



**City of Cle Elum**

**HEARING EXAMINER**  
**RULES OF PROCEDURE**  
for project permit applications and appeals

*(Issued on November 1, 2023, under authority of CEMC 2.60.100)*

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## INTRODUCTION

These Rules of Procedure are established pursuant to the authority granted to the Hearing Examiner by the Cle Elum Municipal Code (CEMC), including CEMC 2.60.100, which expressly provides:

“The examiner may establish reasonable procedural and conduct rules for public hearings not inconsistent with any other provision of Cle Elum Municipal Code.”

**Purpose of Rules of Procedure** – An independent Hearing Examiner conducts hearings to apply general policies and regulations adopted by the City Council to specific proposals or situations. These Rules are to help secure the fair and efficient conduct of matters subject to the City's administrative hearing and appeal system. The underlying concern is to ensure that the essentials of due process: notice and opportunity to be heard, are an integral part of every hearing conducted.

**Procedure** – The intent is to ensure that every hearing provides participants a fair opportunity to be heard. In all hearings, the oral testimony is taken under oath or affirmation. The proceedings are voice recorded so that a written transcript can be prepared, if necessary.

**Basis for Decisions** – The Examiner is concerned not with the popularity of a matter presented but whether it meets the requirements of the applicable code, policy or regulation. The examiner's decision or recommendation must be based on the record of the proceedings before the examiner.

**Jurisdiction** – The Hearing Examiner has jurisdiction over specific matters identified in City codes and ordinances, including without limitation CEMC 2.60.060, re: Authority, as currently written or as may subsequently be amended by the Cle Elum City Council.

## **PROTOCOL FOR HEARINGS**

1. Be punctual in attendance at hearing.
2. Be certain to have enough witnesses on hand for each day's proceedings.
3. Witnesses, counsel and parties should be referred to and addressed by their surnames unless permission to do otherwise is granted (e.g. "Ms. Anderson," "Mr. Jensen"). The Hearing Examiner and City staff should be referred to and addressed by their surnames or titles (Mr. Baker, Ms. City Attorney). The Hearing Examiner should be addressed as Mr. or Ms. Hearing Examiner or Examiner (surname).
4. Except by permission of the Hearing Examiner, all communications to the Hearing Examiner should be made from a position at or beside counsel table or from the podium.
5. Counsel (or other party representative) should not approach opposing counsel (or other party representative), witnesses, the Hearing Examiner, or the Recording Secretary without permission of the Hearing Examiner. If it becomes necessary for counsel (or other party representative) to confer with the Hearing Examiner, permission should be obtained.
6. Counsel (or other party representative) should refrain from making disparaging remarks or displaying ill will toward other counsel or toward a party representative and from causing or encouraging any ill feeling among the parties.
7. Counsel and parties are to refrain from making gestures, facial expressions, or audible comments as manifestations of approval or disapproval of testimony or argument.
8. Arrangements with the City for the use of visual aids should be made sufficiently in advance of the need so that they may be set up prior to the hearing.
9. Only one attorney (or other party representative) may examine or cross-examine a witness.
10. Only one attorney (or other party representative) for each party may object to the testimony of a witness being questioned by an opposing party. The objection must be made by the attorney (or other party representative) who has conducted or is to conduct the examination of the witness.
11. Examination of a witness should be limited to questions addressed to the witness. Counsel (or other party representative) is to refrain from making extraneous statements, comments, or remarks during examination.

## **SECTION 1: GENERALLY APPLICABLE RULES**

### **1.1 Applicability of the Rules**

The procedures established in these rules shall apply to all hearing matters assigned to and within the jurisdiction of the Hearing Examiner for the City of Cle Elum, including without limitation open record public hearings on land use permit applications and appeals.

### **1.2 Definitions**

The following definitions shall apply unless the context or subject matter requires otherwise:

- (a) "Affidavit" - a written or printed statement declared or certified to be true and correct under penalty of perjury under the laws of the state of Washington.
- (b) "Appeal" - a challenge to a decision or other action where the Code or other authority authorizes the City's Hearing Examiner to review and decide.
- (c) "Appeal hearing" - a hearing held by the Hearing Examiner to consider an appeal of a decision or other action where the Hearing Examiner has been granted jurisdiction to hear and decide such an appeal.
- (d) "Appellant" - the person(s), organization, association, corporation, or other entity who files a complete and timely appeal of a decision or other appealable action.
- (e) "Applicant" - the person(s), organization, association, corporation or other entity who files an application or otherwise formally requests a permit or other type of City action, interpretation, or authorization which is the subject of an appeal or other review by the Hearing Examiner.
- (f) "Closed record appeals" are appeals of an administrative decision which are heard by the City Council.
- (g) "Code" – Cle Elum Municipal Code (CEMC).
- (h) "Department" - the department, agency, board, commission or other City entity responsible for the decision or action that is subject to appeal or other review by the Hearing Examiner.
- (i) "Director" - the head of the department, agency, board or commission, or other unit of City government responsible for the decision or other action that is subject to appeal or other review by the Hearing Examiner.
- (j) "Examiner" - the Hearing Examiner, or a Hearing Examiner Pro Tempore who has been delegated responsibility to conduct the hearing or otherwise preside over a matter.
- (k) "Ex parte communication" - a communication between one party and the Examiner in the absence of the other party(s).

(l) "Hearing Examiner" - the official appointed by the City Council pursuant to CEMC Chapter 2.60, to serve as the City's Hearing Examiner; also used when referring to any Hearing Examiner Pro Tempore appointed to preside over a particular matter. See also, "Examiner," herein.

(m) "Interested person" - any individual, or public or private organization, significantly affected by, or interested in proceedings before the Hearing Examiner, including any party.

(n) "Motion" - a request made to the Hearing Examiner, whether written or oral, for an order or other ruling.

(o) "Offer of proof" - a chance to state for the record what the evidence would have shown if it had been admitted.

(p) "Open record hearing" or "open record public hearing" means a hearing, conducted by a single hearing body or officer authorized by the City to conduct such hearings, that creates the City's record through testimony and submission of evidence and information, under procedures prescribed by the hearing body or officer. An open record hearing may be held prior to a City's decision on a project permit to be known as an "open record pre-decision hearing." An open record hearing may be held on an appeal, to be known as an "open record appeal hearing," if no open record pre-decision hearing has been held on the project permit.

(q) "Order" - a ruling, instruction, or other directive issued by the Hearing Examiner in response to a request or motion by a party, or on the Hearing Examiner's own initiative. Where the underlying ordinance establishing the Hearing Examiner's jurisdiction so provides, an order can direct how the Hearing Examiner's decision is to be implemented and may be issued as part of that decision or separately from it.

(r) "Party," and "Party (or Parties) of Record" means:

1. The applicant;
2. The property owner, if different than the applicant;
3. The City;
4. Any person, agency, group, association, nonprofit organization, corporation or other entity, who/that individually submitted written comments to the City prior to the closing of the comment period provided in a legal notice;
5. Any person, agency, group, association, nonprofit organization, corporation or other entity, who/that individually submitted written comments for or testified at a public hearing;
6. Any person, agency, group, association, nonprofit organization, corporation or other entity, who/that submitted to the City a written request to specifically receive the Notice of Decision or to be included as a party of record for the project;
7. A party of record does not include a person who has only signed a petition.
8. When a Party consists of more than one individual and constitutes a group, association, nonprofit organization, corporation or other entity, the Party shall designate one individual member of such group, association, corporation or organization to act as the "representative" for purposes

of receiving any required legal notice(s) and for participation in the hearing; provided, any Party of Record may appear and be represented by legal counsel.

(s) "Principal Party" or "Principal Parties" means and is limited to the Applicant(s), the Appellant(s) and Respondent(s) in a matter pending before the Examiner.

(t) "Project permit" or "project permit application" means any land use or environmental permit or license required from the City for a project action, including but not limited to building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, site-specific rezones authorized by the comprehensive plan or a subarea plan, but excluding the adoption or amendment of a comprehensive plan, subarea plan, area wide rezone or development regulations.

(u) "Public hearing" - a hearing held by the Hearing Examiner for the purpose of preparing a decision or recommendation pursuant to code.

(v) "Representative" - that individual designated by a party to be the official contact person and to speak for the party. Unless the applicable underlying substantive law or regulation establishing the Hearing Examiner's jurisdiction specifies otherwise, a representative is not required to be an attorney.

(w) "Rules" - the Hearing Examiner Rules of Practice and Procedure, as currently written or hereafter amended.

(x) "Timely" - within the time prescribed by applicable ordinance or, in the absence of ordinance provision, the time prescribed by Hearing Examiner rule, or within the time determined by the Hearing Examiner.

### **1.3 Jurisdiction of Hearing Examiner**

The jurisdiction of the Hearing Examiner is set forth in relevant provisions of the Cle Elum Municipal Code and city ordinances or resolutions adopted from time to time by the Cle Elum City Council, including without limitation CEMC Chapters 2.60 and 14.30, as currently written or as may subsequently be amended. The Hearing Examiner has all jurisdiction necessarily implied from the powers granted to him or her in CEMC 2.60 or other applicable city ordinances.

On his or her own motion or on the motion of any party, the Hearing Examiner shall dismiss or remand to the appropriate decision-making body any matter that is outside the scope of the Examiner's jurisdiction as defined in the relevant ordinances. The Hearing Examiner may raise jurisdictional questions at any time during the course of the proceeding.



#### **1.4 Powers of Hearing Examiner**

In addition to the powers of the Hearing Examiner set forth in relevant provisions of the City's municipal code or other applicable city ordinance, the Hearing Examiner shall have all powers necessary to conduct orderly, efficient and fair hearings. The Hearing Examiner's powers shall include, but not necessarily be limited to the authority:

- (a) to administer oaths and affirmations;
- (b) to issue subpoenas compelling the attendance of witnesses and the production of documents (See Rule 2.14); and to issue protective orders;
- (c) to rule on all procedural matters, objections and motions;
- (d) to admit and exclude evidence;
- (e) to limit testimony, by time, number of witnesses, subject, or other aspect;
- (f) to question witnesses and request additional information;
- (g) to hold Prehearing Conferences *in any matter* (See Rule 1.4.1 for summary of Prehearing Conference guidelines);
- (h) to regulate the course of hearings and the conduct of participants; and
- (i) to make recommendations and decisions, including the imposition of reasonable conditions, and to issue orders, in the Hearing Examiner's discretion, deemed necessary to implement the Examiner's decision.
- (j) to make Exceptions to these Rules of Procedure, which are designed to address most normal circumstances that arise when dealing with matters before the Hearing Examiner; however, in the event that an unanticipated situation arises which does not lend itself to the full, literal compliance with a Rule, the Examiner reserves the right to exercise discretion to address such circumstances.

##### **1.4.1 Prehearing Conference**

- (a) In any matter, the Hearing Examiner may, on his or her own order, or at the request of a party, hold a conference prior to any hearing to consider:
  - (1) Identification, clarification, and simplification of the issues;
  - (2) Disclosure of witnesses to be called, witnesses that will be made available to testify;
  - (3) Exhibits to be presented;
  - (4) Motions; and

(4) Other matters deemed by the Hearing Examiner appropriate for the orderly and expeditious disposition of the proceedings.

(b) At the Examiner's discretion, prehearing conferences may be held in person, by telephone conference call, or an online audio/video meeting platform.

(c) The Hearing Examiner shall give written or oral notice to all parties of any prehearing conference.

(d) All parties of record have the right to be represented at any prehearing conference. Representation is not required.

(e) Following the prehearing conference, the Hearing Examiner may issue an order reciting the actions taken or ruling on motions made at the conference that shall be controlling on all participants. If any orders are issued, they will be part of the record.

(f) Prehearing orders may not be appealed until the Hearing Examiner issues a decision.

### **1.5 Ex Parte Communications**

Any communication between any participant in a hearing and the Examiner that occurs outside of the hearing and in the absence of the other participants is an ex parte communication.

(a) No interested person or representative shall communicate ex parte directly or indirectly with the Examiner, nor shall the Examiner communicate ex parte directly or indirectly with any interested person or representative, concerning the merits or facts of any matter being heard before the Examiner.

(b) This rule does not prohibit ex parte communications about procedural topics, nor does it apply to written submissions made for the record and available to all participants. The Examiner may receive advice from the City Attorney in any matter in which the City Attorney has not appeared as the City staff's representative or from outside legal counsel if the City Attorney is representing the City staff and may communicate with staff members on procedural and administrative matters, including without limitation communications to obtain, verify, or complete exhibits, records, updated codes and regulations, or other file materials needed to prepare any recommendation or decision.

(c) If prohibited ex parte communication is made directly or indirectly to the Examiner, such communication shall be disclosed as soon as practicable thereafter on the public record. Consistent with the requirements of the Appearance of Fairness Doctrine requirements set forth in 42.36 RCW, any interested party desiring to rebut the communication shall be allowed to place a written rebuttal in the record or to orally rebut the communication.

## **1.6 Disqualification of Hearing Examiner**

Any person serving as Hearing Examiner is subject to disqualification for bias, prejudice, conflict of interest, or any other cause for which a judge can be disqualified.

(a) Whenever the Examiner believes that his relationship to participants or financial interest in the subject of a hearing create the appearance that the proceedings will not be fair, the Examiner shall either: (1) voluntarily step down from the case, or (2) disclose, the relationship or interest on the record, stating a bona fide conviction that the interest or relationship will not interfere with the rendering of an impartial decision.

(b) Any party or interested person may petition for the disqualification of an Examiner promptly after receipt of notice that the individual will preside or, if later, promptly upon discovering grounds for disqualification. The Examiner for whom the disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination.

## **1.7 Computation of Time**

In computing any time period set forth in these Rules or proceedings before the Examiner, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is neither Saturday or Sunday, nor a legal holiday officially observed by the City of Cle Elum. Lack of observance of time periods for filing and service of documents as set forth in these rules will operate strictly against the party that failed to observe the same.

## **1.8 Filing and Service of Documents**

(a) All written public comments made in advance of an open record hearing shall be in writing and must be received no later than the close of the open record hearing. Written comments must contain the name, mailing address, and email address, of the person providing the comment. Comments may be provided by mail, email, or by personal delivery. Filing of comments shall be complete only upon receipt by the City. Email is strongly encouraged as a means to submit written comments, with any attachments or exhibits provided in .pdf format, consistent with any applicable City policies regarding file size and server limitations.

(b) All filings and documents required to be exchanged, provided, shared, or served shall be emailed from each party to all other parties. Parties are responsible for sharing current, functional email addresses with all other parties of record and City staff involved in a particular matter. Materials that must be filed with the Hearing Examiner shall be transmitted by email to the Examiner's designated City staff contact. Service and filing may be accomplished by email or personal delivery, though before any hearing, email of documents in .pdf format is strongly preferred. The date of service and the date of filing is the date of receipt. The service and filing deadline shall be 4:00 p.m. unless otherwise stated in any order issued by the Examiner for the

matter, though items should be served no later than 4:00 p.m. on any due date, to allow parties to confirm receipt or complete transmittals/receipt of materials by close of business. NOTE: this Rule does not modify or excuse an applicant's requirement to comply with all City filing requirements in connection with any permit application process, nor does it modify or excuse an appellant's requirement to comply with all city filing requirements regarding an appeal of an administrative decision.

### **1.9 Official File**

All written submissions shall be maintained in the official file, by the appropriate City Department. The official file shall be available for public inspection and copying during normal business hours, subject to the Public Records Act requirements as set forth in state law and applicable city regulations.

### **1.10 Consolidation**

(a) As provided in City codes, all appeals of project permit application decisions shall be considered together in a consolidated appeal.

(b) The Examiner shall have discretion, consistent with state law and City code, to consolidate related matters for hearing on any topic whenever the interests of justice and efficient procedure will be served by such action.

(c) When the consolidated matters involve both an open record hearing and an appeal, the open record hearing portion of the proceeding shall normally be held first. This will allow members of the public to testify without a protracted wait. In such a case, the Examiner may determine that evidence given in either portion of the proceeding may apply to the decision in the other portion.

### **1.11 Parties of Record**

(a) "Party of Record" and "Parties of Record" shall have the meaning provided in Rule 1.2.r. Any person over the age of eighteen (18) may become a "Party of Record" in a proceeding before the Hearing Examiner. A child under the age of 12 may only testify if permitted by the Hearing Examiner. To become a Party of Record, an individual, organization or government agency shall provide written notice to the City's designated Clerk for the Examiner of their desire to become a Party of Record, and shall provide their name(s), mailing address(es), phone number(s), and an electronic mailing (email) address.

(b) For entities, groups or agencies, a single spokesperson shall be designated to participate in the hearing, and receive official notices on the organization's behalf. While individual members of groups and organizations are welcome to attend and observe hearings, no person other than the designated spokesperson/representative of an entity, group, or agency shall be allowed to actively participate [i.e. speak on behalf of the organization, file motions, question witnesses, raise objections, and the like] during the hearing unless called to testify as a witness by the representative or another party.

(c) Mailings will not be made to a Party of Record if U.S. Mail sent to the address provided by the party is returned by the postal service as undeliverable for any reason, or if a party's designated email address is not functioning, and no attempt to correct the mailing or email address is made by the Party of Record.

### **1.12 Motions**

(a) Any application to the Examiner for an order shall be by motion. Unless agreed to by all known participants or unless made during a hearing, a motion shall be in writing. Known participants include all parties of record at the time the motion is made.

(b) Unless modified by another rule regarding a specific type of motion, written motions shall be filed at least seven business days in advance of the hearing, and copies thereof shall be served on other known participants according to Rule 2.13. Such motions shall state the reason(s) for the request and specify the relief sought.

(c) Parties of record shall have an opportunity to file written response motions no later than three calendar days prior to the scheduled hearing.

(d) Parties are encouraged to request a pre-hearing conference if they anticipate that a hearing process might include motions, so a special briefing schedule can be established by the Examiner, after hearing from party representatives.

### **1.13 Hearing Date; Continuance**

Hearings shall normally be held at the time and place specified in the notice thereof. A scheduled hearing may be continued by the Examiner on his or her own motion or for good cause on motion of a party of record.

### **1.14 Evidence**

(a) Evidence, including hearsay evidence, is admissible if in the judgment of the Examiner it is the kind of evidence upon which reasonably prudent persons are accustomed to rely in the conduct of their affairs.

(b) The Examiner may exclude evidence that is irrelevant, cumulative, or unduly repetitious.

(c) The Examiner shall exclude evidence that is privileged or excludable on constitutional or statutory grounds.

(d) The Examiner may take official notice of the published regulations, rules and duly adopted policies of any public agency, of matters within his or her specialized expertise and of notorious or commonly understood facts.

### **1.15 Exhibits**

(a) Documents, photographs, drawings and physical evidence may be offered as exhibits and each will be assigned an exhibit number. Exhibits admitted into the record will be retained until after a decision is rendered and all appeal proceedings, if any have been concluded.

(b) The Staff Report, if any, and all documents offered from the official file shall be admitted.

(c) Documentary evidence may be offered in the form of copies or excerpts.

### **1.16 Testimony**

(a) All oral testimony shall be taken under oath or affirmation.

(b) The Examiner may impose reasonable limitations on the nature and length of testimony. In so doing the Examiner shall give consideration to: (1) the expeditious completion of the hearing; (2) the need to provide parties of record a fair opportunity to present their cases; (3) accommodating the desires of all members of the public to be heard when public testimony is taken.

(c) Where the rights of the participants will not be prejudiced, testimony of a witness may be taken by deposition or by electronic means, such as telephone or television, as long as the Superior Court Civil Rules for the taking of depositions has been fully complied with. Prior approval is required from the Examiner before any witness testimony is permitted by deposition or by electronic means. Requests should be made in the form of a motion, prior to the hearing, or during any prehearing conference for the matter.

### **1.17 Continuation or Reopening Hearing; Leaving Record Open; Remand.**

(a) Every effort shall be made to complete the hearing on the scheduled date(s). If, however, testimony cannot be presented in the time available, the hearing may be continued for completion on another date. When in open hearing, the Examiner specifies the date, time and place of the continuation of the hearing, no further notice is required.

(b) The Examiner may hold the record open for the receipt of additional requested information, for legal briefing, or in order to allow participants to respond to matters raised.

(c) Remand. Prior to issuing a decision, if the Hearing Examiner determines that information, analysis, revision or other material needed to satisfy the provisions of relevant law or code requirements have not been provided, the Examiner may remand the matter for the addition of the requisite information, analysis, revision or other material.

1. If the Hearing Examiner remands a matter for additional information, analysis, revision or material, the Hearing Examiner shall retain jurisdiction in order to review the adequacy of the information, analysis, revision or material submitted in response to the remand. The remand order shall expressly state that jurisdiction is retained and what information, analysis, revisions or material is to be provided, and may identify a date when it is to be submitted.
2. A copy of the information, analysis, revision or other material filed with the Hearing Examiner in response to a remand shall also be made available to all parties to the proceeding. The parties shall have an opportunity to review and file rebuttal to the information, analysis, revision or other material filed in response to a remand.

(d) After closing the record, the Examiner may reopen the hearing for good cause at any time prior to the issuance of the subject decision(s) or recommendation(s). If this should occur, the Examiner will issue a written Order, explaining the circumstance(s) that constitute(s) good cause, which may include but not be limited to: newly discovered material evidence, which a party could not with reasonable diligence have discovered and produced at the hearing; or a newly discovered court decision, administrative regulation, or other potentially controlling legal authority that was not identified or addressed by the parties during the hearing process. By written order, the Examiner may limit the scope of additional testimony or evidence, and may limit any reopened hearing to submittal of written materials.

### **1.18 Site Visits**

Where it would assist the Examiner in clarifying or understanding the evidence adduced at a hearing, the Examiner may view a site that is the subject of an application or an appeal prior to the close of the record. Unless otherwise provided by the Examiner, site visits include only the Examiner. Interested parties may not accompany or approach the Examiner during a site visit.

### **1.19 Criteria for Decision**

The applicable legal standards shall be the basis for every decision or recommendation by the Examiner.

### **1.20 Termination of Jurisdiction**

The jurisdiction of the Examiner terminates upon the end of the period for appealing or seeking review of the Examiner's decision or recommendation. Notwithstanding the foregoing, clerical mistakes in decisions, orders, or recommendations and errors therein arising from oversight or omission may be corrected by the Examiner at any time on his or her own motion or on the motion of a party of record or if such decision, order, or recommendation is appealed, such mistakes may be so corrected before review is accepted by the reviewing authority.

### **1.21 Recording of Proceedings**

All proceedings before the Examiner shall be electronically recorded and the recordings shall be made a part of the record. Copies of the recordings shall be made available on request and upon payment of the costs of reproduction. The preparation of a written transcript shall be the responsibility of the person desiring the transcript.

### **1.22 Public Accommodation and Accessibility**

A person with a disability requiring accommodation in order to meaningfully participate in a hearing shall be accommodated to the greatest extent practicable. Individuals needing such accommodation shall contact the City Clerk in advance of the hearing to request accommodation. A person with a disability may also elect to have a personal representative present their testimony or provide support to them during the hearing process. Trained guide dogs and assistance dogs are allowed in the hearing room with their owners and shall remain under their control.

Hearing-impaired persons, non-English speaking persons, or persons for which English is a second language, requiring the skills of an interpreter or other accommodation in order to meaningfully participate in a hearing, may bring a qualified interpreter or interpretation assistance device with them to the hearing, provided use of such assistance shall be coordinated so as to minimize potential disruption or delay of hearing proceedings. Any request for the appointment of a fair and impartial interpreter by a necessary party or key witness involved in a hearing should be made in writing to the City Clerk at least 14 days prior to the hearing.

## **SECTION 2 RULES FOR APPEAL HEARINGS**

### **2.1 Matters Subject to Appeal Hearings**

Appeal hearings shall be held on all matters within the jurisdiction of the Hearing Examiner as set forth in CEMC Title 14 or other applicable ordinances.

### **2.2 Notice of Appeal**

Appeals of Type III, IV, and V project permit decisions made by the Hearing Examiner are governed by CEMC 14.30.040.

Appeals of Type I and II project permit decisions made by City staff are heard by the Hearing Examiner, as provided in CEMC 14.30.230. Unless specifically addressed in applicable city codes, appeals to the Hearing Examiner of any Type I or Type II decision shall be governed by the following procedural requirements:

A. Time to File. An appeal of the Type I or II permit decision must be filed within 14 calendar days following issuance of the written decision. Appeals may be delivered to the Cle Elum City Clerk by mail or personal delivery before 4:30 p.m. on the last business day of the appeal period.

B. Computation of Time. For the purposes of computing the time for filing an appeal, the day the notice of decision is mailed shall not be included. The last day of the appeal period shall be included unless it is a Saturday, Sunday, or a day designated by RCW 1.16.050 or by the City's determination as a legal holiday; then it also is excluded and the filing must be completed on the next business day.

C. Content of Appeal. Consistent with CEMC 14.30.230(B), appeals shall be in writing, be accompanied by an appeal fee, and contain the following information:

1. Appellant's name, address and phone number;
2. Appellant's statement describing his or her standing to appeal;



3. Identification of the application which is the subject of the appeal;
4. Appellant's statement of grounds for appeal and the facts upon which the appeal is based;
5. The relief sought, including the specific nature and extent;
6. A statement that the appellant has read the appeal and believes the contents to be true, followed by the appellant's signature.

### **2.3 Filing Fee**

The Notice of Appeal shall be accompanied by any filing fee required by City code or resolution. Filing of the appeal shall not be complete until both the Notice of Appeal and any required filing fee have been received. This means that for an appeal to be timely, filing of the necessary written appeal information and payment of any applicable filing fees must be complete before the appeal period has run.

### **2.4 Who May Appeal (Standing)**

As explained in CEMC 14.30.230(A), standing to initiate an appeal of Type 1, 2, 3 and 4 reviews is limited to the applicant, project sponsor, or owner of the property in which the project permit is proposed, parties of record, affected agencies or tribes, or any person aggrieved by the final decision and who will suffer direct and substantial impacts from approval or denial of the project.

### **2.5 Notice of Appearance for Attorneys**

An attorney wishing to represent a party of record in an administrative appeal must file and serve a Notice of Appearance on all parties of record, with a courtesy copy submitted by email to the city's designated contact-point for the Hearing Examiner.

### **2.6 Clarification or Amendment of Notice of Appeal**

(a) If the Notice of Appeal is unclear or does not sufficiently explain the basis for the appeal as set forth in Rule 2.2, the Examiner may require that the appellant clarify the appeal to correct the deficiency, or, any party of record may, by motion, request the Examiner to order clarification. This procedure does not negate the authority of the Hearing Examiner to dismiss an appeal on jurisdictional grounds, for failing to comply with the requirements of these Rules or applicable provisions of city codes and regulations.

(b) After the initial filing, a Notice of Appeal may only be amended upon motion to add new grounds, so long as the opportunity of other parties to object is provided. Amendments to appeals will only be permitted where the hearing process will remain fair to all parties and no one is prejudiced by the amendment. The Examiner may deny, grant, or impose conditions or limitations on any requested amendment, to ensure the hearing process is fair to all parties.

## **2.7 Parties to an Appeal**

The parties to an appeal are the appellant(s), the City, the applicant(s) if different from the appellant(s), and any intervenor(s) granted intervenor status. The City and all parties resisting the appeal shall be designated as Respondents. All parties, including the City, may be represented by legal counsel.

## **2.8 Intervention**

(a) Intervention is not a substitute means of appealing a decision for those who could have appealed but failed to do so.

(b) A person, organization or other entity who has not filed a timely appeal may submit a motion in a matter seeking permission from the Hearing Examiner to participate in the appeal. Motions to intervene should substantially comply with the standards set forth in Superior Court Civil Rule 24.

(c) Upon a showing of a substantial or significant interest that is not otherwise represented, the hearing examiner may permit an interested person, group, organization, corporation, or other entity, who is not a party to the appeal, to intervene in the appeal, except that no intervention shall be allowed in appeal hearings concerning code enforcement matters.

(d) A written motion requesting intervention must be submitted to the hearing examiner, the applicant (if any, and if different than the appellant), and the appellant, at least ten days prior to the day on which the hearing is to begin, unless the intervention is for the sole purpose of preserving the right to appeal the decision of the hearing examiner to court, in which such written intervention request may be permitted at any time up to the start of the hearing. The motion to intervene must state the basis for the intervention and how the person, group, organization, corporation or other entity making the request is affected by or interested in the appeal.

(e) Upon receipt of any written Motion to Intervene, all parties of record in the proceedings shall have the right to provide a written response at least five days before the hearing date. The moving party may submit a written reply to any response(s) at least two days before the hearing date. Depending on circumstances and issues at hand, the Examiner may issue an order establishing different briefing timelines and requirements.

(f) In determining the merits of a request for intervention, the Hearing Examiner shall consider whether intervention will unduly delay the hearing process, expand the issues beyond those stated in the appeal, or prejudice the rights of the parties. If any Motion to Intervene is granted, the intervenor shall have all the procedural rights of a party in the proceedings, subject the terms of the order granting intervention and any subsequent condition that the hearing examiner may impose. Conditions of intervention may include:

1. Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest or expertise as shown by the request for intervention or other information;
2. Requiring or limiting the intervenor's use of discovery, cross-examination, and other

procedures so as to promote the orderly and prompt conduct of the proceedings;

3. Requiring two or more intervenors and/or parties with similar interest to combine their presentations of evidence and argument, cross examination, discovery, and other participation in the proceedings;

4. Prohibiting any participation because the intervention is granted only for the purpose of preserving a right of appeal of the hearing examiner decision;

5. Such other terms as will help further the purpose and efficiency of the proceedings.

## **2.9 Representative of Party**

(a) An individual may represent him or herself, or may be represented by legal counsel. This rule shall not prevent an individual from using a non-lawyer as a translator, so long as the only service performed is translation.

(b) Where the party is other than an individual (e.g. an organization or legal entity such as a corporation or legal partnership), a representative shall be designated in writing in the form of a notice to all parties. This person shall be the only person authorized to speak on behalf of the party. The representative shall speak for and otherwise exercise the rights of the party. Any authorized person may serve as a representative for an association, corporation or other entity.

## **2.10 Dismissal Prior to Hearing**

An appeal may be dismissed prior to the appeal hearing if the Examiner determines that:

(a) The appeal was not timely filed.

(b) The appeal is based on grounds or seeks relief outside the authority of the Examiner.

(c) The appellant lacks standing to bring the appeal. (See Rule 2.4)

(d) The appeal is without merit on its face, patently frivolous, or brought merely for purposes of delay.

(e) The Notice of Appeal fails to comply with the requirements of these rules or otherwise applicable requirements found in city codes or regulations.

## **2.11 Default/ Withdrawal of Appeal; Withdrawal of Decision**

(a) If an appellant fails to appear at a scheduled and properly noticed hearing, an order shall be entered dismissing the appeal for default. A default order shall be final unless, within seven calendar days of service, good cause to vacate the order is shown by the party against whom it was entered.

(b) An appellant may request withdrawal of the appeal. Such a request shall be granted if made before the appellant has completed presentation of his or her case. Thereafter, the granting of the request is discretionary.

(c) When the decision or action being appealed is withdrawn by the City, the appeal shall be dismissed as moot and the appellant(s) shall be entitled to return of any filing fee paid.

### **2.12 Prehearing Conference**

(a) When it will assist the orderly and efficient disposition of the appeal, the Examiner may schedule and hold a prehearing conference. Alternatively, any party may request a prehearing conference. A prehearing conference may, among other things, consider:

1. Settlement of the appeal;
2. Simplification, definition or limitation of issues;
3. The possibility of obtaining stipulations relating to undisputed facts, the admission of documents or other matters which will avoid unnecessary proof;
4. Identification of witnesses and documentary or other evidence to be presented at hearing;
5. The conduct of reasonable discovery prior to hearing according to a discovery schedule;
6. Procedural matters.

(b) Prehearing conferences may be held by telephone conference call or via an online conference platform.

(c) Based on the discussion and agreements at the prehearing conference, the Examiner may issue a Prehearing Order which shall govern subsequent proceedings.

### **2.13 Filing and Service of Documents and Motions**

(a) Rule 1.8 of these Rules applies to the filing and service of documents and motions.

(b) All documents served must be accompanied by a Declaration of Service, indicating: the name of the person who served the documents, the date served, emailed, or placed in the mail, the type of mail service used for service, the documents served, and be signed by the person named in the Declaration of Service.

(c) Service on the representative of a party shall constitute service upon the party, except for decisions or recommendations of the Examiner, or petitions for review to the superior court. Such decisions, recommendations or appeals shall be served on the parties as well as on their designated representative.

(d) Except as provided in any rule addressing a specific type of motion, motions shall be served no later than seven business days prior to a scheduled hearing. Subject to Rule 1.7, Responses to motions shall be served no later than three calendar days prior to the scheduled hearings and Replies to motions shall be served no later than one day prior to the scheduled hearing. Exceptions to these filing dates are allowed for a motion to quash a subpoena, or for a protective

order relating to discovery. All documents subject to this filing schedule must be served by 4:00 PM unless an Order of the Hearing Examiner establishes a different filing time.

## **2.14 Subpoena or Summons; Failure to produce witness.**

a) A subpoena or a summons may be issued by the Examiner compelling the appearance of witnesses and the production of documents and may be served upon any person 18 years of age or over, competent to be a witness, and who is not a party to the matter for which the subpoena or summons is issued. The Examiner encourages parties to use other means (simple requests, disclosing need for potential witnesses and/or records during a pre-hearing conference, submitting a timely request for public records, and the like) before resorting to requests for a summons or subpoena.

b) A Summons or Subpoena may only be requested by a Principal Party or the Hearing Examiner. A motion shall be made in writing requesting that the Examiner issue a subpoena or summons to require a person to appear and testify at a hearing, or for a person to produce specified documents or other physical exhibits at a prehearing conference or at a hearing. A motion for a subpoena or summons regarding a person shall: include the person's name and address; show the relevance of that persons' testimony; and, demonstrate the reasonableness of the scope of subpoena sought. A motion for a subpoena for documents or other physical exhibits shall: include the name and address of the person who is to produce the documents or other physical exhibit; specify the materials to be produced; indicate the relevance of the materials subpoenaed to the issues on appeal; and, demonstrate the reasonableness of the scope of the production. All motions for a subpoena or summons must include an explanation as to why the same evidence or testimony cannot be adequately addressed by some other available witness or document. The party requesting a subpoena or summons shall be responsible for serving the subpoena or summons.

c) The Examiner in his/her sole discretion may issue a summons and/or subpoena. The Examiner will provide the summons and/or subpoena to the requestor for service according to law. The requestor is solely responsible to arrange for service of the summons and/or subpoena.

d) The requestor shall pay all costs associated with the summons and/or subpoena including, but not limited to, costs of service, costs of producing records required by the summons and/or subpoena, and fees and allowances. Witnesses subpoenaed shall be entitled to the same fees and allowances, in the same manner and under the same conditions, as provided for witnesses in Superior Court, as addressed in Chapter 2.40 RCW and RCW 5.56.010.

(e) Failure to Produce Witness, Adverse Inference. When a subpoena or summons has issued in a case or matter before the Examiner, or where the parties have agreed upon witnesses who will be called and/or made available during a hearing as part of a prehearing conference agreement or order, and the witness subject to such summons, subpoena, prehearing agreement or order fails to appear or testify during the hearing, the *Examiner may infer* such person's testimony would have been unfavorable to a party if: (1) the witness must be within the control of, or peculiarly available to, that party; (2) the testimony must relate to an issue of fundamental importance as contrasted to a trivial or unimportant issue; (3) the circumstances must establish, as a matter of reasonable probability, that the party would not (i) knowingly fail to call the witness in question or (ii) knowing fail to ensure the person appeared to testify during the hearing, unless the witness's testimony would be damaging; (4) there is no satisfactory reason or explanation as to why the witness was not called or failed to appear; and (5) the adverse inference is reasonable in light of all the circumstances.

### **2.15 Informal Settlement**

Nothing in these rules shall be construed to limit the right of any party to attempt informal settlement of an appeal at any time.

### **2.16 Limited Public Participation**

Unless specifically required by law to be closed, appeal hearings are open to the public. However, testimony or other evidence is not allowed from individuals or entities that are not parties of record, unless they are called as witnesses by a party or by the Examiner. Subject to these rules, Appellants have the right to present their case on appeal as they see fit, including the selection of the witnesses they wish to present.

### **2.17 Format of Hearing**

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

- (a) An introductory outline by the Examiner of the procedure to be followed;
- (b) Any preliminary matters;
- (c) Opportunity for opening statements;
- (d) Presentation of the appeal by the appellant(s), including any witnesses;
- (e) Opportunity for cross-examination of appellant(s) and witnesses;
- (f) Presentation of the City's case, including any witnesses;
- (g) Opportunity for cross-examination of City staff and witnesses;
- (h) Presentation by the other respondent(s), including any witnesses.
- (i) Opportunity for cross-examination of respondent(s) and witnesses;
- (j) Rebuttal testimony or evidence, if any;
- (k) Closing arguments.

The Examiner may change the order of presentation at his or her discretion.

### **2.18 Burden of Proof**

Unless otherwise provided by law, the appellant(s) have the burden to establish by a preponderance of the evidence that the matter fails to conform with applicable legal standards

and the administrative decision should be reversed

### **2.19 Expert Testimony**

In general, expert opinion testimony shall be received only from witnesses appearing in person, where a foundation for their expertise has been established, the expert has been qualified as an expert by the Hearing Examiner, and where the expert is available for cross examination. Unless upon Order of the Hearing Examiner, affidavits, declarations or letters containing expert opinion shall be excluded.

### **2.20 Hearing on Written Submissions**

When the parties so agree, an appeal may be submitted entirely on written submissions. If this option is selected, the Examiner shall establish by Order a schedule for initial and responsive submissions. The record shall close when this schedule is completed.

### **2.21 Hearing Examiner's Decision**

(a) The Examiner shall issue a written decision and provide a copy thereof to the City's designated contact person for such matter for distribution to parties of record and their designated representative or legal counsel.

(b) The Examiner's decision may affirm, modify, remand or reverse the administrative decision(s) being reviewed. When an administrative decision is modified, the Examiner may attach reasonable conditions found necessary to make the action consistent with applicable approval criteria.

### **2.22 Reconsideration**

(a) The Hearing Examiner may reconsider a decision on an application, if it is filed in writing within 14 calendar days of the date of issuance. Designated parties to the appeal who participated in the hearing may have standing to seek reconsideration. Any request for reconsideration shall be served on all parties of record and to any party's designated representative or legal counsel on the same day as the request is delivered to the Hearing Examiner. The Examiner will seek to accept or reject any request for reconsideration within 3 business days of receipt. If the Examiner decides to reconsider a decision, the appeal period will be tolled (placed on hold) until the reconsideration process is complete and a new decision is issued. If the Examiner decides to reconsider a decision or recommendation, all parties of record shall be notified. The Examiner shall set a schedule for other parties to respond in writing to the reconsideration request and shall issue a decision no later than 14 calendar days following the submittal of written responses. A new appeal period shall run from the date of the Hearing Examiner's Order on Reconsideration.

(b) In the Order on Reconsideration the Hearing Examiner may take such action as he or she deems appropriate, including but not limited to the following:

- (1) Denying the request;
- (2) Approving the request by modifying or amending the initial decision.

There shall be no reconsideration of a revised/amended decision issued in response to a request for reconsideration.

### **2.23 Content of Record**

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

- (a) All Notices of Appeal, Notices of Appearance and any amendments to the Notices of Appeal;
- (b) The staff report and all accompanying documents;
- (c) All pleadings, briefs and memoranda of the parties;
- (d) All documentary or physical evidence admitted;
- (e) The electronic recording of the proceedings;
- (f) The Hearing Examiner's findings, conclusion and Decision(s), together with any Orders issued or other rulings made in the matter.

Any person who desires a copy of the electronic recordings of the proceedings must pay the cost of reproducing same.

## **SECTION 3 RULES FOR PRE-DECISION HEARINGS**

### **3.1 Matters Subject to Pre-Decision Hearings**

Pre-decision open-record public hearings will be held on those matters identified in CEMC Table 14.30.040 .

### **3.2 Public Participation**

At pre-decision hearings, members of the public are invited to express their views and to offer factual testimony and exhibits. Public testimony may be presented orally, in writing, or both. The Examiner may impose time limits on oral testimony. Written public testimony may be submitted either in advance or at the hearing. The Examiner shall have the discretion to provide an opportunity for written responses post-hearing, by ordering that the hearing record be left open to a date certain.

### **3.3 Parties of Record -- See Definition in Rule 1.2.r.**

### **3.4 Interested Persons**

For purposes of pre-decision hearings only, interested persons are those individuals or organizations indicating a desire to be informed of the result of the hearing by signing an



attendance sheet at the hearing or otherwise requesting notice, but who do not give testimony. Persons who sign an attendance sheet but do not give testimony or submit written comments into the record will not become parties of record with right to appeal the Examiner's decision.

### **3.5 Staff Report**

At least seven calendar days prior to the hearing, the Planning and Economic Development Department or other appropriate department of the City shall make its staff report to the Examiner. The Report shall coordinate and assemble the comments and recommendations of other City departments, other governmental agencies and utility providers having an interest in the matter and shall summarize the project and the applicable laws and regulations and make a recommendation for approval, approval with conditions, or denial.

### **3.6 Format of Hearing**

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

- (a) An introductory outline of the procedure by the Examiner.
- (b) Presentation by the City summarizing the staff report and providing any additional exhibits or testimony the staff believes should be brought to the Examiner's attention, including any written comments received by City staff pursuant to Rule 1.8.
- (c) Testimony by the applicant(s) or petitioner(s) and their witnesses.
- (d) Testimony from the public. Any public participant may make all or part of his or her presentation through witnesses.
- (e) Questions by the Examiner.
- (f) Rebuttal testimony (if any) by the City, the applicant(s) or petitioner(s).
- (g) Closing statements by the City, the applicant(s) or the petitioner(s).

### **3.7 Default**

If an applicant or his or her representative fails to appear at a scheduled and properly noticed hearing, the Examiner may take such action as he or she deems appropriate, including dismissing the matter, continuing the matter, or holding the hearing in the applicant's absence.

### **3.8 Testimony for Organizations**

Whenever the view of any organization or legal entity is to be presented, the organization shall designate a representative with authority to speak for the group. Any written communication with the organization by the Examiner or any party of record shall be through the designated

representative. Repetitious testimony by multiple members of an organization or legal entity will not be allowed; and written submissions by multiple members of an organization or legal entity are discouraged.

### **3.9 Burden of Proof**

The burden of proof shall be on the applicant or petitioner to establish by a preponderance of the evidence that the project permit is consistent with state law, city codes and standards.

### **3.10 Hearing Examiner's Decision**

(a) The Examiner's decision shall be in writing and shall contain findings of fact and conclusions of law supporting the result reached. A copy thereof shall be provided to each party of record and to that party's legal counsel or designated representative.

(b) The Examiner's decision may approve the application with or without conditions, remand the matter to the City for further investigation, or deny the proposal.

### **3.11 Reconsideration**

(a) The Hearing Examiner may reconsider a decision or recommendation on an application, if it is filed in writing within 14 calendar days of the date of issuance. Only parties of record have standing to seek reconsideration. Any request for reconsideration shall be served on all parties of record and to any party's designated representative or legal counsel on the same day as the request is delivered to the Hearing Examiner. The Examiner will seek to accept or reject any request for reconsideration within 3 business days of receipt. If the Examiner decides to reconsider a decision, the appeal period will be tolled (placed on hold) until the reconsideration process is complete and a new decision is issued. The Examiner shall set a schedule for other parties to respond in writing to the reconsideration request and shall issue a decision no later than 14 calendar days following the submittal of written responses. A new appeal period shall run from the date of the Hearing Examiner's Order on Reconsideration.

(b) In the Order on Reconsideration the Hearing Examiner may take such action as he or she deems appropriate, including but not limited to the following:

- (1) Denying the request;
- (2) Approving the request by modifying or amending the initial decision or recommendation.

There shall be no reconsideration of a revised/amended decision or recommendation issued in response to a request for reconsideration.

### **3.12 Content of the Record**

The record of a pre-decision hearing shall include at least the following:

- (a) The application and all supporting materials;

- (b) The staff report and any attachments;
- (c) All documentary and physical evidence received and admitted;
- (d) All pleadings, briefs, or memoranda submitted by a party of record;
- (e) The electronic recording of the proceedings;
- (f) The Examiner's findings and conclusions and the decision made, together with any Orders or other rulings made in the matter.

Any person who desires a copy of the electronic recording must pay the cost of reproducing such item.