 days	6.3 hours	\$100/hr.	\$8.86/case	
14	Camas	17,210	\$2,914.81	3	2-3 hrs./hr.	3 per year	2-24 days	7	\$150/hr.	\$0.55/mi.	
15	Covington	17,640	\$5,280	2-3/year	1-2 hrs./hr.		10 days	6-8 hours	\$110/hr.		
16	Ellensburg	17,326	N/A				0 (approx.)				
17	Kennore	20,650									
18	Maple Valley	23,130									
19	Mercer Island	22,890	\$2,053.05	<1/year		1 in 2010	21 days		\$95/hr.	\$20 per trip	Contract w/Seattle
20	Mill Creek	18,700							\$175/hr.		
21	Monroe	16,680							\$210/hr.		
22	Moses Lake	19,460									
23	Mountlake Terrace	20,960	\$3,121.98	3/year	130.5 hrs./year	1 every 4 months	10 days (approx.)	8.43	\$135-\$145/hr.	1 hr. per round trip	
24	Mukitoo	20,150	\$10,000 - \$12,000 average	7/year		4 total in 2010	14-21 days (approx)				
25	Oak Harbor	23,420	\$18,000	8.8		0.5 average	7 days	15 hours	\$1,500/mo.		
26	Tukwila	18,190									
27	Tumwater	16,770									
28											
29											
30											
31											
32	Carnation	1,915							\$140/hr.		
33	Cashmere	3,005							\$130/hr.		
34	Chelan	4,105							\$130/hr.		Spokane agreement
35	Cheney	10,680							\$75/hr.		Spokane County agreement
36	Deer Park	3,480							\$93.23/hr.		Spokane County agreement
37	Gig Harbor	7,520							\$180/hr. in 2000		
38	Lake Stevens	26,670							\$135/hr.		
39	Puyallup	38,900							\$105/hr.		
40	Sammamish	41,070							\$110/hr.		
41	Shoreline	54,580							\$105/hr.		Seattle agreement
42	Snohomish	9,320							\$175/hr.		
43	Sultan	4,570							\$110/hr.		
44	Sunnyside	15,410							\$140/hr.		
45	Woodinville	11,350							\$125/hr.		Spokane agreement

Hearing Examiner Information from Larger and Smaller Cities