TO: City Council  
FROM: Ben Shumaker  
DATE: May 21st, 2015  
SUBJECT: Optional Hearing Examiner Process

Introduction

The attached draft ordinance has been provided at the recommendation of the City’s legal counsel as an optional process to use for controversial or highly technical land use proposals. The process includes two key policy decisions related to local control of land use decisions and the inherent risk involved in that control: 1) On a case-by-case basis should the City Council have the authority to send adjudicative decisions to a Hearing Examiner instead of the Board of Adjustment, City Council, or Planning Commission? and 2) Should all appeals from a hearing examiner’s decision go directly to judicial review instead of following the many different appeal sequences currently in place?

Attachments

Two attachments are included with this memo. The first contains the optional hearing examiner process as it would look in the Stevenson Municipal Code. The second, longer, attachment contains the draft ordinance that would be signed by the Mayor, Clerk, and City Attorney.

Background

The Board of Adjustment and Planning Commission ease the legislative and decision making burdens of the City Council and ensure the separation of powers in city governance. As land use decisions have become increasingly litigious, cities are increasingly adopting a hearing examiner process for review of land use proposals. These hearing examiners are typically lawyers and understand the need to apply the laws based only on the facts of the case, and they are far less susceptible to outside political factors than typical adjudicative bodies made up of local residents. Pros of the hearing examiner include less risk for the city when decisions are challenged in court. Cons of the hearing examiner include the removal of opportunities for local discretion/control. The optional use of a hearing examiner proposed intends to strike a middle ground, saving the hearing examiner process for use on a case-by-case basis.

Potential Motion

If the attached draft is acceptable, the following motion could be used: “I move to approve Ordinance 1086 providing the option for use of a hearing examiner [as drafted OR including the following amendments…].

Prepared by,

Ben Shumaker
Planning Director

Attachments-
1. Draft SMC 2.15
2. Draft Ordinance 1086
SMC 2.15 Hearing Examiner.

SMC 2.15.010 Created—Powers & Duties.
A. There shall be a hearing examiner for the City. Known as the “City of Stevenson Hearing Examiner,” the position is established to provide an efficient and effective administrative adjudicatory system for acting upon quasi-judicial matters and reviewing contested administrative determinations.

B. Except for amendments to the Comprehensive Plan, Zoning Code or Zoning Map, the Hearing Examiner may be empowered to hear and decide any adjudicative land use proceeding arising from Stevenson Municipal Code titles 16 – Subdivisions, 17 – Zoning, and 18 – Environmental Protection.

C. When performing its role as the City’s adjudicative authority, the hearing examiner shall have the same powers and duties as are granted to the adjudicative authority the hearing examiner is empowered to replace.

D. The hearing examiner shall adopt rules concerning procedures for scheduling and conduct of hearings and as otherwise related to the duties of the office, not inconsistent with the terms of this chapter.

SMC 2.15.020 Appointment—Removal.
A. The Hearing Examiner shall be appointed by the Mayor and confirmed by the Council. Appointments may occur on a case-by-case basis or for longer terms not to exceed three (3) years.

B. The party appointed to serve the City in this role must be an experienced attorney, with expertise presiding over hearings often involving private citizens without counsel, in matters typically addressing land use, planning, code enforcement, and development issues. The Examiner must be familiar with due process, appearance of fairness rules, applicable Washington State law and become familiar with the City of Stevenson development codes and other relevant codes, ordinances, regulations and policies.

C. The Hearing Examiner may be removed by the Council at any time. Upon request of the hearing examiner proposed for removal, the Council may hold a hearing on the removal before it becomes effective.

D. Vacancies in the Hearing Examiner position shall be filled as soon as possible.

SMC 2.15.030 Optional Use of Hearing Examiner:
After consultation with the Planning Director, the Council may, in its discretion, elect to use the Hearing Examiner in lieu of the Council, Planning Commission, or Board of Adjustment for adjudicative land use proceedings. Except with regard to decisions below, code provisions relating to the Council, to the Planning Commission, or to the Board of Adjustment as an adjudicative body (including on remand) shall be construed as including the alternate use of the Hearing Examiner, where applicable.

SMC 2.15.040 Challenges to Optional Use of Hearing Examiner.
A. Prior to any hearing on a matter, a party may file an affidavit, which is a sworn statement in writing and under oath, challenging the city council’s optional use of the hearing examiner.

B. The hearing examiner shall rule on the affidavit prior to making other rulings and prior to the hearing.
C. The hearing examiner may remand the matter back to the City Council to reconsider the use of the adjudicative authority the Council originally empowered the hearing examiner to replace.

SMC 2.15.050 Conflict of Interest: The hearing examiner shall not conduct or participate in any hearing or decision in which they have a direct or indirect personal interest, which might exert such influence upon the examiner that might improperly interfere with the decision-making process. Any actual or potential conflict of interest shall be disclosed to the parties immediately upon discovery of such conflict and the examiner shall abstain from any further proceedings in the matter unless all parties agree in writing to have the matter heard by that hearing examiner.

SMC 2.15.060 Disqualification of Hearing Examiner:
A. Prior to any hearing on a matter, a party may file an affidavit, which is a sworn statement in writing and under oath, stating that such party cannot have a fair and impartial hearing by reason of the hearing examiner’s personal bias or prejudice.
B. The hearing examiner shall rule on the affidavit only after ruling on a challenge brought under SMC 2.15.050, above and prior to making other rulings and prior to the hearing.
C. The hearing examiner may enter an order of disqualification to in the event of personal bias or prejudice or to preserve the appearance of fairness.

SMC 2.15.070 Legal Counsel for Hearing Examiner: General legal advice to the hearing examiner will be provided by the city attorney, except that in a contested case where the city will be represented by the city attorney, the mayor with input from the city council may appoint independent counsel to render legal advice to the hearing examiner, the cost of which shall be borne by the city.

SMC 2.15.080 Noninterference in Performance of Duties: No person shall attempt to interfere with or improperly influence the hearing examiner in the performance of designated duties. This provision shall not prohibit the city attorney from providing legal advice to the hearing examiner.

SMC 2.15.090 Decisions-Hearing Examiner Conduct: Each final decision of a hearing examiner shall be in writing and shall include findings and conclusions, based on the record, to support the decision. Such findings and conclusions shall also set forth the manner in which the decision would carry out and conform to the city’s comprehensive plan and the city’s development regulations. Each final decision of the Hearing Examiner, unless a longer period is mutually agreed to in writing by the applicant and the Hearing Examiner, shall be rendered within ten (10) working days following conclusion of all testimony and hearings.

SMC 2.15.100 Decisions-Finality and Appeals: The action by the Hearing Examiner on a matter shall be final and conclusive unless an appeal is filed in accordance with RCW 36.70C, Judicial Review of Land Use Decisions.

SMC 2.15.110 Fees: Each application brought before the hearing examiner shall be accompanied by payment of a fee which shall be set by resolution of the city council.
AN ORDINANCE OF THE CITY OF STEVENSON, WASHINGTON PROVIDING THE OPTION FOR USE OF A HEARING EXAMINER IN LAND USE HEARINGS AND PROVIDING FOR SEVERABILITY AND AN EFFECTIVE DATE

WHEREAS, Stevenson Municipal Code titles 16–Subdivisions, 17 Zoning, and 18 Environmental Protection provide the City has its initial open record land use adjudicative hearing before the City Council, Planning Commission, and Board of Adjustment; and

WHEREAS, Code Cities in Washington State have statutory authorization to establish a hearing examiner system under RCW 35A.63.170, and RCW 57.17.330; and

WHEREAS, the City Council finds that there may be occasions that due to the nature of the proposed land use proposal, the Council may have reason to question the ability of the Council, Planning Commission, or Board of Adjustment to fairly adjudicate a land use matter, and the Council intends to provide an alternate process of a hearings before a hearing examiner where the Council deems it appropriate.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF STEVENSON, WASHINGTON DO ORDAIN AS FOLLOWS:

Section 1- THAT, a new chapter shall be added to Title 2 of the Stevenson Municipal Code as SMC 2.15 Hearing Examiner.

Section 2- THAT, a new section shall be added to Chapter 2.15 as SMC 2.15.010 Created—Powers & Duties.

2.1- The following shall be added to SMC 2.15.010: “A. There shall be a hearing examiner for the City. Known as the “City of Stevenson Hearing Examiner,” the position is established to provide an efficient and effective administrative adjudicatory system for acting upon quasi-judicial matters and reviewing contested administrative determinations.”

2.2- The following shall be added to SMC 2.15.010: “B. Except for amendments to the Comprehensive Plan, Zoning Code or Zoning Map, the Hearing Examiner may be empowered to hear and decide any adjudicative land use proceeding arising from Stevenson Municipal Code titles 16 – Subdivisions, 17 – Zoning, and 18 – Environmental Protection.”

2.3- The following shall be added to SMC 2.15.010: “C. When performing its role as the City’s adjudicative authority, the hearing examiner shall have the same powers and duties as are granted to the adjudicative authority the hearing examiner is empowered to replace.”

2.4- The following shall be added to SMC 2.15.010: “D. The hearing examiner shall adopt rules concerning procedures for scheduling and conduct of hearings and as otherwise related to the duties of the office, not inconsistent with the terms of this chapter.”

Section 3- THAT, a new section shall be added to Chapter 2.15 as SMC 2.15.020 Appointment—Removal.

3.1- The following shall be added to SMC 2.15.020: “A. The Hearing Examiner shall be appointed by the Mayor and confirmed by the Council. Appointments may occur on a case-by-case basis or for longer terms not to exceed three (3) years.”

3.2- The following shall be added to SMC 2.15.010: “B. The party appointed to serve the City in this role must be an experienced attorney, with expertise presiding over hearings often involving private citizens without counsel, in matters typically addressing land use, planning, code enforcement, and development issues. The Examiner must be familiar with due process, appearance of fairness rules, applicable Washington State law and become familiar with the City of Stevenson development codes and other relevant codes, ordinances, regulations and policies.”

3.3- The following shall be added to SMC: “C. The Hearing Examiner may be removed by the Council at any time. Upon request of the hearing examiner proposed for removal, the Council may hold a hearing on the removal before it becomes effective.”

3.4- The following shall be added to the SMC 2.15.010: “D. Vacancies in the Hearing Examiner position shall be filled as soon as possible.”
Section 4. THAT, a new section shall be added to Chapter 2.15 as SMC 2.15.030
Optional Use of Hearing Examiner: “After consultation with the Planning Director, the Council may, in its discretion, elect to use the Hearing Examiner in lieu of the Council, Planning Commission, or Board of Adjustment for adjudicative land use proceedings. Except with regard to decisions below, code provisions relating to the Council, to the Planning Commission, or to the Board of Adjustment as an adjudicative body (including on remand) shall be construed as including the alternate use of the Hearing Examiner, where applicable.”

Section 5. THAT, a new section shall be added to Chapter 2.15 as SMC 2.15.040
Challenges to Optional Use of Hearing Examiner.

5.1. The following shall be added to SMC 2.15.040: “Prior to any hearing on a matter, a party may file an affidavit, which is a sworn statement in writing and under oath, challenging the city council’s optional use of the hearing examiner.”

5.2. The following shall be added to SMC 2.15.040: “B. The hearing examiner shall rule on the affidavit prior to making other rulings and prior to the hearing.”

5.3. The following shall be added to SMC 2.15.050: “C. The hearing examiner may remand the matter back to the City Council to reconsider the use of the adjudicative authority the Council originally empowered the hearing examiner to replace.”

Section 6. THAT, a new section shall be added to Chapter 2.15 as SMC 2.15.050
Conflict of Interest: “The hearing examiner shall not conduct or participate in any hearing or decision in which they have a direct or indirect personal interest, which might exert such influence upon the examiner that might improperly interfere with the decision-making process. Any actual or potential conflict of interest shall be disclosed to the parties immediately upon discovery of such conflict and the examiner shall abstain from any further proceedings in the matter unless all parties agree in writing to have the matter heard by that hearing examiner.”

Section 7. THAT, a new section shall be added to Chapter 2.15 as SMC 2.15.060
Disqualification of Hearing Examiner. “

7.1. The following shall be added to SMC 2.15.060: “A. Prior to any hearing on a matter, a party may file an affidavit, which is a sworn statement in writing and under oath, stating that such party cannot have a fair and impartial hearing by reason of the hearing examiner’s personal bias or prejudice.”

7.2. The following shall be added to SMC 2.15.060: “B. The hearing examiner shall rule on the affidavit only after ruling on a challenge brought under SMC 2.15.050, above and prior to making other rulings and prior to the hearing.”

7.3. The following shall be added to SMC 2.15.060: “C. The hearing examiner may enter an order of disqualification to in the event of personal bias or prejudice or to preserve the appearance of fairness.”

Section 8. THAT, a new section shall be added to Chapter 2.15 as SMC 2.15.070 Legal Counsel for Hearing Examiner: “General legal advice to the hearing examiner will be provided by the city attorney, except that in a contested case where the city will be represented by the city attorney, the mayor with input from the city council may appoint independent counsel to render legal advice to the hearing examiner, the cost of which shall be borne by the city.”

Section 9. THAT, a new section shall be added to Chapter 2.15 as SMC 2.15.080 Noninterference in Performance of Duties: “No person shall attempt to interfere with or improperly influence the hearing examiner in the performance of designated duties. This provision shall not prohibit the city attorney from providing legal advice to the hearing examiner.”

Section 10. THAT, a new section shall be added to Chapter 2.15 as SMC 2.15.090 Decisions-Hearing Examiner Conduct: “Each final decision of a hearing examiner shall be in writing and shall include findings and conclusions, based on the record, to support the decision. Such findings and conclusions shall also set forth the manner in which the decision would carry
out and conform to the city’s comprehensive plan and the city’s development regulations. Each
final decision of the Hearing Examiner, unless a longer period is mutually agreed to in writing by
the applicant and the Hearing Examiner, shall be rendered within ten (10) working days
following conclusion of all testimony and hearings.”

**Section 11**- THAT, a new section shall be added to Chapter 2.15 as SMC 2.15.100
Decisions-Finality and Appeals: “The action by the Hearing Examiner on a matter shall be final
and conclusive unless an appeal is filed in accordance with RCW 36.70C, Judicial Review of
Land Use Decisions.”

**Section 12**- THAT, a new section shall be added to Chapter 2.15 as SMC 2.15.110 Fees:
“Each application brought before the hearing examiner shall be accompanied by payment of a
fee which shall be set by resolution of the city council.”

**Section 13- Severability.** If any section, sentence, clause or phrase of this Ordinance
shall be held to be invalid or unconstitutional by a court of competent jurisdiction, such
invalidity or unconstitutionality shall not affect the validity or constitutionality of any other
section, sentence, clause or phrase of this Ordinance.

**Section 14- Effective Date and Publication.** This Ordinance shall be effective five days
after publication of the Ordinance, or a summary thereof consisting of its title, in the official
newspaper of the City.

PASSED BY THE CITY COUNCIL on May 21st, 2015.

Frank Cox, Mayor

ATTEST:

Nick Hogan, City Clerk

APPROVED AS TO FORM:

Kenneth B. Woodrich, City Attorney