

CITY of COVINGTON

HEARING EXAMINER

RULES OF PROCEDURE

**Issued pursuant to Section 2.25
of the Covington Municipal Code
on February 10, 2009**

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Section 1 INTRODUCTION

1.1 AUTHORITY

Section 2.25.080 of the Covington Municipal Code authorizes the promulgation of rules of procedure for the hearing examiner. These rules supplement municipal code provisions for matters within the hearing examiner's jurisdiction. In case of conflict between these rules and the municipal code, the municipal code shall control.

1.2 PURPOSE

An independent hearing examiner conducts hearings to apply general policies and regulations adopted by the City Council to specific proposals or situations. These rules govern administrative practice and procedure before the hearing examiner and are established to make hearings fair and efficient.

1.3 APPLICABILITY

These rules apply to the following types of hearings: Hearings on land use applications, appeal hearings, and code enforcement hearings.

1.4 JURISDICTION

The hearing examiner's jurisdiction is limited to those matters specifically identified in the Covington Municipal Code or assigned to the examiner by City ordinance or Council motion. Decisions by the examiner may expressly retain jurisdiction for purposes which are within the scope of the original matter.

Section 2
RULES OF GENERAL APPLICATION

2.1 DEFINITIONS

The following definitions shall apply throughout these rules unless context or subject matter clearly indicates that another meaning is required:

- A. "Appeal" means a challenge to a City staff decision or action for which jurisdiction is assigned to the hearing examiner under City code.
- B. "Appellant" means the person, organization, or authorized representative appealing an administrative decision to the hearing examiner pursuant to City code or appealing the examiner's decision to a higher authority, depending upon the context.
- C. "Applicant" means the person, organization, or authorized representative seeking City approval of one or more permits over which the examiner has jurisdiction.
- D. "Council" means the Covington City Council.
- E. "Examiner" means the hearing examiner, deputy hearing examiner, and any examiners *pro tem* appointed by the City Manager pursuant to CMC 2.25.030.
- F. "Interested person" means any individual, partnership, corporation, association, or public or private organization of any character significantly affected by a proceeding before the examiner or identified by the ordinance or code provision under which the proceeding is brought as having a right to participate.
- G. "Party" means and is limited to the applicant(s), the appellant(s), the applicable City department, and any entity granted party status through intervention.
- H. "Land use application" means an application for a City permit or approval requiring a pre-decision hearing by the examiner, such as a rezone, preliminary subdivision, conditional use permit, variance, street vacation petition, etc.
- I. "Staff" means City of Covington employees and contract employees who work for the City department(s) having responsibility for processing land use applications, for code enforcement, and for other matters which fall within the examiner's jurisdiction.

2.2 INTERPRETATION OF RULES

- A. The examiner shall interpret the Hearing Examiner Rules of Procedure and determine how the rules apply in specific instances. An affected party may petition the examiner during the pendency of an appeal or other proceeding to request a

declaratory ruling regarding the applicability of these rules to specific actual circumstances. Except during hearing, such request must be in writing and clearly identify the subject rule(s) and describe the circumstances for which the declaratory ruling is sought.

- B. These rules address most normal circumstances which might arise during examiner proceedings. An unforeseen situation may arise which does not lend itself to full, literal compliance with these rules. Therefore, the examiner reserves the right to exercise reasonable and necessary flexibility and discretion when applying these rules to extraordinary circumstances.
- C. Where questions of practice and procedure arise that are not addressed by these rules, the hearing examiner shall determine the practice or procedure that the examiner deems most appropriate and consistent with providing fair treatment and due process. In making such determinations, the examiner may look to the current King County Superior Court Civil Rules for guidance.

2.3 EXPEDITIOUS PROCEEDINGS

The examiner and all parties shall make every reasonable effort to avoid delay at each stage of every proceeding consistent with fairness to all parties.

2.4 CONSOLIDATION

When practical and consistent with ordinance requirements, the examiner will consolidate land use matters for hearing. Any party may bring to the attention of the examiner the need for consolidation.

2.5 SCHEDULING HEARINGS

- A. Promptly following receipt of a timely appeal, the examiner shall schedule a hearing consistent with the requirements of the applicable ordinance(s) and these rules.
- B. Applications requiring a hearing examiner decision shall be scheduled for hearing promptly upon notification by the City that the application is complete and ready for scheduling. The hearing shall be scheduled for a mutually-agreed date coordinated by City staff.
- C. All applicable fees, including appeal fees, shall be paid prior to scheduling a hearing in any matter.

2.6 COMPUTATION OF TIME

- A. In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default from which the designated period of time begins to run

shall not be included.

- B. The last day of the period so computed shall be included, terminating at 5:00 p.m., unless the last day of the period is a Saturday, Sunday, or legal holiday as defined in RCW 1.16.050, in which case the period shall run until 5:00 p.m. of the next day which is not a Saturday, Sunday, or legal holiday.
- C. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, or legal holidays shall be excluded from the computation.
- D. "Days" as referenced in these rules are calendar days.

2.7 EX PARTE COMMUNICATION

- A. For purposes of this rule, "*ex parte* communication" means a written or oral communication with the examiner outside of a public hearing and not included in the public record.
- B. Pursuant to Chapter 42.36 RCW, no interested person (nor his or her agent, employee, or representative) shall communicate *ex parte* directly or indirectly with the examiner concerning the merits or facts of any matter being heard before the examiner, or any factually related matter. This rule shall not prohibit *ex parte* communications about schedules and other procedural matters.
- C. The examiner shall not communicate *ex parte* directly or indirectly with any interested person (nor his or her agent, employee, or representative) in such matters except about procedural matters as identified above.
- D. If a substantial, prohibited *ex parte* communication is made to or by the examiner, such communication shall be publicly disclosed at the next and each succeeding public hearing regarding the subject petition or application, or, if there is no further such hearing, disclosure shall be made in writing to all parties of record within ten days of the date of the improper communication.

2.8 ELECTRONIC COMMUNICATIONS

- A. Fax and e-mail may be used in communicating with the examiner. The sender of such a communication has the obligation to ensure receipt. All such communications are subject to the *ex parte* communication restrictions.
- B. E-mail filing of applications, requests for reconsideration, and appeals is not permitted unless expressly authorized by City code or rule.
- C. Correspondence related to examiner cases may not be submitted to the City by e-

mail unless expressly authorized by City code or rule. If so authorized, the sender shall be solely responsible to ensure that e-mail correspondence is actually received by the appropriate staff person and entered into the appropriate application or appeal file.

2.9 MAINTAINING ORDER

The examiner may take any actions necessary to conduct a fair and orderly hearing, including but not limited to:

- A. Removing or having removed from the hearing room any person whose conduct is interrupting the hearing;
- B. Ordering the hearing room cleared and continuing in session;
- C. Adjourning the hearing and reconvening the hearing at another location; and
- D. Any other such action necessary to maintain the order of the hearing.

2.10 RIGHTS OF A PARTY

- A. Every party in any proceeding before the examiner shall have a right to the following: Due notice, presentation of evidence, objection, motion, argument, rebuttal, cross-examination, and any other rights essential to a fair hearing.
- B. Parties have the right to be represented by an attorney. Representation by an attorney is not required.
- C. All parties, witnesses, and others participating in and observing hearings shall conduct themselves with civility and deal courteously with all persons involved in the proceedings.
- D. Each party shall provide the examiner and other parties with a current name and mailing address for receipt of official notifications and service of other documents. Neither the examiner nor the City will make further mailings to a party if mail sent to the address provided by the party is returned by the postal service as undeliverable, unless and until a correct address is provided by the party.

2.11 PARTY REPRESENTATIVE REQUIRED

When a party consists of more than one individual, or is a group, organization, corporation, or other entity, the party shall designate an individual to be its representative and inform the examiner of the name, address, and telephone number of that designated representative. The rights of such an appellant shall be exercised by the person designated as the party representative. Notice or other communication to the party representative, is notice or communication to the party.

2.12 NOTICE OF APPEARANCE

When a party is represented by an attorney, the attorney shall file a notice of appearance with the examiner and send a copy of that notice to the other parties. Where the appellant attorney filed the appeal and indicated his/her representative capacity, a notice of appearance does not need to be filed. The notice of appearance shall serve to designate the attorney as the party representative.

2.13 WITHDRAWAL OF APPLICATION/APPEALS

- A. Withdrawal of an application/appeal shall be made by the applicant/appellant in writing at any time prior to the close of the record or expiration of the time for submittal of any post-hearing briefs, whichever is later.
- B. An appellant's request to withdraw shall be granted as a matter of right and the appeal dismissed.
- C. There shall be no appeal from a withdrawal. Withdrawal terminates City consideration of the application/appeal.
- D. Applicants shall remain responsible for the payment of fees and costs already incurred by the City with respect to the application.

2.14 MOTIONS

- A. Filing. Any person wishing to file a prehearing motion or request (such as a request for a prehearing conference, for establishment of special hearing procedures, *etc.*) shall submit it in writing to all of the parties and concurrently to the examiner at least 14 days prior to the scheduled hearing date.
- B. Response. A party may file with the examiner a written response to a filed motion no later than 7 days after the date that the motion was filed. Responses will be considered by the examiner only if received prior to issuance of a dispositive order ruling on the motion.
- C. Ruling. The examiner will rule on each motion by issuance of a written order or orally at the hearing. Multiple motions may be consolidated for purposes of written order issuance where efficiency would be served and where the rights of the parties would not be prejudiced.
- D. Distribution. Written orders issued prior to the scheduled hearing will be mailed or faxed to each party of record where time allows, distributed at the hearing, or announced at the hearing. Oral rulings made during a hearing will be memorialized within the written decision on the application/appeal.

2.15 ORDER OF PROCEEDINGS

- A. The format for an open record 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 readily and efficiently available to the examiner. The formats for land use application hearings, combined application and appeal hearings, code enforcement appeal hearings, and other appeal hearings are set forth in Sections 3, 4, and 5 of these rules.
- B. Notwithstanding the designated order of proceedings in subsection (A), the order may be modified or a different order established as the examiner deems necessary for the clear and fair presentation of evidence. The order of the hearing may also be modified as agreed upon by the parties with the examiner's approval.
- C. The order of presentation at hearing shall not alter or shift any burden(s) or presumption(s) established by applicable law(s).
- D. The examiner may ask questions of any witness, including City staff, at any time during the hearing to seek clarification or elaboration of testimony given. The examiner may request submittal of additional information to facilitate a complete and accurate evaluation of the issues.
- E. The examiner may request that particular issues be addressed in testimony and/or argument.

2.16 EVIDENCE

- A. Burden of proof. The applicant/appellant shall have the burden of proof as to material factual issues, except in code enforcement proceedings where the City has the burden of proving the violation, and except where applicable City code provisions or state law provide otherwise.
- B. Admissibility. The hearing generally will not be conducted according to technical rules relating to evidence and procedure. Any relevant evidence shall be admitted if it is the type which possesses probative value commonly accepted by reasonably prudent people in the conduct of their affairs. Irrelevant, immaterial, unreliable, or unduly repetitious evidence may be excluded. The rules of privilege shall be effective to the extent recognized by law.
- C. Exhibits. Hearing participants may submit documentary evidence to the record during their direct and rebuttal portions of the hearing. A party offering such a document shall provide a copy to all other parties, unless previously disclosed through the pre-filing process. Such evidence will be marked as exhibits when accepted for entry by the examiner.

- D. Objections. An objection to the admission or exclusion of evidence shall state briefly the ground for objection. Any evidence entered into the record without objection shall be deemed admissible. The examiner shall determine the probative value, if any, of all evidence entered into the record.
- E. Evidence received subsequent to the hearing. No documentary material submitted after the close of the hearing will be considered by the examiner unless, at such hearing, the examiner granted additional time to submit such material and stated on the record that the hearing record was left open for such receipt.

2.17 OATH OR AFFIRMATION

All testimony will be taken under oath or affirmation administered by the examiner. Any potential witness who declines to be sworn in shall be barred from testifying, except that attorneys who will not be offering testimony will not be required to be sworn in.

2.18 CROSS-EXAMINATION

- A. Cross-examination generally is not necessary to the examiner's fact-finding process. However, where the hearing assumes distinctly adversarial proportions, some or all of the parties are represented by counsel, expert witnesses are called, and/or complex, technical, and disputed factors are involved, the examiner may allow cross-examination.
- B. The examiner will allow a party to cross-examine expert witnesses (which term includes public agency staff) and other witnesses of a party in accordance with these guidelines. Only one person representing each party may cross-examine any given witness. (This rule does not prevent different persons representing one party from cross-examining different witnesses. It only prohibits more than one person representing a given party from cross-examining a single witness.) Cross-examination after any re-direct testimony shall be limited strictly to the subject(s) of the re-direct testimony.
- C. Within the above guidelines, the allowance and scope of cross-examination is within the discretion of the examiner.

2.19 LIMIT ON TESTIMONY

The examiner may impose reasonable limitations on the number of witnesses heard and on the nature and length of their testimony. Where time limits are imposed, time is not cumulative and may not be given or traded to another party. Testimony shall be concise and non-repetitious.

2.20 OPTIONAL WRITTEN CLOSING STATEMENTS

- A. A party's request for establishment of a written closing statement process must be made prior to the close of the hearing. A written closing statement process may be established by the examiner upon the request of a party, and shall be in lieu of oral closing statements. Such a process may depend on execution by the applicant's/ appellants' waiver of the decision timeline.
- B. The written closing statement submittal schedule shall be determined either at a prehearing conference or before the close of the hearing. Statements shall be submitted in the same order as oral closing statements would have been offered. The first written closing statement will be due one week after the close of the hearing; the remaining statements will be due at one week intervals thereafter. All written closing statements will be entered as exhibits in the hearing record. No new evidence may be presented in a closing statement. The hearing record shall close upon receipt of the last closing statement or upon expiration of the period for submittal of closing statements, whichever occurs first.
- C. No party shall be compelled to produce a written closing statement. Non-submittal of a written closing statement before the established deadline shall not be held against the party which did not submit the statement. The running of a time period without submittal of the expected closing statement(s) shall constitute a waiver of the right to submit a statement by the party who fails to submit the statement.
- D. Special procedures and timing may be established where to do so would serve the interests and preserve the due process rights of the parties.

2.21 DISQUALIFICATION

- A. The examiner on his or her initiative may enter an order of disqualification in the event of personal bias, prejudice, financial interest, or to preserve the appearance of fairness.
- B. A party may file an affidavit (a statement in writing and under oath) stating facts supporting the belief that such party cannot have a fair and impartial hearing. The affidavit shall be filed not less than ten days before the hearing unless good cause is shown, and in any case before the examiner makes any discretionary ruling; provided an affidavit seeking disqualification on appearance of fairness grounds may be filed at any time, but must be filed promptly after the basis for disqualification is known or should have been known to the party seeking such disqualification. The fact that the examiner has considered the same or a similar proposal in another hearing, or has made a ruling adverse to the interests of a party in this or another hearing, or has considered and ruled upon the same or a similar issue in the same or similar context, shall not be a basis for disqualification.

The examiner shall rule on the affidavit prior to making any other ruling and prior to proceeding with the hearing.

- C. In case of disqualification, an examiner pro tem shall be assigned to hear the matter.

2.22 SITE VIEW

- A. The examiner may view a site before or after a hearing. Failure to view the site will not invalidate the examiner's decision.
- B. When a site has been viewed, the examiner will so state at the hearing and/or in the written decision.
- C. The site view will be taken out of the presence of any interested party wherever feasible. Where accompaniment by an interested party is necessary to fully view the property, no substantive discussion may occur during the site view.

2.23 CONTINUING OR REOPENING HEARING

- A. The examiner may continue proceedings for good cause on his/her motion, or the motion of a party, announcing the continuance on the record at a public hearing and specifying the date, time, and place. No further notice is required.
- B. If the examiner determines after the hearing has closed that there is good cause to reopen a hearing, notice in writing of the further hearing shall be given to all parties who were present at the hearing, and shall specify the date, time, and place.

2.24 LEAVING RECORD OPEN

The examiner may leave the record of hearing open at the conclusion of a hearing in order to receive argument or for other good purpose. Parties shall be provided notice of the consideration of any evidence received after hearing and shall have an opportunity to review such evidence and to file rebuttal evidence or argument. Except as provided in Rule 2.23 and for observations made during site views per Rule 2.22, information submitted after the close of the record shall not be included in the hearing record or considered by the examiner in making the decision or recommendation.

2.25 DECISIONS AND RECOMMENDATIONS

Except as otherwise permitted by these rules, the examiner shall issue a recommendation or decision within fourteen (14) days of the closure of the record. Copies of the recommendation or decision shall be mailed to all parties of record, and to any person who is not a party of record but who signs the sign-up sheet and provides his or her address at

the hearing requesting a copy of the recommendation or decision. A copy of the list of parties of record may be obtained from the City upon request. The examiner's recommendation or decision shall contain findings of fact, conclusions based thereon, and a recommendation or decision consistent with those conclusions. In addition, the examiner's recommendation or decision may include conditions necessary to mitigate any impacts of the proposal and a brief statement of appeal rights of the parties.

2.26 SUMMARY ORDERS ON REMAND

The examiner shall issue a written summary order without further hearing when: (1) an examiner decision has been remanded in whole or in part by an appellate body, (2) the remand order either does not require or bars the taking of additional testimony or evidence, and (3) the examiner believes that the record provides an adequate basis to rule on the remanded issue(s). Summary orders shall be sent to all persons who received the original decision. Summary orders shall have the same legal effect as did the original decision except as to any code-established limits on appeal.

2.27 RECONSIDERATION

- A. A party who believes an examiner's decision or recommendation is in error because of: (1) the existence of new evidence not available at the time of the hearing, (2) a procedural error, (3) a factual error which is material to the decision, or (4) an error in a legal ruling, may file a written request for reconsideration of the decision or recommendation. The written request for reconsideration must be received by the hearing examiner and by all parties within ten (10) days after the date of issuance of the examiner's decision or recommendation. The examiner, in his or her discretion, shall determine what further action is proper, and within twenty (20) days after the date of issuance of the examiner's decision or recommendation shall issue that determination in writing to all parties of record.
- B. The examiner may either: (1) deny the request, (2) issue a revised decision or recommendation, or (3) schedule an additional public hearing. The examiner shall summarily dismiss a request for reconsideration that is without merit on its face, or brought merely to secure a delay.
- C. A request for reconsideration does not stop the running of the time for filing appeals, whether to the City Council or Superior Court.
- D. A reconsideration request for which one of the actions specified in Subsection (B) has not been taken within 10 days of close of the reconsideration period shall be deemed to have been denied.
- E. The examiner's action following reconsideration is not subject to further requests for reconsideration.

2.28 CLARIFICATION

A party may file a written request for clarification of the decision or recommendation. Alternatively, the examiner may issue a clarification upon his or her own motion. A clarification may not materially alter the outcome of the decision or recommendation. A request for clarification does not stop the running of the time for filing appeals, whether to the City Council or Superior Court. The written request for clarification must be received by the hearing examiner and by all parties within seven (7) days after the date of issuance of the examiner's decision or recommendation. The examiner, in his or her discretion, shall determine what further action is proper, and within seven (7) days after filing of the request shall issue that determination in writing to all parties of record.

2.29 CLERICAL ERRORS

The examiner may correct obvious clerical errors in decisions on his/her initiative or in response to a request from a party of record. Clerical corrections are limited to those clearly identifiable from the public record. Issuance of a clerical correction has no effect upon any time limit provided under code or these rules.

2.30 TERMINATION OF JURISDICTION

The jurisdiction of the examiner in a matter shall terminate upon the issuance of his or her final action in that matter. The examiner's final action is the issuance of a recommendation or decision unless a request for reconsideration or clarification is timely filed. If a request for reconsideration or clarification is timely filed, the final action of the examiner is his or her determination on the reconsideration or clarification request.

2.31 RECORD RETENTION

The official case record and other related materials shall be forwarded to the City Clerk for storage after a matter has been finally acted upon by the City Council or by the examiner. The official case record consists of:

- A. The written case record, which includes all documentary written materials and other exhibits submitted for consideration by the examiner, the examiner's decision(s), the register of parties of record, and the list of exhibits and witnesses maintained by the clerk.
- B. A recording of the hearing; however, where a qualified court reporter retained by the City reports the hearing, the reporter's transcript of proceedings shall constitute the official transcript of the oral proceedings.

Section 3 Land Use Application Hearings

3.1 APPLICABILITY

In addition to the Rules of General Application in Section 2, the rules in Section 3 shall govern review of matters where the hearing examiner is to hold a public hearing and issue a decision on a land use application or other original jurisdiction matter, or prepare a recommendation for the City Council. In case of conflict with Section 2 rules, Section 3 rules shall control.

3.2 NOTICE OF HEARING

Rules governing notice of hearings before the examiner are provided in the Covington Municipal Code. Unless notice is given to the contrary, hearings will be conducted during regular working hours in Covington City Hall at 16720 SE 271st Street, Covington, Washington.

3.3 PUBLIC HEARING FORMAT

A public hearing shall include, but need not be limited to, the following:

- A) Land Use Application Hearings:
 - 1. Introduction by Hearing Examiner
 - 2. Direct Testimony & Evidence: Applicant, City Staff, General Public
 - 3. Rebuttal Testimony & Evidence: Applicant, City Staff, General Public
 - 4. Closing Statements (Optional): City Staff, Applicant

- B) Combined Application and Appeal Hearings:
 - 1. Introduction by Hearing Examiner
 - 2. Direct Testimony & Evidence: Applicant, on the merits; Appellant, on the appeal & merits; Respondent City, on the appeal & merits; General Public
 - 3. Rebuttal Testimony & Evidence: Applicant, Appellant, Respondent City, General Public
 - 4. Closing Statements (Optional): Applicant, Respondent City, Appellant

3.4 STAFF REPORT ON APPLICATION AND RESPONSE

- A. Filing. A written report by the involved City department(s) shall be delivered to the examiner and the applicant at least 14 days prior to the date of the public hearing. Staff reports shall also be made available for public viewing at City Hall. In the examiner's discretion, failure to timely provide the report may constitute grounds for continuing the scheduled public hearing. In so determining, the examiner shall consider the particular circumstances of the case, the possible prejudice to the persons failing to receive a copy of the report, and the justification, if any, for the

failure to comply. Any such continuance shall normally be for not less than three weeks. When a case is continued under this rule, the examiner may establish a deadline prior to the continued hearing for further submittals.

- B. Content. The staff report should include information which staff believes will have probative value in the open record hearing process and/or which will be necessary for preparation of a properly and fully considered decision. Such information should include, but shall not be limited to:
1. Project proposal;
 2. Application information;
 3. Procedure and notice requirements;
 4. Land use/zoning findings, conclusions, and recommendations;
 5. Water and sewer findings, conclusions, and recommendations;
 6. Storm drainage findings, conclusions, and recommendations;
 7. Traffic, circulation, and road standards findings, conclusions, and recommendations;
 8. Sensitive areas findings, conclusions, and recommendations;
 9. Any other findings, conclusions, and recommendations;
 10. Staff recommendation; and
 11. Exhibit list.
- C. Exhibits. City staff shall prepare a list of exhibits. The listing and a copy of each exhibit shall be available at City Hall for public review at the same time that the staff report becomes available. Such exhibits should include, but shall not be limited to:
1. The original or a clear and complete copy of the application;
 2. Documentation of application completeness;
 3. Current site plan(s);
 4. Documentation of compliance with the procedural requirements of the State Environmental Policy Act (SEPA);
 5. Required public notices;
 6. Any documents specifically requested by the applicant to be included as an exhibit; and
 7. All substantive letters from citizens regarding the application.
- D. Responses. Parties and interested persons may file with the examiner written responses to the staff report or written statements opposing an application. Copies of all responses or statements shall be delivered to the City concurrent with filing with the examiner, and should be served on opposing parties to the extent reasonable.

3.5 DECISION

The examiner shall issue a written decision or recommendation as required in the applicable ordinance(s). The decision shall include, but not be limited to, a statement of the following:

- A. Background. The nature and background of the proceeding.
- B. Findings. The individual facts that the examiner finds relevant, credible, and requisite to inform the City.
- C. Conclusions. Legal and factual conclusions based upon specific provisions of law and the findings of fact.
- D. Decision. The examiner's decision as to whether the application or petition is approved, approved with conditions, or denied.
- E. Findings of fact that should be denominated conclusions of law shall be deemed to be conclusions of law. Conclusions of law that should be denominated findings of fact shall be deemed to be findings of fact.

3.6 RECORD

The record of a public hearing shall include, but need not be limited to, the following materials:

- A. Application or petition;
- B. Department's report and recommendation;
- C. Environmental documents, special studies, reports, reviews, correspondence, memos and other public documents relating to the matter under consideration and contained within the City file for the matter, and transmitted to the hearing examiner, provided that any party may object to the admission into evidence of specific items contained within the City file. Such objections shall be made prior to or at the opening of the public hearing. The examiner shall rule on such objections prior to the close of the public hearing;
- D. Written comments from the public and other agencies received during the Director's review;
- E. Exhibits and written comments received by the hearing examiner prior to the close of the record;
- F. Statement of matters officially noticed (if any);
- G. Hearing examiner's findings, conclusions, and decision;
- H. Notice(s) and mailing list(s) for notice and decision;
- I. The tape recording and/or transcript of the public hearing.

Section 4 APPEAL HEARINGS

4.1 APPLICABILITY

In addition to the rules of general applicability in Section 2, the rules in this section shall apply to appeals. In case of conflict between Section 2 rules and Section 4 rules, Section 4 rules shall control.

4.2 FILING

- A. Compliance with Rules. All appeals must comply with these rules and with the requirements established in the applicable ordinance(s) under which the appeal is filed.
- B. Timeliness. To be considered timely filed, an appeal must be received by the Covington City Clerk no later than 5:00 PM on the last day of the appeal period.
- C. Fees. A filing fee shall accompany an appeal, as required by City ordinance or resolution.

4.3 CONTENT OF APPEAL

An appeal must be in writing and contain the following:

- A. The action or decision appealed, including the date thereof;
- B. The City department that took the action or made the decision;
- C. The name, address and telephone number of the appellant;
- D. The name, address, telephone and fax number of the attorney or other representative, if any for the appellant;
- E. A brief statement as to how the appellant is significantly affected by or interested in the matter appealed;
- F. A brief statement of the errors that the appellant believes were made in the action or decision being appealed, or the procedural irregularities associated with the action or decision, noting appellant's specific exceptions and objections to the decision or action being appealed. Unless amendment is allowed the identification of errors will define and limit the issues the examiner will consider;
- G. The relief requested, such as reversal or modification; and
- H. Any other information required by the Covington city code.

4.4 CLARIFICATION OF APPEAL STATEMENT

If, within ten (10) days of the receipt of an appeal, the examiner determines that the appeal is vague or ambiguous or does not sufficiently set forth the exceptions and objections with regard to the appealed matter, the examiner may require that the appellant amend the appeal. Within seven (7) days of notice to amend, the appellant shall file a written clarification of the appeal as required by the examiner. If the appeal is not amended by 5:00 p.m. of the last day of that time period, it shall be dismissed by the examiner.

4.5 AMENDMENT

For good cause shown, the examiner may allow an appeal to be amended within five (5) days after it has been filed. A request to amend an appeal shall be made by the appellant in writing and shall be filed within the five (5) day time period, together with the proposed amended appeal. In deciding whether to allow such an amendment, the examiner shall attempt to ensure that the fair hearing opportunity of other parties will not be prejudiced by the amendment. A timely filed amendment, if allowed, shall relate back to the date of filing of the original appeal.

4.6 DISMISSAL OF APPEALS

- A. The examiner may summarily dismiss an appeal in whole or in part on the motion of the party or on the examiner's own motion if the examiner concludes that the appellant lacks standing to appeal, or the appeal: (a) was untimely filed, (b) fails to state a claim for which the examiner has jurisdiction to grant relief, or (c) it is without merit on its face, frivolous, or brought merely to secure delay.
- B. Any party may request dismissal of all or part of an appeal at any time with notice to all parties. The examiner may make a ruling on a motion to dismiss based upon written arguments or may call for oral arguments.
- C. When the decision or action being appealed is withdrawn by the issuing department, the appeal becomes moot and shall be dismissed.

4.7 INTERVENTION

An interested person may petition the examiner to intervene as a party. The petition shall be filed at least seven (7) days prior to the appeal hearing and shall set forth reasons why the petitioner should be allowed to participate. The examiner may provide opportunity for reply. The petition shall be considered at or before the beginning of the hearing and intervention shall be allowed only if the examiner so orders, and only upon a showing of a substantial or significant interest that is not otherwise adequately represented.

4.8 NOTICE OF HEARING

Notice of the time and place of an appeal hearing as required by the applicable ordinance or Code shall be provided directly to the parties.

4.9 HEARING FORMAT

The hearing format for appeals of issues not combined with a land use application and not a code enforcement appeal shall adhere to the following format:

- A. Introduction by Hearing Examiner
- B. Direct Testimony & Evidence: Appellant – Respondent City – General Public
- C. Rebuttal Testimony & Evidence: Appellant – Respondent City – General Public
- D. Closing Statements (Optional): Respondent City – Appellant

4.10 RECEIPT OF CITY FILE

A copy of the official City file concerning the action which is the subject of the appeal shall be sent to the examiner at least fourteen (14) days before the date of the appeal hearing, and shall contain all documents used to reach the determination which is the subject of the appeal.

4.11 RESPONSE TO APPEAL

The City shall send copies of any written response to the appellant's objections and exceptions to the examiner and all parties to the appeal at least fourteen (14) days prior to the appeal hearing.

4.12 PRE-FILING OF EXHIBITS

Each appellant shall assemble and file one copy of all documents or exhibits which that party intends to submit at the hearing not less than seven (7) days prior to the scheduled appeal hearing.

4.13 DEFAULT

The hearing examiner may dismiss an appeal by an order of default where the appellant, without good cause, fails to appear or is unprepared to proceed at a scheduled and properly noticed hearing.

4.14 DECISION

- A. Issuance. The examiner shall issue a written decision and provide a copy of that decision to each party representative within the time required by the applicable ordinance. If more than one ordinance applies and the time limits specified conflict, the shorter period shall apply unless the parties agree to the longer period.

- B. Judgment on Relief Requested. Unless proscribed by applicable ordinance(s), the examiner's decision may affirm, reverse, modify, or remand the City's decision or other action that is the subject of the appeal.
- C. Contents. A decision of the hearing examiner on appeals shall include, but not be limited to, a statement regarding the following:
 - 1. Background. The nature and background of the proceeding, including identification of party representatives participating in the hearing, prehearing determinations, and other similar information.
 - 2. Findings. The individual facts that the examiner finds relevant, credible, and requisite to the decision, based on the evidence presented at hearing and those matters officially noticed. (This may include recitation of relevant provisions of ordinance, other regulation, or case law.)
 - 3. Conclusions. Legal and factual conclusions based upon specific provisions of law and the findings of fact.
 - 4. Decision. The hearing examiner's decision as to the outcome of the appeal (affirm, modify, reverse, or remand) shall be based upon a consideration of the whole record and supported by substantial evidence in the record.
 - 5. Any finding of fact that should be denominated a conclusion of law shall be deemed to be a conclusion of law. Any conclusion of law that should be denominated a Finding of Fact shall be deemed to be a finding of fact.
- D. The decision may also include an order disposing of contested issues and/or directing parties to take actions consistent with the decision.

4.15 RECORD

The record of an appeal shall include the following:

- A. Decision or action being appealed;
- B. Appeal statement;
- C. Evidence received or considered;
- D. Pleadings, procedural rulings, and other non-evidentiary materials that are part of the examiner's file;
- E. Statement of matters officially noticed, if any;
- F. Findings, conclusions and decision of the hearing examiner;
- G. Recording and/or transcript of the hearing; and
- H. An affidavit or certificate of the written notice given of the appeal hearing.

Section 5 CODE ENFORCEMENT HEARINGS

5.1 APPLICABILITY

In addition to the rules of general applicability in Section 2, the rules in this section shall apply to appeals of code enforcement violation notices. In case of conflict between Section 2 rules and Section 5 rules, Section 5 rules shall control.

5.2 FILING

- A. How to Appeal. A person to whom a notice and order is issued pursuant to this chapter may appeal to the hearing examiner by filing a written notice of appeal with the City Clerk within 14 days from the date of service of the notice and order. The appeal must be accompanied by a filing fee in the amount established by the City's fee resolution, which is refundable if the appellant prevails on the appeal.
- B. Effect of Appeal. The timely filing of an appeal pursuant to this section shall stay the requirement for action specified in the notice and order that is the subject of the appeal. The monetary penalty for a continuing violation does not continue to accrue during the pendency of the appeal; however, the Hearing Examiner may impose a daily monetary penalty from the date of service of the notice and order if he or she finds that the appeal is frivolous or intended solely to delay compliance.
- C. Effect of Failure to Appeal. The violation shall be deemed committed, the notice and order shall become the final administrative order, and the monetary penalties assessed shall be immediately due and subject to collection if (a) an appeal is not filed within 14 days after the notice and order was issued, or (b) an appeal was timely filed, but the appellant or his or her representative failed to appear at the hearing.

5.3 CONTENT OF APPEAL

An appeal must be in writing and contain the following:

- A. The action or decision appealed, including the date thereof;
- B. The City department that took the action or made the decision;
- C. The name, address and telephone number of the appellant;
- D. The name, address, telephone and fax number of the attorney or other representative, if any for the appellant;

- E. A brief statement as to how the appellant is significantly affected by or interested in the matter appealed;
- F. A brief statement of the errors that the appellant believes were made in the action or decision being appealed, or the procedural irregularities associated with the action or decision, noting appellant's specific exceptions and objections to the decision or action being appealed. Unless amendment is allowed, the identification of errors will define and limit the issues the examiner will consider;
- G. The relief requested, such as reversal or modification; and
- H. Any other information required by the Covington city code.

5.4 NOTICE OF HEARING

The Clerk shall cause a notice of the appeal hearing to be posted on the property that is the subject of the notice and order, and mailed to the appellant and the complainant, if not anonymous, at least 10 days before the hearing. The notice shall contain the following:

- A. The file number and a brief description of the matter being appealed;
- B. A statement of the scope of the appeal, including a summary of the errors alleged and the findings and/or legal conclusions disputed in the appeal;
- C. The date, time and place of the public hearing on the appeal;
- D. A statement of who may participate in the appeal; and
- E. A statement of how to participate in the appeal.

5.5 HEARING FORMAT

The hearing format for code enforcement appeals shall adhere to the following format:

- A. Introduction by Hearing Examiner
- B. Direct Testimony & Evidence: Respondent City – Appellant – General Public
- C. Rebuttal Testimony & Evidence: Respondent City – Appellant – General Public
- D. Closing Statements (Optional): Appellant – Respondent City

5.6 BURDEN OF PROOF

The City shall have the burden of proving, by a preponderance of the evidence, that a violation has occurred and that the proposed corrective action is reasonable.

5.7 STAFF REPORT

- A. Filing. At least seven (7) days before the hearing, the City shall deliver a written report to the examiner and the appellant summarizing its case and making a recommendation for a monetary penalty. Staff reports shall also be made available

for public viewing at City Hall. In the examiner's discretion, failure to timely provide the report may constitute grounds for continuing the appeal hearing. In so determining, the examiner shall consider the particular circumstances of the case, the possible prejudice to the persons failing to receive a copy of the report, and the justification, if any, for failure to comply. Any such continuance shall normally be for not less than three weeks. When a case is continued under this rule, the examiner may establish a deadline prior to the continued hearing for further submittals.

B. Content. The staff report should contain information which staff believes will have probative value in the appeal hearing and which will be necessary for preparation of a properly and fully considered decision. Such information should include, but shall not be limited to:

1. A general heading, to include file number, issue, location of violation, name of property owner, hearing date and time, staff representative.
2. Code violation procedure and notice requirements;
3. A description of the code violation(s) with specific details as to what is occurring/not occurring on the property that constitutes a violation, and citation of relevant code sections.
4. Detailed information on the background investigation and action, including specific dates and times of inspections of property, contacts with the person responsible for the violation, and written notifications to correct the violation(s).
5. Findings and conclusions;
6. Staff recommendation.
7. Exhibit list.

C. Exhibits. City staff shall prepare a list of exhibits. The exhibit list and a copy of each exhibit shall be available at City Hall for public review at the same time the staff report becomes available. Such exhibits should include, but shall not be limited to:

1. Any correspondence with the responsible person(s) regarding the violation
2. Notice of Code Violation & Order to Correct, Notice to Correct Code Violation, Voluntary Correction Agreement, etc.
3. Declaration of Service
4. Photographs – provide date/time/location where photos taken
5. Appeal
6. Any other relevant information

5.8 DEFAULT

The hearing examiner may dismiss an appeal by an order of default where the appellant, without good cause, fails to appear or is unprepared to proceed at a scheduled and properly noticed hearing.

5.9 DECISION

- A. Decision. The hearing examiner shall determine whether the City has established by a preponderance of the evidence that a violation has occurred and that the required correction is reasonable and shall affirm, vacate, or modify the City's decisions regarding the alleged violation and/or the required corrective action, with or without written conditions.
- B. Order. The examiner shall issue an order to the person responsible for the violation which contains the following information:
 - 1. The decision regarding the alleged violation including findings of fact and conclusions based thereon in support of the decision;
 - 2. The required corrective action;
 - 3. The date by which the correction must be completed;
 - 4. The monetary penalties assessed based on the provisions of this chapter;
 - 5. The date after which the City may proceed with abatement of the unlawful condition if the required correction is not completed.
- C. Assessment of Monetary Penalty. Monetary penalties assessed by the examiner shall be in accordance with the monetary penalty schedule in CMC 1.30.110(6).
- D. Abatement. Where action to abate the violation is required, the examiner shall give substantial weight to the City's determination regarding the nature of any such action required, and whether such action has been satisfactorily performed.
- E. Notice of Decision. The examiner shall mail a copy of the decision, including findings of fact, conclusions, and order, to the applicable department director within 21 days of the hearing. The City shall forward a copy of the decision to the appellant no later than two days after its receipt of the decision.
- F. Judicial Review. Judicial review of a decision by the hearing examiner may be sought by any person aggrieved or adversely affected by the decision, pursuant to the provisions of the Land Use Petition Act, Chapter 36.70C RCW, if applicable, or other applicable authority, if any, if the petition or complaint seeking review is filed and served on all parties within 21 days of the date of the decision. For purposes of this section, "aggrieved or adversely affected" shall have the meaning set forth in RCW 36.70C.060(2).

- G. Effect of Decision. If judicial review is not obtained, the examiner's decision shall constitute the final decision of the City, and the failure to comply with the decision shall constitute a misdemeanor punishable by a fine of not more than \$1,000 or up to 90 days imprisonment, or both. In addition to criminal punishment pursuant to this subsection, the City may pursue collection and abatement as provided in this chapter.

5.10 RECORD

The record of an appeal shall include the following:

- A. Decision or action being appealed;
- B. Appeal statement;
- C. Evidence received or considered;
- D. Pleadings, procedural rulings, and other non-evidentiary materials that are part of the examiner's file;
- E. Statement of matters officially noticed, if any;
- F. Findings, conclusions and decision of the hearing examiner;
- G. Recording and/or transcript of the hearing; and
- H. An affidavit or certificate of the written notice given of the appeal hearing.