

CITY of MERCER ISLAND

HEARING EXAMINER

RULES OF PROCEDURE

issued pursuant to Section 3.40.080(B)

of the Mercer Island Municipal Code

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PART 100

GENERAL RULES

104 Purpose

These rules supplement, not replace, the provisions of municipal code. In case of conflict between these rules and any provision of municipal code, the code provision prevails.

These rules address most normal circumstances which might arise when dealing with Examiner proceedings. The possibility exists that a situation may arise which has not been foreseen and 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.

108 Definitions

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

- a) “Administrative appeal” means any appeal from a City Staff action for which jurisdiction is assigned to the Examiner under City code.
- b) “Appellant” means the person, organization, or authorized representative appealing an administrative decision to the 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 City Council of Mercer Island.
- e) “Day(s)” means calendar days unless specifically stated otherwise herein or in City code.
- f) “Examiner” means the Hearing Examiner and any Examiners *Pro Tem* appointed by the City Manager.
- g) “*Ex parte*” means communication with the Examiner by one party outside the presence of other parties.
- h) “Principal parties” means and is limited to the applicant(s), the appellant(s), and the respondent(s) to any given application/appeal.
- i) “Project permit application” means an application for a City permit or approval requiring a pre-decision hearing by the Examiner, such as a preliminary subdivision, conditional use permit, variance, etc.
- j) “Staff” means City of Mercer Island employees and contract employees who work for the City department(s) having responsibility for processing project permit applications, code enforcement, and other matters which fall within the Examiner’s jurisdiction.

116 Expeditious Proceedings

It is the policy of the Examiner that, to the extent practicable and consistent with requirements of law, public hearings shall be conducted expeditiously. In the conduct of such proceedings the Examiner and all persons testifying shall make every effort at each stage of a proceeding to avoid delay.

120 Ex Parte Communication

- a) Proceedings before the Examiner are subject to requirements of due process which restrict *ex parte* communication. (See Rule 108(g) for the definition of *ex parte*.)
- b) The Examiner may communicate *ex parte* with city staff and others on procedural matters as required to perform their duties in accordance with these rules.
- c) If an *ex parte* communication other than allowed by subsection (b) is made to or by the Examiner, the Examiner shall publicly disclose such communication at the outset of the open record hearing. Where a hard copy of the communication is available, the Examiner shall enter it into the record of the proceeding.

124 Acceptability of Electronic Communications

- a) E-mail may be used in communicating with the Examiner. The sender of such a communication has the obligation to insure receipt. All such communications are subject to the *ex parte* communication restrictions of Rule 120.
- 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/appeal file. E-mail not physically entered into a hearing record before the Examiner closes that record shall not be considered part of the record and will not be considered by the Examiner.

128 Potential Conflict of Interest Cases.

If an application/appeal is received by the City that City Staff reasonably believes may present a conflict of interest or appearance of fairness issue to the Examiner, the Staff shall, prior to assigning a hearing date and time to the application/appeal, explain their concern to the Examiner. If the Examiner concurs, the Examiner shall recuse himself from hearing the case. (See Rule 616.) The City Manager shall be informed of the situation so that an Examiner *Pro Tem* may be appointed.

132 Special Hearing Dates

If an application/appeal is received, which, in the Staff's opinion, is likely to be of significant interest to a large number of citizens, Staff may request a special hearing date and time from the Examiner. The Examiner shall have final authority to set the date, time and place for all such special hearings.

136 Fees for Staff Services.

Nothing in these Rules affects Staff's authority to charge and collect fees for services as otherwise authorized by law, code, or adopted City policy.

140 Time Periods

Unless otherwise regulated by law or municipal code: In counting days in a time period, the day a triggering action occurs is not counted; the time period ends at the municipality's regular close of business on the last day of the time period. Unless otherwise regulated by law or municipal code, if the last day of the period would fall on a Saturday, Sunday, legal municipal holiday, or other municipal non-business day, the time period ends at the close of business on the next municipal work day. (See MICC 1.04.010.B.)

PART 200

PREHEARING PROCEDURES

202 Appeals – Transmittal to Examiner

When the City receives an administrative appeal which falls within the Examiner's jurisdiction, it shall transmit a copy of the appeal package as submitted by the appellant together with a copy of the decision being appealed, if not included within the appeal package, to the Examiner by E-mail within three business days of its receipt by the City.

204 Motions/Requests

- a) Filing Any person wishing to file a prehearing motion/request (such as a request for a prehearing conference, for establishment of special hearing procedures, *etc.*) shall submit it in writing to the City and concurrently to all principal parties to the case. The City shall E-mail the motion to the Examiner. If a motion is filed less than 20 days before the scheduled open record hearing date, there may not be sufficient time to allow written responses and prepare written rulings. In such circumstances, the Examiner may elect to rule on the motion at the open record hearing; strict adherence to the procedures set forth in the following subsections may not occur.
- b) Response Any principal party and/or the Staff may file with the Examiner a written response to a filed motion not later than 10 days after the date that the motion was filed. Responses will be considered by the Examiner if and 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 open record hearing. Multiple motions may be consolidated for purposes of 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 open record hearing will be mailed or FAXed to each party of record where time allows, distributed at the open record hearing, or announced at the open record hearing. Oral rulings made during an open record hearing will be memorialized within the written decision on the application/appeal.

208 Prehearing Conferences (See also MICC 3.40.070.)

- a) General The Examiner has sole discretion to convene prehearing conferences. Prehearing conferences may be convened to resolve procedural matters and/or to discuss settlement. A prehearing conference shall be scheduled at a time and place of greatest convenience to its participants. Prehearing conferences will not be recorded, but the Examiner may issue a post-conference Order to memorialize agreements reached during the conference.
- b) Project Permit Applications Prehearing conferences will not normally be convened in project permit application cases. However, where a case is of major community interest, is expected to generate extraordinary amounts of participation, and scheduling issues may be paramount to an expeditious proceeding, the Examiner may elect to convene a prehearing conference. At least seven days written notice of the date, time, and place of the conference will be given to known interested persons.
- c) Administrative Appeals Any principal party may request that the Examiner convene a prehearing conference in an administrative appeal. The Examiner may also call a conference on his own initiative. At least seven days written notice of the date, time, and place of the conference will be given to principal parties (unless the parties waive such notice). Attendance at the conference by other persons will be allowed; however, participation by others will not normally be permitted.

212 View Trip

- a) The Examiner may inspect the site prior or subsequent to the hearing. Failure to inspect the site will not render the Examiner's decision void.
- b) When a view trip has been taken, the Examiner will so state at the hearing and/or in the written decision.
- c) The view trip 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 view trip.

216 Applicant Submittal Deadlines - Project Permit Applications

- a) Applicant submittals made less than 15 days prior to a scheduled hearing shall not be considered at the hearing unless the Examiner finds that the due process rights of the parties and proper Staff review will not be adversely affected. Any such submittal(s) will otherwise be afforded hearing consideration only if the hearing is postponed to a date sufficiently far in the future to allow proper review of the submittal(s) by Staff and public. Any such postponement shall normally be for not less than three weeks. When a case is postponed or continued under this rule, the Examiner may establish a deadline prior to the continued hearing for further applicant submittals.
- b) "Submittals" as used herein includes without limitation original and revised applications, site development plans, preliminary plat maps, concomitant agreements, impact mitigation offers, preliminary drainage plans, environmental checklists, technical and/or scientific evidence, *etc.* The term "submittals" does not include written applicant argument or plan changes that respond to Staff positions and/or late-arriving agency review comments, nor written statements describing and arguing for the application/appeal as already submitted.

220 Initial Exhibits and Exhibit List - Project Permit Applications

- a) The Staff shall select from the documents within the application file all those which it believes in its professional judgment 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. The original or a clear and complete copy of the application, documentation of application completeness, current site plan(s), documentation of compliance with the procedural requirements of the State Environmental Policy Act (SEPA), required public notices, any documents specifically requested by the Applicant to be included as an Exhibit, and all substantive letters from citizens regarding the application shall be included. The Staff shall prepare a Staff Report on the application which shall be included.
- b) The Staff shall mark each document selected under Rule 220(a) with a consecutive exhibit number. These marked documents shall constitute pre-filed exhibits.
- c) The Staff shall prepare a listing of the pre-filed exhibits. The listing and the original (or if the original cannot be provided for exhibit purposes, one clear copy) of each of the pre-filed exhibits shall be available at the Community Planning and Development Department, Mercer Island City Hall, 9611 36th Street SE, Mercer Island, for public review not less than 10 days prior to the scheduled hearing.
- d) The Staff shall mail, deliver, or electronically transmit a copy of the listing and each pre-filed exhibit to the Examiner not less than 10 days prior to the scheduled hearing.

224 Pre-filing of Evidence by Principal Parties – Open Record Hearing Appeal cases

- a) The intent of the following rules is to insure that all documents and arguments to be relied upon by any of the principal parties in an open record appeal hearing before the Examiner are available for review by all other principal parties prior to the open record hearing, thus preventing "surprise" at the hearing and facilitating efficiency. These rules will be interpreted by the Examiner to facilitate that purpose. Requirements of this Rule may be modified through the prehearing conference process. (See Rule 208.)
- b) Pre-filing submittals shall be made to the Planning and Community Development Department, Mercer Island City Hall, 9611 SE 36th Street, Mercer Island.
 - 1) Each principal party shall number its own pre-filing submittals for identification purposes using the following number ranges:

<i>Principal Party</i>	<i>Exhibit Number Range</i>
Respondent	1 – 999
Appellant	1001 – 1999
Applicant (when other than the Appellant)	2001 - 2999

The Examiner will assign additional number ranges when an appeal involves additional principal parties. Numbering will begin with the lowest number in the assigned series and proceed in whole number increments.

An exhibit number shall be assigned to individual documents, not to each page in a document. If a document contains sub-parts or attachments which are not uniquely identified within the document, you must identify each sub-part with a suffix composed of a decimal point followed by either an integer, an upper case letter, or a lower case letter. For example, subparts of Exhibit 1005 would be 1005.1, 1005.2, etc., 1005.A, 1005.B, etc., or 1005.a, 1005.b, etc.

Briefs and hearing memoranda are to be assigned exhibit numbers like any other pre-filed document. Enclosures or attachments to briefs/memoranda are permissible; enclosures or attachments shall be labeled as described above.

Pages in documents should be numbered. If the original document does not have page numbers, please use a "Bates" number stamp or something similar to number each page.

Remember that the purpose of this Rule is simply to facilitate easy reference to each document and to each page within a document by all hearing participants. Please keep that purpose in mind as you prepare your documents for pre-filing.

- 2) Each principal party shall include a list of its exhibits with its submittal. The list shall not be assigned a pre-filed exhibit number as exhibit lists are normally not entered into the record as exhibits.
 - 3) Each principal party, including the City, shall cross-copy its pre-filing to the other principal parties.
 - 4) Each principal party, including the City, shall send or cause to be delivered a copy of its exhibit list and pre-filed exhibits to the Examiner at the same time those documents are filed with the City. The Examiner's business mailing address is 927 Grand Avenue, Everett, WA 98201-1305.
- c) The Examiner will assign pre-filed exhibit numbers within the range 9001 - 9999 to administrative documents which will be entered into the hearing record. Those documents will be made available at City Hall.
 - d) Not less than 14 days prior to the scheduled hearing, the respondent department shall assemble and file the original or a clear and complete copy of all items within the application/appeal file which it believes in its professional judgment 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. The original application and/or appeal, documentation of application completeness, current site plan(s), documentation of compliance with the procedural requirements of the State Environmental Policy Act (SEPA), required public notices, any documents specifically requested by the Applicant to be included as an Exhibit, and all substantive letters from citizens regarding the application/appeal shall be included. (Duplication of items filed under Rule 224(c) is strongly discouraged.)
 - e) Not less than seven days prior to the scheduled hearing, each appellant shall assemble and file one copy of all documents or exhibits, including any pre-hearing brief and/or memorandum, which that party intends to submit. (Duplication of items filed under Rule 224(c) and (d) is strongly discouraged.)
 - f) Not less than seven days prior to the scheduled hearing, the parties shall assemble and file a list of persons the party expects to call as witnesses, and the following information for each person (excluding City staff) the party expects to call as an expert witness: name, resume, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. The witness information also shall not be assigned a pre-filed exhibit number as the Examiner does not anticipate that witness lists need to be entered into the record as exhibits.

- g) The Staff shall prepare and make available to the public the Staff Report not less than 10 days prior to the scheduled hearing.
- h) Principal Parties have a duty under the following circumstances to supplement at the earliest possible opportunity their submittals made under subsections (d) - (f):
 - 1) Whenever an additional expert witness is identified whose participation in the proceedings could not reasonably have been foreseen before the close of the exhibit pre-filing period, the information required by Rule 224(f) shall be provided.
 - 2) Whenever a party obtains information upon the basis of which (A) the party knows that the material submitted was incorrect when submitted, or (B) the party knows that the material submitted, though believed correct when submitted, is no longer correct and the circumstances are such that failure to amend the submittal would constitute knowing concealment of information central to the issues in the appeal.

Exhibit supplements required by this Rule shall be marked, filed, cross-copied to the parties, and provided to the Examiner as required by Rule 224(b).

- i) Documents, materials, studies, analyses, *etc.* not disclosed through the exhibit pre-filing process, other than those offered in response/rebuttal, will not be considered in adjudicating the appeal except by agreement of the other principal parties or at the Examiner's discretion in extraordinary circumstances.

225 Pre-filing of Evidence by Principal Parties – Open Record Hearing Appeal cases – Shortened Version

- a) Some appeal cases are not likely to involve large volumes of exhibits. In those cases, the Examiner may elect to utilize a shortened exhibit pre-filing procedure. The Examiner will notify all principal parties whenever the shortened procedure contained in this Rule will be used.
- b) All the requirements of Rule 224 shall apply in the shortened pre-filing process except that the deadline for the respondent to pre-file its exhibits under Rule 224(d) shall be seven (7) days before the hearing instead of 14 days before the hearing.

226 Pre-filing of Evidence by Principal Parties – Closed Record Hearing Appeal cases

- a) Evidence in a closed record appeal is limited to that which was before the administrative decision maker before the administrative decision was rendered; submission of new evidence by an appellant is not allowed.
- b) All the requirements of Rule 224 shall apply in a closed record appeal case except that:
 - 1) Rule 224(e) does not apply.
 - 2) Parties wishing to submit prehearing briefs/memoranda shall do so not less than seven (7) days before the hearing date. The Examiner will assign administrative exhibit numbers to all prehearing briefs/memoranda.

228 Summary Dismissal – Appeals

- a) The Examiner may summarily dismiss an appeal in whole or in part on the motion of a principal party or on the Examiner's own motion if the Examiner concludes that: The appeal was untimely filed, fails to state a claim for which the Examiner has jurisdiction to grant relief, is without merit on

- its face, is frivolous, or has been brought merely to secure delay; and/or the appellant lacks standing to appeal.
- b) Summary dismissal may be requested by a principal party by filing a Motion pursuant to Rule 204 or may be initiated by the Examiner.
 - c) The Examiner will allow the principal parties a reasonable time in which to submit written responses to a Motion for or Proposed Order of Summary Dismissal.
 - d) An Order summarily dismissing the entirety of an appeal (or all appeals where more than one has been filed and consolidated for processing) constitutes the Examiner's final decision on the appeal/appeals and is subject to reconsideration/appeal in accordance with City code and these Rules. In all other situations, the Order is interlocutory and not subject to reconsideration or appeal until the Examiner issues the final decision on the remaining appeal/appeals.
 - e) When the Respondent Department withdraws or vacates the decision or action being appealed, the appeal becomes moot and shall automatically be dismissed. (Withdrawal of an appeal by the appellant is addressed in Rule 620.)
 - f) The Examiner shall e-mail or mail summary dismissal orders to the principal parties.

PART 300

CONDUCT OF HEARINGS

304 Format – Open Record Hearings

- 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. An open record hearing will normally include, but need not be limited to, the following elements: a brief prefatory statement of procedures and introduction of pre-filed exhibits by the Examiner; a presentation by the applicant/appellant which shall include an explanation of the request, explanation of relevant visual aids (maps or plans), and a discussion of the reasons why the application/appeal should be approved/granted; testimony of any public agencies, including the Staff; testimony by the public; and opportunity for rebuttal.
- b) 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.
- c) The Examiner may ask questions of any witness, including agency and Staff, at any time during their testimony to seek clarification or elaboration of testimony being given. Further, the Examiner may request submittal of additional information to better make a complete and accurate evaluation of the issues.
- d) The Examiner may indicate, at the outset of the hearing, that she/he has studied the materials relating to the case and has preliminarily determined that there seem to be certain central issues which need to be addressed. The Examiner may request that these issues be addressed in testimony to be offered.
- e) The normal sequence of hearing proceedings shall be as follows:

<u>Project Permit Hearings</u>	<u>Combined Project Permit and Appeal Hearings</u>	<u>Enforcement Appeal Hearings</u>	<u>All Other Appeal Hearings</u>
Introduction by Hearing Examiner	Introduction by Hearing Examiner	Introduction by Hearing Examiner	Introduction by Hearing Examiner
Direct Testimony & Evidence Applicant City Staff General Public	Direct Testimony & Evidence Applicant - on the merits Appellant- on the appeal & merits Respondent (Agency)- on the appeal & merits General Public	Direct Testimony & Evidence Respondent (Agency) Appellant	Direct Testimony & Evidence Appellant Respondent (Agency) Parties of Record
Rebuttal Testimony & Evidence Applicant City Staff General Public	Rebuttal Testimony & Evidence Applicant Appellant Respondent (Agency) General Public	Rebuttal Testimony & Evidence Respondent (Agency) Appellant	Rebuttal Testimony & Evidence Appellant Respondent (Agency) Parties of Record
Closing Statements (Optional) City Staff Applicant	Closing Statements (Optional) Applicant Respondent (Agency) Appellant	Closing Statements (Optional) Appellant Respondent (Agency)	Closing Statements (Optional) Respondent (Agency) Appellant

- f) The Examiner reserves the right to abbreviate the normal sequence of events at a hearing when it appears that no one's rights would be infringed upon by such abbreviation and that detailed exposition of the facts is not necessary to the Examiner's understanding of the case. The Examiner also reserves the right to vary from the normal sequence of events in order to ensure due process and/or for convenience or efficiency.
- g) Each public hearing will be recorded in analog or digital format or taken by a certified court reporter to preserve a verbatim record of the proceedings. Where necessary to acquire a good-quality recording, all parties wishing to offer verbal testimony may be required to speak into a microphone provided for that purpose. All hearing participants shall preface their remarks with their full name and the spelling of their last name. Hearing recordings will be retained by the City as required by state law/rule. Hearing recordings may be destroyed, erased, deleted, or otherwise disposed of at the City's convenience after the end of the retention period.

306 Format – Closed Record Hearings

The format for closed record appeal hearings is similar to that for open record hearings with one major exception: Parties are allowed to present only argument, not new evidence or testimony. Unless otherwise specified by the Examiner, presentation of argument in closed record appeal hearings shall follow the sequence for "All Other Appeal Hearings" under Rule 304(e) except that there can be no testimony or evidence submitted. Argument will not be taken under oath or affirmation. In all other respects, the provisions of Rule 304 will apply.

308 Clerk

The City may provide a clerk during hearings. If provided, the clerk shall maintain the register of parties of record, mark exhibits, keep a list of exhibits and witnesses, and perform such other ministerial duties as may be assigned by the Examiner.

312 Rights of Parties

- a) General. Every hearing participant shall have all rights essential to a fair hearing. 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 any other party. Testimony shall be concise and non-repetitious.
- b) Cross-Examination
 - 1) 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.
 - 2) The Examiner will allow cross-examination by principal parties of expert witnesses (which term includes public agency staff) and of principal party witnesses in accordance with these guidelines. Only one person representing each principal 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.

- 3) Within the above guidelines, the allowance and scope of cross-examination is within the discretion of the Examiner.

316 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 that 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) Pre-filed Exhibits The Examiner shall enter Exhibits pre-filed in accordance with Rules 220, 224, 225, and/or 226 into the record at the outset of the open record hearing.
- d) Formal Submittal of Evidence Hearing participants may submit documentary evidence to the record during their direct and rebuttal portions of the open record hearing (subject to the restrictions of Rules 216 and 224). A copy of each item offered for submission by a principal party shall be provided by the offering party to all other principal parties (unless previously disclosed through the pre-filing process under Rule 224 in appeal cases). Such evidence will be marked as exhibits when accepted for entry by the Examiner.
- e) Handling of E-mail and Hand Deliveries to the City Neither the City nor the Examiner shall be responsible for ensuring that E-mail and post- and hand-delivered documents received after 8:00 a.m. on the day of hearing are entered into the hearing record. Persons submitting such documents are responsible for ensuring such entry. The originator of an E-mail is solely responsible for insuring that the transmittal was successfully and timely received by the City/Examiner.
- f) Receipt and Retention All documentary or other physical evidence submitted shall be sequentially numbered as exhibits and retained by the City as a part of the official case record, except City codes, laws, comprehensive plans or other readily available public documents. Materials which the offering party is not willing to have become City property will not be accepted as evidence except, at the discretion of the Examiner, in unusual circumstances.
- g) Oversize, Mounted, and Three Dimensional Models Reduced scale/size copies and/or copies which can easily be folded for storage in a legal sized file folder are preferred whenever oversized and mounted documents are used for display purposes at hearing. Three dimensional models may not be used in presentations unless the offering party has color photographs of the model to offer as evidence.
- h) Copies Documentary evidence may be received in the form of copies or excerpts. Upon request, parties shall be given an opportunity to compare the copy with the original.
- i) Official Notice The Examiner may take official notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within her/his specialized knowledge. When any decision of the Examiner rests in whole or in part upon the taking of official notice of a material fact not appearing in evidence of record, the Examiner shall so state in her/his decision. Appellate

court decisions and adopted state and local laws, ordinances, motions, policies, plans, and other similar documents in the public domain may be referenced, cited, quoted, and relied upon.

- j) Evidence received subsequent to the hearing No documentary material submitted after the close of the open record 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.
- k) Updating of Exhibit List The City shall be responsible for updating the initial exhibit list to include all additional materials admitted during the hearing process.

320 Optional Written Closing Statement Process

- a) A written closing statement process may be established by the Examiner upon the request of one or more of the principal parties. Establishment of such a process may be dependent upon execution by the applicant (or appellant where there is no underlying applicant) of a waiver of decision time line to provide for the time required for the submittal of written closing statements.
- b) Any principal party may request establishment of a written closing statement process. Any such request must be made prior to the close of the open record hearing. The written closing statement submittal schedule shall be established either at a prehearing conference or before the close of the open record hearing.
- c) When employed, the written closing statement process shall take the place of the oral closing statement portion of the open record hearing. (See Rule 304(e).)
- d) Written closing statements shall be submitted in the same order as oral closing statements would have been offered. (See Rule 304(e).) 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.
- e) No principal 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 principal party who fails to submit the statement.
- f) Special procedures and timing may be established where to do so would serve the interests and preserve the due process rights of the parties.

324 Examiner's Power to Maintain Order During Hearing

- a) The Examiner shall have the power to maintain order and decorum during the conduct of all hearings before her/him. The Examiner may remove or have removed from the hearing room any person whose conduct is interrupting the hearing.

- b) In the event that any person or persons interrupt any hearing before the Examiner such that it becomes impossible to conduct an orderly hearing and order cannot be restored by removal of the individuals interrupting the hearing, the following steps may be taken:
 - 1) The Examiner may order the hearing room cleared and continue in session; or,
 - 2) The Examiner may adjourn the hearing and reconvene the hearing at another location.
- c) Whenever the Examiner deems it necessary to reconvene a hearing in a new location because of interruptions preventing an orderly hearing at the regular hearing room location:
 - 1) Final disposition may only be taken on matters appearing on the agenda at the time the disturbance arose leading to an adjournment.
 - 2) The Examiner may establish a procedure for re-admitting any persons not responsible for the disturbing of the orderly conduct of the hearing.
- d) If necessary, law enforcement officers may be summoned by the Examiner to carry out any of the provisions of this Rule and to maintain law and order.

328 Appeals – Required Rules Content
 Subsection 19.15.130.G MICC requires that certain codified provisions regarding decision-making in appeals be included in these Rules of Procedure. Therefore, the content of MICC 19.15.130.G is incorporated herein by reference as if set forth in full.

PART 400

POSTPONEMENT OF HEARINGS

404 Postponement Due to Examiner Unavailability
 If the Examiner cannot be present for a previously scheduled hearing due to illness or other unforeseen event, the Staff may reschedule such hearing for another date. Where the Examiner's absence can be foreseen some days in advance, the Staff shall make a reasonable attempt to notify applicants/appellants and all others who received notice of the hearing of the new date, time, and place of the hearing. The Staff shall post a cancellation notice on the day of the scheduled hearing on the hearing room door. Where the absence becomes known only at the last minute, such posting alone will suffice for notice of the schedule change.

408 Postponement Before Hearing - Project Permit Applications

- a) Only the applicant may request postponement. Postponement requests made before the scheduled hearing has been convened must be filed in writing with the City. The City shall promptly FAX or E-mail the request to the Examiner.
- b) Once a project permit application hearing has been scheduled and public notice has been given, the Examiner will grant a postponement request only if the Staff has adequate time and resources (and is willing) to send timely cancellation notices to all persons who were sent the initial hearing notice. A cancellation notice is “timely” only if mailed three or more days prior to the date of the scheduled open record hearing. If timely cancellation notices are not sent, the Examiner will convene the hearing.

- c) Postponement will not be granted where to do so would violate any state or City procedural time lines, such as deadlines for bringing a matter to hearing or issuing a decision, unless the applicant agrees in writing to waive such time lines.

412 Postponement Before Hearing - Open Record Appeals

- a) Only the appellant and/or respondent may request postponement. Postponement requests made before the scheduled hearing has been convened must be filed in writing with the City. The City shall promptly FAX or E-mail the request to the Examiner.
- b) The Examiner will grant a postponement request in combined project permit application and appellate proceedings filed jointly by the principal parties only if the Staff has adequate time and resources (and is willing) to send timely cancellation notices to all persons who were sent the initial hearing notice. A cancellation notice is “timely” only if mailed three or more days prior to the date of the scheduled open record hearing. A new hearing date and time will be set in consultation with the parties. If timely cancellation notices are not sent, the Examiner will convene the hearing.
- c) The Examiner will grant postponement requests filed jointly by the principal parties in all other appellate proceedings.
- d) The Examiner will not grant *ex parte* postponement requests filed other than jointly except in extraordinary circumstances.
- e) Postponement will not be granted where to do so would violate any state or City procedural time lines, such as deadlines for bringing a matter to hearing or issuing a decision, unless the applicant (or appellant where there is no underlying applicant) agrees in writing to waive such time lines.

416 Continuation or Postponement at Hearing

- a) The Examiner may continue or postpone proceedings for any good cause she/he deems reasonable and appropriate within the time limits imposed by relevant ordinances. If the Examiner determines at a hearing that there is good cause to continue or postpone such proceeding and specifies the date, time, and place on the record, no further notice is required.
- b) Continuation/postponement will not be granted where to do so would violate any state or City procedural time lines, such as deadlines for bringing a matter to hearing or issuing a decision, unless the applicant (or appellant where there is no underlying applicant) agrees in writing or orally on the record to waive such time lines. In all cases subject to a 90-day or 120-day decision time limit, continuances/postponements shall be made to the soonest available date and time of hearing room and Examiner availability and shall in no case extend beyond Day 75 of the 90-day time limit or Day 105 of the 120-day time limit, whichever applies, unless such waiver is granted.

420 Extension of Continuation/Postponement Dates

- a) When an open record hearing has been continued or postponed to a date and time certain, the Examiner may administratively cancel the established hearing date and further continue or postpone the hearing as follows:
 - 1) The request must be made in writing by the applicant/appellant, must be received by the City not less than 30 days prior to the established hearing date, and must state why a further delay is desired.

- 2) The Staff must assure the Examiner that it has adequate time and resources (and is willing) to send timely cancellation notices to all persons who were sent the initial hearing notice and to all parties of record. A cancellation notice is “timely” only if mailed three or more days prior to the date of the scheduled open record hearing.
 - 3) The Examiner will grant or deny the request in writing based upon consideration of the public interest impacts of the request. A copy of the Examiner’s action will be sent to the applicant/appellant and to the Staff.
 - 4) The Staff shall send cancellation notices to all parties of record. The cancellation notice shall: state the reason therefor and indicate in what fashion, if at all, the hearing will be reconvened.
- b) When an open record hearing has been continued or postponed indefinitely subject to a “Not Later Than” (NLT) date, the Examiner may administratively grant extensions of the NLT date as follows:
- 1) The request must be made in writing by the applicant/appellant and must state why a further delay is desired.
 - 2) The request must be received by the Examiner: not less than 30 days prior to the NLT date; and prior to the distribution of notice of the date, time and place for the continued/postponed hearing.
 - 3) The Examiner will grant or deny the request in writing based upon consideration of the public interest impacts of the request. A copy of the Examiner’s action will be sent to the applicant/appellant and to the Staff.

PART 500

RECONSIDERATION AND CLERICAL CORRECTIONS

504 Reconsideration

- a) Reconsideration requests shall conform with the requirements of MICC 3.40.110(A). Untimely filed requests will not be considered. A request for reconsideration filed by the applicant/appellant shall be considered an extension of time mutually agreed for the purposes of timely permit processing.
- b) The City shall E-mail Requests for reconsideration to the Examiner within two business days of filing.
- c) The Examiner’s action following reconsideration is not subject to further requests for reconsideration.

508 Clerical Corrections

The Examiner may correct obvious clerical errors in decisions on his/her own 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.

PART 600

MISCELLANEOUS PROVISIONS

604 Summary Orders on Remand

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

608 Case Record - Content

The official case record of a hearing conducted by the Examiner shall consist of:

- a) A written case record including all documentary written materials and other exhibits submitted for consideration by the Examiner and the Examiner's decision(s), together with the register of parties of record and the list of exhibits and witnesses maintained by the clerk.
- b) An analog or digital recording of the open record hearing. 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.

612 Case Record - Disposition

The integrity of all materials which have become a part of the case record shall be maintained. The City is responsible for retention of the official case record as required by law.

616 Recusal of Examiner

- a) When the Examiner deems her/himself disqualified to preside in a particular proceeding, she/he shall withdraw by notice on the record as soon as the need for recusal becomes known/apparent to the Examiner.
- b) Any person may request recusal of the Examiner in a particular case. Such a request shall be raised as soon as the basis for disqualification is known to the person and shall state the grounds for the request with as much specificity as possible.
- c) The Examiner's decision on a recusal request shall be documented in writing and placed in the relevant case file (preferably as a marked exhibit whenever possible) or delivered orally during the open record hearing.
- d) If, after considering the merits of a recusal request, the Examiner determines not to recuse her/himself, the raising of such request shall in no way be considered by the Examiner in rendering a decision on the substantive case at hand.

620 Withdrawal of Applications/Appeals or Settlement of Appeals

- a) Withdrawal of an application/appeal shall be made by the applicant/appellant in writing, except as provided herein. Settlement agreements shall be submitted in writing and signed by all appropriate parties. Withdrawals and settlements shall be accepted in the following manner:
- 1) Withdrawal or Settlement Prior to Publication of Public Hearing Notice The applicant/appellant shall notify the Staff, which shall place the withdrawal or settlement agreement in the official case file. No further action by the City is necessary.
 - 2) Withdrawal or Settlement after Issuance of Public Hearing Notice but prior to Open Record Hearing The applicant/appellant shall notify the City which shall place the withdrawal or settlement agreement in the official case file. The City shall forthwith notify the Examiner of the withdrawal or settlement. Where sufficient time and resources are available, a notice of withdrawal or settlement may be mailed by the City to all persons to whom the notice of hearing was mailed. The notice shall state that withdrawal or settlement (whichever is applicable) automatically cancels the scheduled hearing. Where sufficient time and resources are not available, the notice shall be posted on the hearing room door on the day the hearing was to be held.
 - 3) Withdrawal or Settlement at the Open Record Hearing The Examiner shall orally accept withdrawals made during the open record hearing; the Examiner shall orally accept a settlement agreement presented during the open record hearing. Oral withdrawal shall be documented by issuance of a written order by the Examiner which shall be placed in the official case file. A settlement agreement shall be placed in the official case file.
 - 4) Withdrawal or Settlement after the Open Record Hearing but Prior to Decision Issuance The applicant/appellant shall notify the City which shall place the withdrawal or settlement agreement in the case file. The City shall forthwith notify the Examiner of the withdrawal or settlement. The Examiner will not issue a Decision. The City shall mail a notice of withdrawal or settlement to all parties of record.
- b) No appeal from a withdrawal or settlement is authorized. Withdrawal or settlement terminates City consideration of the application/appeal.