Chapter 2.76

HEARING EXAMINER

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2.76.010 Creation and purpose.
(1) Creation. The city hereby creates the office of hearing examiner consistent with Article XI, Section 11 of the Washington State Constitution, and Chapters 35.63 and 58.17 RCW, as written or hereafter amended. Unless the context requires otherwise, the term “examiner” shall include “examiner pro tem.”

(2) Purpose. The purpose of this chapter is to provide an efficient and effective land use regulatory system; provide for consistency and predictability in certain land use decision making; establish clear and understandable application of policies and regulations adopted by the city; and provide for fair and impartial determinations of land use decisions while ensuring procedural due process.

(3) State Law Incorporated by Reference. Any reference to state law herein is specifically incorporated by reference. (Ord. 047-07 § 3).

2.76.030 Appointment and term.
The examiner shall be appointed by the mayor with confirmation by the council, and shall serve at the pleasure of the mayor. The examiner shall be appointed based on his or her qualifications for the duties of the office and shall have the necessary training and experience in land use and related legal matters to conduct administrative or quasi-judicial hearings, and to render decisions according to law. The examiner shall hold no other classified, appointive, or elected position in city government. The examiner shall suggest an examiner pro tem to serve in the event of his/her absence or disability, or in the event of a conflict of interest. The appointment of an examiner pro tem is expected to be infrequent in nature. The mayor will confirm the appointment of an examiner pro tem, in writing, and specify the term of service. Confirmation of appointment of an examiner pro tem is not required by the council. The examiner pro tem will be entitled to the same compensation as the examiner during his/her term of service. (Ord. 047-07 § 4).

2.76.040 Compensation.
The examiner may be retained on a professional service contract on terms deemed appropriate by the mayor, with any necessary approval for budget purposes by the council. The contract shall specify that the examiner serves at the pleasure of the mayor, and that the examiner has authority to suggest appointment of an examiner pro tem to the mayor, to serve in the absence or disability or in the event of a conflict of interest of the examiner. (Ord. 047-07 § 5).

2.76.050 Conflict of interest.
(1) The examiner shall not conduct or participate in any hearing or decision in which:
(a) The examiner has a direct or indirect personal interest; or
(b) The examiner has a beneficial interest, directly or indirectly, in any aspect of the matter on which he or she is called upon to issue a decision; or
(c) The examiner has a direct or indirect familial interest which might influence or interfere with his or her decision-making process or give rise to a violation of the appearance of fairness doctrine as codified in Chapter 42.36 RCW, as written or hereafter amended, and the common law.

(2) The examiner shall disclose matters involving ex parte contacts, conflicts of interest or appearance of fairness issues prior to or at the beginning of any matter or immediately upon becoming aware of the need for such disclosure. The examiner shall recuse himself or herself if the
examiner believes his or her review of the matter would represent a conflict of interest or violate the appearance of fairness doctrine as set forth herein.

(3) In the event the examiner recuses himself or herself, an examiner pro tem will be appointed, according to POMC 2.76.030. (Ord. 047-07 § 6).

2.76.060 Improper influence.
No city official either elected or appointed shall attempt to influence the examiner in any matter officially before him or her so as to constitute misconduct by a public officer under Chapter 42.20 RCW, as written or hereafter amended, or that would constitute a violation of the appearance of fairness doctrine as codified in Chapter 42.36 RCW, as written or hereafter amended. (Ord. 047-07 § 7).

2.76.070 Organization and rules.
(1) Organization. The examiner operates independently of any department of the city, but will receive such administrative assistance from the planning director as is necessary to carry out the functions of his or her office.

(2) Rules. The examiner shall have the power to prescribe rules not in conflict with this chapter for procedural matters including adopting procedures for prehearing conferences, the scheduling and conduct of hearings, the submission of legal motions, briefs and other written documents, the scheduling of discovery, issuance of subpoenas for the attendance of witnesses or the production of information, receipt of evidence, and issues relating to settlement. (Ord. 047-07 § 8).

2.76.080 Powers.
(1) General. The examiner shall receive and examine all information in the official file, conduct hearings and administer preparation of the official record and issue a written recommendation or a written decision on the matter. The examiner is authorized to impose conditions on the applicant’s proposal, consistent with federal, state and local law. The examiner is authorized, as applicable, to hear and decide issues related to a taking of private property for public use without just compensation, and/or the denial of substantive due process of law, in addition to challenges to imposition of conditions or exactions on a project, whether based on constitutional, statutory or common law.

(2) Specific. In addition to the general authority as granted herein, the examiner shall have the authority granted to him in this code.

(3) The city council may, from time to time, grant to the examiner additional powers and authority as the council deems appropriate, consistent with state law and the city code, ordinances and resolutions. (Ord. 047-07 § 9).

2.76.090 Burden of proof.
The applicant has the burden of proof to establish, by a preponderance of the evidence, that the project or matter under consideration is consistent with applicable law and serves the interests of the community. (Ord. 047-07 § 10).

2.76.100 Notice of hearing – Staff report – Hearing.
(1) Notice of Hearing. The planning department shall, in coordination with the examiner, be responsible for assigning a date and assuring due notice of the hearing on the matter to come before the examiner. Notice of the time, place, location, and subject matter of the hearing shall be consistent with applicable law. Such notice shall be given a minimum of 10 days prior to the scheduled hearing.

(2) Staff Report. The director shall coordinate and assemble the reviews of other city departments and governmental agencies having an interest in the subject application as well as any written comments received from the public, and shall prepare a report summarizing the application and the department’s findings, conclusions, and recommendations. No later than five working days prior to the scheduled hearing, the report shall be filed with the examiner and copies thereof shall be mailed to the applicant and made available for public inspection, unless a different date has been established by the examiner pursuant to a scheduling order.

(3) Hearing. Before issuing a recommendation, the examiner shall hold one open record predecision hearing. Before issuing a decision, the examiner shall hold one open record public hearing thereon. The public hearing shall be conducted in accordance with such rules as the examiner may adopt pursuant to POMC 2.76.070. (Ord. 047-07 § 11).
2.76.110 Examiner’s recommendation/decision.
(1) Time for Issuance of Recommendation/Decision. Unless a longer period is agreed to by the applicant, the examiner shall issue a recommendation or decision within 10 working days after the close of the hearing and the record.
(2) Recommendation. A recommendation shall set forth findings of fact, conclusions and a recommendation. Findings shall be supported by substantial evidence in the official record. Conclusions shall follow from the findings and set forth the manner in which a decision by the council to approve or disapprove the project would or would not implement and conform to state law requirements as well as the comprehensive plan and development regulations and standards.
(a) Effect of Recommendation. A recommendation by the examiner shall be forwarded to the city council for scheduling of an open record hearing and decision on the matter that is the subject of the recommendation. The city council shall set the required public hearing on the recommendation at the next regularly scheduled meeting following the date of the examiner’s recommendation. An open record public hearing on the matter will be scheduled no later than 30 calendar days from the date the recommendation was issued.
(3) Decision. A decision will grant, modify and grant, or deny the application. A decision shall set forth findings of fact, conclusions and decision based on the record. Findings shall be supported by substantial evidence in the record. Conclusions shall follow from the findings, and set forth the manner in which the decision will or will not implement and conform to state law requirements as well as the city’s comprehensive plan and development regulations and standards. The decision will specify all conditions, exactions and restrictions imposed on the project or matter that is the subject of the decision. The decision will further specify the parties’ appeal rights.
(a) Effect of Decision. Unless a party files an appeal, a decision by the examiner is final 14 calendar days following the date of the decision. If no appeal has been filed within the applicable appeal period, the applicant may engage in activity based on the decision; provided, that any necessary permits have been issued. (Ord. 047-07 § 12).

2.76.120 Notice of decision.
Not later than five calendar days following the issuance of the examiner’s decision, copies thereof shall be mailed to the applicant, to parties of record and to any person who requested a copy of the decision. The original decision shall be maintained in the official record. (Ord. 047-07 § 13).

2.76.130 Reconsideration.
(1) Request for Reconsideration. The examiner has discretion whether to consider a request for reconsideration. A request for reconsideration must be in writing and filed by a party or aggrieved person within seven working days of the examiner’s decision. The request must include: the grounds for reconsideration, including specific reference to the decision and each claimed error therein whether error of law or fact, and any discovery of new evidence which, upon reasonable diligence, could not have been discovered by a party prior to the close of the hearing on the matter. Failure to allege error is grounds for summary denial of the request.
(2) Effect of Request. The filing of a request for reconsideration shall stay the running of the appeal period until the examiner issues a decision on the request. Upon issuance of a decision on a request for reconsideration, the time for filing an appeal will begin. The examiner will review the request in light of the official record and his or her decision, taking into account the grounds for the request. The examiner may deny the request; may set a hearing in order to supplement the official record and issue a revised decision following that hearing; or may revise the decision without a hearing. If the request is denied without further hearing or submission of materials by other parties, the denial must be issued in writing within five working days of the date of the request. The examiner has the authority to take any action consistent with the powers granted herein, in order to issue a decision on a request for reconsideration. Action taken by the examiner in response to a request for reconsideration, other than a denial, shall be in writing, and shall be issued within 21 calendar days of the date of the request. (Ord. 047-07 § 14).

2.76.140 Appeal from examiner’s decision.
(1) Jurisdiction. All appeals of a decision of the examiner will be to the city council.
(2) Standing. Only an aggrieved person shall have standing to appeal a decision of the examiner.

(3) How to Appeal.

(a) Only parties of record or an aggrieved person may appeal.

(b) An appeal must be in writing, and shall contain all grounds on which error is alleged, including specific reference to the official record and the decision and claimed errors in the decision whether they be errors of law or fact. Any reference to the official record must specify the document by name and/or exhibit number and should reference the applicable page number(s). Any reference to an error of law must include a specific reference to the law, municipal code, ordinance, policy or plan alleged to have been violated. The grounds on which the appeal is based shall be referred to herein as “the scope of the appeal.” The appeal must specify the action the appellant wishes the city council to take in order to correct the alleged error(s). Failure to raise a challenge to an issue of law or fact in the written appeal shall constitute a waiver of right to appeal on that issue of law or fact.

(c) A party of record or aggrieved person may include a group of people such as an association or legal entity. The group, association or entity must select a single contact person to represent the group and must identify that person in writing to the city, including the person’s address and telephone number(s). The identified contact person must be included with the written appeal, and the necessary fees. The identified contact person will receive required notices from the city pursuant to provisions of this chapter, and will be the contact person for purposes of procedural issues relating to the appeal. The purpose of selecting a single contact person to represent the group, association or entity is to avoid unnecessary duplication of written documents in support of or opposition to an appeal, to avoid delay in procedural matters, and to avoid duplication and unnecessary repetition of oral argument at the hearing set for the appeal. If a different contact person is later selected by the group or association, the city must be notified in writing of the change, including the address and telephone number(s) of the new contact person. Failure of receipt of any notice from the city, wherein the city was not timely notified of a change in the identified contact person, will not serve to raise any cognizable issue of denial of procedural due process.

(4) Fees for Appeal. An appeal will not be accepted unless accompanied by the required filing fee and the required deposit for a certified transcript of the hearing. The filing fee for an appeal shall be established by the council pursuant to the city’s fee resolution. In addition to the filing fee, the appellant must pay the costs for a certified transcription of the electronic recording of the hearing. The director will be responsible for obtaining a certified transcription in a timely manner upon receipt of the appeal and payment of the required filing fee and deposit for transcription services. If the actual costs of transcription are less than the deposit, a refund will be made to the appellant. If the actual costs of transcription are more than the deposit, the appellant must pay the additional costs upon notification by the director that costs are due. Failure to pay the actual costs of the transcript will be cause for dismissal of the appeal. Inability to pay the costs of the transcript will be taken into consideration by the examiner, upon submission of an affidavit of inability to pay, supported by documentation tending to prove the assertion of inability to pay. The appeal fee shall be refunded to the appellant, if the appellant substantially prevails on appeal. The city council shall decide whether an appellant has substantially prevailed on appeal, and shall so state in its decision and order. The transcription deposit and costs are nonrefundable.

(5) Effect of Appeal. The timely filing of an appeal will stay the effective date of the examiner’s decision until such time as the appeal is adjudicated by the city council or is withdrawn by the appellant.

(6) Burden of Proof on Appeal. The appellant has the burden of proof to show, by a preponderance of the evidence, that the examiner’s decision contains an error of law or fact, or that conclusions are incorrect. (Ord. 047-07 § 15).

2.76.150 Appeal date – Notice of appeal – Procedure on appeal.

(1) Setting the Appeal Date. The city council shall set a hearing on the appeal, which shall be noticed as a closed record appeal, at the next regular council meeting that follows the filing of an appeal. The city council may set the appeal as a special meeting, pursuant to RCW 42.30.080 as written or hereafter amended, or may set the appeal as an agenda item during a regular city council...
meeting. The date for the closed record appeal must occur within 30 calendar days of the final day upon which an appeal could be filed in the matter.

(2) Notice of Appeal. Notice of the closed record appeal date, time and location shall be sent to parties of record, and the appellant, and published in the newspaper of general circulation.

(3) Procedure on Appeal. The appeal to the city council is a closed record appeal. The appeal hearing is open to the public, but the participants for purposes of the appeal are limited to the parties of record and the appellant.

(a) Time for Submission of Documents. Any legal briefs, or other document in support of or in opposition to the appeal, must be filed according to the timelines specified herein:

(i) The appellant’s legal brief or other document in support of its appeal is due no later than 10 calendar days prior to the date set for the appeal hearing.

(ii) All other parties of record who intend to submit a legal brief or other document in support of or in opposition to the appeal must file the brief or other document no later than five calendar days prior to the date set for the appeal hearing. Parties of record who do not submit a legal brief or other document in support of or in opposition to the appeal will not have the ability to present oral argument to the council.

(iii) The appellant may file a brief or other document in reply to briefs or documents filed by parties of record no later than two calendar days prior to the date set for the appeal hearing. Only the appellant is allowed to file a reply brief or other document.

(4) Content of Legal Briefs or Other Documents. The content of a legal brief or other document allowed by this section must be confined to the scope of appeal as set forth in POMC 2.76.140(3). New evidence that was not presented to or considered by the examiner is not allowed to be argued in the written documents submitted for the appeal unless the new evidence:

(a) Relates to the validity of the examiner’s decision at the time it was made and the party offering the new evidence did not know and was under no duty to discover or could not reasonably have discovered the evidence until after the hearing examiner’s decision; or

(b) The examiner improperly excluded or omitted the evidence from the record.

Arguments outside the scope of appeal are not allowed, and a party may object to the same.

(5) Record on Appeal. The official file will be the record on appeal.

(6) Oral Argument. Only the appellant and parties of record who have submitted a legal brief or other written document for purposes of the appeal will be allowed to present an oral argument at the appeal hearing. Oral argument will be limited to 10 minutes per party, unless a different time is specified by the city council.

(7) Presiding Officer. The mayor will be the presiding officer during the appeal.

(8) Continuation of Appeal. The city council may, by motion passed by majority consent, continue the hearing if it is unable to hear all of the argument on the appeal within a reasonable time frame for the scheduled hearing, or if it determines that it needs more information from the parties and such information is within the scope of the appeal. No new notice of continuation of the appeal hearing will be necessary.

(9) The council may choose to adjourn into closed session for deliberations on the matter, at the close of the appeal hearing, pursuant to RCW 42.30.140. (Ord. 047-07 § 16).

2.76.160 Decision on appeal.

(1) If the council determines that there is no basis for the alleged errors set forth in the appeal, it may adopt the findings and conclusions of the examiner and affirm the decision of the examiner. The city council may accept, modify or reverse the examiner’s decision, and/or any findings and/or conclusions therein. In making its decision the council should consider:

(a) Whether the examiner’s conclusions or decision contain error or are inconsistent with the law, and/or with the city’s adopted plans and policies, or are not based on findings established by the examiner; and

(b) Whether the examiner’s proceedings were materially affected by irregularities in procedure; and

(c) Whether the examiner’s findings were unsupported by substantial evidence in view of the entire record.

(2) The council shall issue its decision within 60 calendar days of the filing of the appeal. The director shall prepare copies of the council’s deci-
sion and mail a copy to each party of record within five calendar days of the issuance of the council’s decision. (Ord. 047-07 § 17).

2.76.170 Judicial review.
A final decision (after exhausting administrative remedies) may be appealed by a party of record pursuant to Chapter 36.70C RCW in the Kitsap County superior court. The land use petition must be filed within 21 calendar days after the decision by the council. (Ord. 047-07 § 18).

Chapter 2.78
DESIGN REVIEW BOARD

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2.78.030 Board established – Membership.
2.78.040 Terms of membership.
2.78.050 Meetings.
2.78.060 Powers and duties.
2.78.070 Conflict of interest.
2.78.080 Administrative support.

2.78.010 Purpose of board.
The purpose of the design review board (DRB) is to review development applications associated with development in the downtown overlay district area. The DRB will review applications and make recommendations to the director of planning regarding the applications’ consistency with adopted design guidelines. (Ord. 006-08 § 1; Ord. 035-07 § 1).

2.78.020 Definitions.
(1) “Board” or “DRB” means the design review board.
(2) “Director” means the director of planning or designee.
(3) “Design guidelines” means the design and building standards for the downtown overlay district as now or hereafter adopted by city council resolution or ordinance. (Ord. 006-08 § 1; Ord. 035-07 § 1).

2.78.030 Board established – Membership.
(1) Appointment. There is created a design review board consisting of not less than five and not more than seven members who shall be appointed by the mayor subject to confirmation by the city council. Vacancies occurring otherwise than upon the expiration of terms may be filled for the unexpired terms by the mayor subject to confirmation by the city council.
(2) Membership. A five-member board shall consist of three lay members who reside within city limits or reside within the Port Orchard urban growth area and have an interest in architecture, building, or design, and two professional members who reside within city limits or reside within the Port Orchard urban growth area or own a business.