

**RULES OF PROCEDURE FOR
PROCEEDINGS BEFORE THE HEARING EXAMINER
OF THE CITY OF DES MOINES, WASHINGTON**

CHAPTER I: HEARINGS ON PERMIT APPLICATIONS

Purpose

These Rules of Procedure exist to facilitate orderly open record hearings related to land use applications. They should be read in conjunction with Des Moines Municipal Code Chapter 18.240. As noted in Section 1.11, any conflict between the Rules of Procedure and the provisions of the DMMC will be resolved in favor of the provisions of the DMMC. These rules exist to provide guidance. The rules may, at the Hearing Examiner's discretion, be waived in order to promote hearing fairness and efficiency. Chapter I applies to open record hearings on land use applications and Chapter II applies to open record appeal hearings.

SECTION 1.1: DEFINITIONS

"Appellant" means a person, corporation, organization, association or other similar group who files a complete and timely appeal of a decision or other appealable action in accordance with the DMMC.

"Applicant" means a person applying for permission for a land use or development regulated by the DMMC.

"DMMC" means Des Moines Municipal Code.

"City" means the City of Des Moines, Washington.

"City Council" means the Des Moines City Council.

"Clerk of the Hearing Examiner" means a person designated by the City to assist the Hearing Examiner in his/her duties.

"Comprehensive Plan" means the Comprehensive Plan that has been adopted by the City of Des Moines.

"Ex parte communication" means written or oral communications made to or by the Hearing Examiner about a matter pending before the Hearing Examiner, not included in the record and made outside of a hearing.

"Hearing" means the proceeding at which the public is given the opportunity to provide written and oral testimony and the testimony is made part of the record. The hearing creates the record through testimony and submission of evidence and information.

"Hearing Examiner" or "Examiner" means the Hearing Examiner or the Hearing Examiner Pro Tem of the City of Des Moines.

"Motion" means an oral or written request made to the Hearing Examiner, for an order or other ruling

"Open Record Appeal Hearing" means a hearing that creates the record on appeal through written and oral testimony and submission of evidence and information. An open record appeal hearing may only be held if no open record pre-decision hearing has been held on the application.

"Open Record Hearing" means a hearing held under Chapter 36.70B RCW and conducted by the Des Moines Hearing Examiner that creates the record through testimony and submission of evidence and information.

"Order" means a written determination of the Hearing Examiner, which directs a party to the proceedings to act or to refrain from acting.

"Party of record" means any person who has appeared at a hearing of the Hearing Examiner by presenting testimony or making written comment.

"Record" means the oral testimony and written exhibits submitted at the hearing. The audio or video recording of the proceeding shall be included as part of the record.

"RCW" means the Revised Code of Washington

"Staff Report" means the document prepared by the City's planning or administrative staff.

"Working Day" means any day for which the City's offices are open for normal business hours.

SECTION 1.2: JURISDICTION

The scope of the Hearing Examiner's jurisdiction is defined by ordinance and other appropriate authority. The scope of this jurisdiction may not extend to the resolution of all issues, but does include the power to issue orders and make a decision or recommendation on an application.

SECTION 1.3: EX PARTE COMMUNICATION

- 1.3.1 No person, nor his or her agent, employee, or representative, who is interested in a particular petition or application currently pending before the Hearing Examiner shall communicate ex parte, directly or indirectly, with the Hearing Examiner concerning the merits of that or a factually related petition or application. This rule shall not prohibit ex parte communications concerning procedural matters.
- 1.3.2 The Hearing Examiner shall not communicate ex parte directly or indirectly with any person, nor his or her agent, employee or representative, with regard to the merits of an application or appeal.
- 1.3.3 If a prohibited ex parte communication is made to or by the Hearing Examiner, such communication shall be publicly disclosed, and proper discretion shall be exercised by the Hearing Examiner on whether to disqualify himself or herself as Hearing Examiner for that particular hearing.

SECTION 1.4: NATURE OF PROCEEDINGS

1.4.1 Expeditious Proceedings

To the extent practicable and consistent with requirements of law, hearings shall be conducted expeditiously. In the conduct of such proceedings the Hearing Examiner, City staff, and all parties, or their agents, shall make every effort at each stage of a proceeding to avoid delay.

1.4.2 Frequency

Hearings will be scheduled through the City Clerk in coordination with the Hearing Examiner. There may be more than one case scheduled to commence at the same time, and in such an event the Hearing Examiner shall have discretion in setting the agenda.

1.4.3 Format

The format for a hearing will be informal, yet designed to make the evidence and facts relevant to a particular proceeding become available to the Hearing Examiner and easily ascertainable by a reviewing body. The format will allow development of a record by parties.

1.4.4 Site Visit

When necessary, the Hearing Examiner may inspect the site prior or subsequent to the hearing. The site visit is not part of the record. Failure to inspect the site will not render the Hearing Examiner's recommendation or decision void.

1.4.5 Record of Hearing

- a. The City shall make an electronic recording of all hearings in an audio format, such recordings shall be a part of the record. No minutes of the hearing will be kept. Copies of the electronic recordings of a particular proceeding shall be made available to the public within three working days of a request. The cost of such copying shall be paid by the requester.
- b. Copies of any written materials in the record may be obtained by any interested person who shall be responsible for paying the cost of reproducing such material.

1.4.6 Computation of Time

Computation of any period of time prescribed or allowed by these rules, ordinances of the City and the State of Washington shall begin with the first day following that on which the act or event initiating such period of time shall have occurred. When the last day of the period so computed is a Saturday, Sunday or a City, national, or state holiday, the period shall run until the end of the next following business day.

SECTION 1.5: RIGHTS AND RESPONSIBILITIES OF ALL INVOLVED PARTIES

1.5.1 Rights of City

The City staff shall have the right to present evidence and testimony, object, and make motions, arguments, recommendations, and all other rights essential to a fair hearing.

1.5.2 Rights of Applicant

Every Applicant shall have the right to notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing.

The Hearing Examiner may impose reasonable limitations on the number of witnesses heard, and on the nature and length of their testimony. Cross-examination is permitted as necessary for a full disclosure of the facts, but the Hearing Examiner shall control the amount and style of cross-examination.

1.5.3 Rights of Parties of Record

Every party of record shall have the right to present evidence and testimony at hearings. The right of persons to cross-examine, object, submit motions and arguments shall be at the discretion of the Hearing Examiner. The Hearing Examiner may impose reasonable limitations on the number of witnesses heard and the nature and length of their testimony.

1.5.4 Responsibilities of City Staff

The City Staff shall provide a staff report, provide notice of hearings, be present at the hearings, and provide the Hearing Examiner with documentation relevant to the case. Staff reports should be available to the public a minimum of 15 days before the hearing.

1.5.5 Responsibilities of Applicant

The Applicant shall provide the Hearing Examiner with material that supports his/her case five working days prior to the hearing and be prepared for questions from the Hearing Examiner. All supporting materials shall be provided to the Clerk to the Hearing Examiner a minimum of five working days before the hearing.

1.5.6 Responsibilities of All Parties, Witnesses and Observers

Parties, witnesses or observers shall conduct themselves with civility and deal courteously with all involved in the proceedings. Failure to do so will result in removal from the hearing at the discretion of the Hearing Examiner.

All parties submitting evidence at the hearing should submit the original to the Clerk of the Hearing Examiner. Copies should also be given to the City staff and the Hearing Examiner.

SECTION 6: PRESIDING OFFICIALS

1.6.1 Presiding Officials

- a. Hearings shall be presided over by the Hearing Examiner.
- b. The Hearing Examiner shall have all of the authority and duties as granted him/her in state statutes, DMMC and other City ordinances. Included in the duties of the Hearing Examiner are the following: to conduct fair and impartial hearings; to take all necessary action to avoid delay in the disposition of proceedings; and to maintain order. He/she shall have all powers necessary to that end, including the following:
 1. to administer oaths and affirmations;
 2. to issue subpoenas;
 3. to rule upon offers of proof and receive evidence;
 4. to regulate the course of the hearings and the conduct of the parties and their agents;
 5. to question any person presenting testimony at the hearing;

6. to hold conferences for settlement or simplification of the issues, or any other proper purpose;
 7. to require briefs on legal issues;
 8. to consider and rule upon all procedural and other motions appropriate to the proceedings;
 9. to make and file recommendations or decisions; and
 10. to issue any orders related to the hearing process.
- c. Interference. In the performance of his/her adjudicative functions, the Hearing Examiner shall not be subject to the supervision or direction of any elected official, officer, employee or agent of any municipal department.

1.6.2 Presence of Legal Counsel at Hearings or Meetings

- a. Although representation by legal counsel is not required at the hearings, all parties participating in the hearings may be represented at the hearings by legal counsel of their choice.
- b. At the request of any department and in the discretion of the Hearing Examiner, a representative of the City Attorney's Office may be present at the hearings or meetings to advise on matters of law and procedure.
- a. Attorneys engaged in the representation of clients before the Hearing Examiner shall conduct themselves in accordance with all applicable Rules of Professional Conduct, including the display of courtesy to other members of the bar, witnesses, and all other persons present in the hearing room.
- d. All forms of legal authority upon which a party of record will be relying or presenting at the hearing must be submitted to the Clerk to the Hearing Examiner at least five working days in advance of the scheduled hearing date. The above mentioned documents shall be available to the public at least five working days in advance of the scheduled hearing date.

SECTION 1.7: CONDUCT OF HEARINGS

1.7.1 Notice Requirements of Hearings and Filings

- a. All notice and time requirements and methods of notification shall be consistent with the provisions as set forth in the DMMC.
- b. Affidavit of Notice: An affidavit attesting to the notice given of a hearing (including dates and places of publication and list of addressees) shall be part of each case record.

1.7.2 Oath or Affirmation

All testimony before the Hearing Examiner shall be given under oath or affirmation to tell the truth. Either the Hearing Examiner or the clerk of the Hearing Examiner shall administer the oath or affirmation.

1.7.3 Content of the Record

The record of a hearing conducted by the Hearing Examiner shall include, but not be limited to, the following materials:

- a. the application or petition;
- b. the departmental staff reports;
- c. all evidence received which shall include oral testimony given at the hearing, all exhibits and other materials admitted as evidence;
- d. a statement of all matters officially noticed;
- e. a decision or a recommended decision containing the findings and conclusions of the Hearing Examiner;
- f. recordings made on electronic equipment;
- g. an environmental determination made pursuant to the State Environmental Policy Act of 1971 (SEPA) (if applicable); and
- h. verification of public notification of the hearing.

1.7.4 Development of Record at the Hearing

A hearing usually will include, but not be limited to, the following elements:

- a. A brief introductory statement of the Hearing Examiner's process;
- b. Presentation of testimony by the City. At the discretion of the City, it may
 1. present the staff report or recommendation without the applicant first providing testimony, or
 2. ask the applicant to present information on the application prior to presenting the City recommendation.
- c. Presentation of witnesses by the applicant, and the cross-examination of these witnesses;
- d. Presentation of witnesses by interested parties; the cross-examination of these witnesses;
- e. Rebuttal of testimony, if applicable.
- f. An opportunity for questions by the Hearing Examiner.

1.7.5 Content and Form of Staff Reports

The staff report on a land use application shall include the following, if relevant to the application:

- a. A list of the names and addresses of the owner(s) and applicant(s) of the subject property and his/her property interest in the property that is the subject of the hearing.
- b. A brief summary of the requested action and the citation of the ordinance controlling the request.
- c. A common description of the subject property and a legal description of the subject property.
- d. A statement identifying applicable City zoning code regulations.
- e. A technical data summary of the Comprehensive Plan designation and zoning designation of the subject property; the current development of the subject property and the adjoining properties; topographical information; geological and soils information; information on the vegetation on the property; and any other relevant scientific, environmental or engineering information.
- f. The current access to the subject property and the proposed access to the subject property.
- g. An in-depth analysis of the proposed project. This analysis may include, but not be limited to, the following elements of review:
 1. natural features;
 2. character and design, including population figures;
 3. human resources;
 4. housing;
 5. economic development;
 6. transportation;
 7. community facilities, services and institutions;
 8. government jurisdiction boundaries;
 9. neighborhoods;
 10. land use plans; and
 11. land use regulations.
- h. A history of the requested action and a history of the development in the surrounding properties. In making the analysis, the staff shall refer to applicable ordinances as often as possible.
- i. A summary of any other requested land use permits in the area.

- j. A description of the compatibility and impact of the proposal on the existing development and the probable character of the proposal.
- k. A summary of the reports or recommendations of any other agencies consulted.
- l. Appropriate maps of the subject property. If photographs of the site are available the applicant is encouraged to provide color reproductions that shall be part of the staff report.
- m. The result of the determination pursuant to the State Environmental Policy Act.
- n. Staff's conclusions and recommendations.

The staff report shall be distributed to the Hearing Examiner, the applicant and the public.

1.7.7 Continuances of Hearings

a. Hearing Examiner

If, in the opinion of the Hearing Examiner, more information is necessary in order to make a recommendation or decision, or he/she is unable to hear all of the public comments on the matter, the hearing may be continued to a certain date. If the hearing is continued to a specific time and place, and notice is posted on the door of the hearing room, no further notice of that hearing need be given. Continuances shall be consistent with the provisions of the DMMC.

b. At the Request of a Party

Any party of record may request continuance of a hearing. The request, if made prior to the hearing, must be in writing; submitted five (5) working days prior to the hearing; and state reasonable grounds for a continuance. If the request is made orally at the hearing it must be based on reasonable grounds. The Hearing Examiner shall have discretion to grant or deny the request for continuance. Any party requesting a continuance should confer with the other parties to select a mutually agreeable date to resume the hearings; continuances will more likely be granted with the consent of all parties.

c. Continuances shall be granted for a period of no longer than thirty calendar days.

1.7.8 Re-opening Hearings

- a. At any time prior to the filing of the final decision or recommendation, the Hearing Examiner may reopen the proceeding for the reception of further evidence or testimony. All parties of record who participate at the hearing shall be given notice of the consideration of such evidence and granted an opportunity to review such evidence and file rebuttal arguments as required by the DMMC.

- b. If within five working days after the hearing any party of record petitions the Hearing Examiner for a reopening of the hearing, the Hearing Examiner shall have discretion to reopen the hearing to consider new testimony or new evidence that was unavailable at the time of the hearing.

1.7.9 Evidence

- a. Burden of proof. In each proceeding, the applicant shall have the burden of proof to show compliance with applicable laws and regulations of Washington State and the City.
- b. Admissibility. The hearing generally will not be conducted in strict adherence to Rules of Evidence. Any relevant evidence shall be admitted if it is the type that possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. The rules of privilege shall be effective to the extent recognized by law. The Hearing Examiner shall have discretion on the admissibility of all evidence.
- c. Copies. Documentary evidence may be received in the form of copies of excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original. It is advisable to provide an extra copy of all documents to the Hearing Examiner as a working copy.
- d. Judicial notice. The Hearing Examiner may take judicial notice of judicially cognizable facts and in addition may take notice of general, technical or scientific facts within his or her specialized knowledge. The Hearing Examiner shall not take notice of disputed adjudicative facts that are at the center of a particular proceeding.
- e. Occasionally the Hearing Examiner may request a document to be filed after the close of testimony. Only those documents referred to at the hearing and documents specifically requested by the Hearing Examiner may be submitted.
- f. Additional evidence may only be submitted upon a Request for Reconsideration based on the discovery of new evidence which could not reasonably be available at the time of the hearing. If additional evidence is submitted with a request for reconsideration it will be considered only upon a showing of significant relevance and good cause for delay in its submission. All parties of record will be given notice of the consideration of such evidence and granted an opportunity to review such evidence and file rebuttal arguments.

- g. All parties will be allowed an opportunity to make a record of evidence admitted or denied during the course of the hearing. This record shall include offers of proof.

SECTION 1.8: WITHDRAWAL OF APPLICATION OR PETITION

1.8.1 Withdrawal Prior to Service of Official Notice

If a withdrawal request is made before the official notice of the hearing is given, the applicant or petitioner shall notify the City of the withdrawal request and the withdrawal shall be automatically permitted.

1.8.2 Withdrawal Made Any Other Time

If a withdrawal request is made at any time other than that mentioned in Rule 1.8.1, the Hearing Examiner shall have discretion in allowing or disallowing the request.

SECTION 1.9: RECOMMENDATIONS / DECISIONS

1.9.1 Written Recommendations

For permits that require City Council approval, a written report of findings, conclusions and recommendations shall be forwarded to the City Council and the parties of record. The Hearing Examiner submittal shall be within the time allowed by law or agreed to by the Applicant and the City of Des Moines. The findings, conclusions and recommendations shall indicate how the recommendation carries out the goals, policies, plans and requirements of the DMMC and other policies and objectives of the City.

1.9.2 Written Decisions

For permits on which the Hearing Examiner has final approval authority, a written report of findings, conclusions and decision shall be made and forwarded to all parties of record. The Hearing Examiner decision shall be within the time allowed by law or agreed to by the Applicant and the City of Des Moines. The findings, conclusions and decision shall indicate how the decision carries out the goals, policies, plans and requirements of the DMMC and other policies and objectives of the City.

1.9.3 Content of Recommendation/Decision

- (a) The Hearing Examiner's decision;
- (b) Any conditions included as part of the decision or recommendation;
- (c) Findings of fact upon which the decision or recommendation, including any conditions, was based. The findings shall be based exclusively on the evidence presented in the hearing and those matters officially noticed. A statement of any threshold determination made under Chapter 43.21 RCW shall be included.

- (d) Conclusions. Conclusions shall include a resolution of the issue(s) based upon the findings. The conclusions may reference legal criteria, if applicable. The conclusions may make reference to the Comprehensive Plan, as well as to the effect of both approval and denial on property in the vicinity, on businesses, if relevant, and on the general public.

1.9.4 Procedure for Reconsideration

- a. As authorized by the DMMC, the City administrative staff or any party of record may file a written request for reconsideration with the Hearing Examiner within ten working days of the date of Notice of the Hearing Examiner's recommendation or decision. The request shall explicitly set forth alleged errors of law, fact, or procedure, or the discovery of new evidence which was not available at the hearing. The request may also include direction to a specific issue that was inadvertently omitted from the Hearing Examiner's recommendation or decision.
- b. The Hearing Examiner shall respond to the request for reconsideration by either denying the request or approving the request by modifying or amending the recommendation/decision based on the established record or setting the matter for an additional hearing.
- c. If an additional hearing is required the notice of said hearing shall be mailed to all parties of record not less than five working days from the date of the Order of the Hearing Examiner.

1.9.5 Request for Clarification

Any party who participated at the hearing may request at any time a clarification of the decision. The Hearing Examiner shall have the discretion to provide clarification. Such clarification shall not stay the effect of a decision or amend the conclusions of the Hearing Examiner's Decision.

SECTION 1.10: CONFLICTS

These rules of procedure are adopted to supplement the requirements set forth in the DMMC. Any conflicts between these rules and the provisions of the DMMC will be decided consistent with the provisions of the DMMC.

CHAPTER II:
RULES OF APPEAL
OF ADMINISTRATIVE DECISIONS

This chapter applies to appeals of administrative decisions that approve, deny, or condition a land use permit application.

SECTION 2.1: DEFINITIONS

See DEFINITIONS, Chapter 1, Section 1.

SECTION 2.2: FILING

2.2.1 Compliance with Rules

All appeals must comply with these Rules and with the requirements established in the applicable City of Des Moines ordinance(s) and/or RCW 36.70C.040 under which the appeal is filed.

2.2.2 Timeliness

In accordance with the provisions of the DMMC, an appeal must be filed within ten working days of the issuance of the decision being challenged. To be considered timely, the appeal must be filed no later than 4:30 PM on the day the appeal period expires. The appeal must be filed with the Clerk of the City of Des Moines.

2.2.3 Fee

Any filing fee as required by the City of Des Moines Fee Schedule shall accompany an appeal.

2.2.4 Contents

An appeal must be in writing and contain the following:

- a. A brief statement as to how the appellant is significantly affected by or interested in the matter appealed;
- b. A brief statement of the appellant's issues on appeal, noting appellant's specific exceptions and objections to the decision or action being appealed;
- c. The specific relief requested, such as reversal or modification;

- d. Signature, address, and phone number of the appellant, and name and address of appellant's designated representative, if any.

2.2.5 Briefs

Briefs or other memoranda of law may be submitted by the parties in support of or in response to an appeal. Each party is permitted one primary brief not exceeding fifteen double-spaced pages in length. In addition, the Appellant may submit a reply brief not exceeding ten pages in length. The Hearing Examiner may, in his discretion, waive or modify these page limits at the request of either of the parties in order to accommodate complex legal and factual issues.

Briefs must be limited to the specific issues set forth in the Appellant's statement of appeal.

2.2.6 Motions

A party to the proceeding may present a motion to the Hearing Examiner. All motions must be presented in writing and clearly noted as a motion. Motions may be presented at a scheduled hearing, as set out in a Pre-Hearing Order, or by presenting the Clerk to the Hearing Examiner with the motion. Notice of the motion and a copy of it must be given to all other parties to the proceeding. Motions and responses to motions are not to exceed fifteen double-spaced pages in length without prior approval of the Hearing Examiner.

2.2.7 Proposed Findings and Conclusions

The Hearing Examiner may request proposed Findings and Conclusions to be submitted at the option of the parties.

SECTION 2.3: DISMISSAL

- 2.3.1 An appeal may be dismissed without a hearing if the Hearing Examiner determines that it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief, or it is without merit on its face, frivolous, or brought merely for the purpose of delay.
- 2.3.2 Any party may request dismissal of all or part of an appeal at any time with notice to all parties. The Hearing Examiner may make a ruling on a motion to dismiss based upon written arguments or may call for oral arguments.
- 2.3.3 When the decision or action being appealed is withdrawn by the issuing Department, the appeal becomes moot and shall be dismissed.

SECTION 2.4: PREHEARING ORDERS

- 2.4.1 The Hearing Examiner may, on his/her own discretion, or at the request of a party having standing, issue a prehearing order (PHO) to:
- a. Identify, clarify, and simplify the issues;
 - b. Decide prehearing motions;
 - c. Establish a schedule for the hearing process, including orders for the exchange of briefs relating to the appeal.
 - d. Address other matters deemed by the Hearing Examiner to be appropriate for the orderly and expeditious disposition of the proceedings.
- 2.4.2 The prehearing order may be circulated via e-mail or fax.
- 2.4.3 Prehearing orders may not be appealed until the Hearing Examiner issues an appeal decision.
- 2.4.4 The Hearing Examiner may, at his/her own discretion, or at the request of a party with standing, hold a preconference hearing to facilitate the issuance of the PHO. Holding a preconference hearing is not required for the issuance of a PHO.
- a. All parties shall receive notice of the prehearing conference.
 - b. The prehearing conference may take place via telephone or videoconference equipment.
 - c. All parties of record have the right to be represented at any prehearing conference, but such representation is not required.

SECTION 2.5: WITHDRAWAL

- 2.5.1 An appeal may be withdrawn only by the appellant.
- 2.5.2 Where an appeal is made by several persons, a group, organization, corporation, or other entity, withdrawal shall be made by the person designated as the party representative.
- 2.5.3 An appellant's request to withdraw shall be granted as a matter of right and the appeal dismissed.

SECTION 2.6: PARTY'S REPRESENTATIVE REQUIRED

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

SECTION 2.7: NOTICE OF HEARING

2.7.1 Contents

The notice of hearing given to the parties shall conform to the provisions of the DMMC.

2.7.2 Time

Notice of the hearing shall be given within the time required by applicable ordinance(s). If the time for notice of hearing is not specified by the applicable ordinance(s), or applicable ordinances conflict, minimum notice shall be 10 days.

2.7.3 Responsibility

The Clerk of the Hearing Examiner shall be responsible for serving notice of hearing for appeals.

2.7.4 Record of Notice

A copy of the notice of hearing shall be made part of each case record.

SECTION 2.8: PARTIES' RIGHTS AND RESPONSIBILITIES

2.8.1 Although all parties have the right to be represented by an attorney, representation by an attorney is not required.

2.8.2 Where a party has designated a representative, the representative shall exercise the rights of the party.

2.8.3 All parties and others participating in and observing hearings shall conduct themselves with civility and deal courteously with all persons involved in the proceedings.

SECTION 2.9: DEFAULT

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

SECTION 2.10: HEARING FORMAT

2.10.1 Appeal hearings, although generally informal in nature, shall have a structured format and shall be conducted in a manner deemed by the Hearing Examiner to make the relevant evidence most readily and efficiently available to the Hearing Examiner and to provide the parties a fair opportunity for hearing.

2.10.2 The order of an appeal hearing will generally be as follows:

- a. Hearing Examiner's introductory statement;
- b. Background presentation by Department;
- c. Appellant's argument;
- d. Department's presentation;
- e. Applicant's presentation (if not Appellant);
- f. Rebuttal;
- g. Closing argument of parties.

2.10.3 Notwithstanding the provisions of the City of Des Moines Code, the order of hearing may be modified or a different order established as the Hearing Examiner deems necessary for a clear and fair presentation. The order of the hearing may also be modified as agreed upon by the parties, with the Hearing Examiner's approval.

2.10.4 The order of presentation at hearing shall not alter or shift any burden(s) or presumption(s) established by applicable law(s).

SECTION 2.11: HEARING EXAMINER'S DECISION

2.11.1 A decision of the Hearing Examiner on appeal shall include, but not be limited to, a statement regarding the following:

- a. Background. The nature and background of the proceeding, including identification of party representatives participating in the hearing, prehearing determinations, and other similar information
- b. Findings. The individual facts that the Hearing Examiner finds relevant, credible, and requisite to the decision, based on the record of proceedings
- c. Conclusions. Legal and factual conclusions based upon specific provisions of law and the findings of fact
- d. Decision. The Hearing Examiner's decision as to outcome of the appeal (affirm, modify, reverse) based upon a consideration of the whole record and supported by substantial evidence in the record

SECTION 2.12: RECORD

2.12.1 The record of an appeal shall include:

- a. The application or petition;
- b. The departmental staff reports;
- c. All evidence received which shall include oral testimony given at the hearing, all exhibits and other materials admitted as evidence;
- d. A statement of all matters officially noticed;
- e. A decision or a recommended decision containing the findings and conclusions of the Hearing Examiner;
- f. Recordings made on electronic equipment; and
- g. An environmental determination made pursuant to the State Environmental Policy Act of 1971 (SEPA) (if applicable).

2.12.2 The Hearing Examiner's administrative file on an appeal case may include other information or materials that are not part of the evidentiary record.

SECTION 2.13: RECONSIDERATION

2.13.1 Reconsideration of the appeal decision may be granted by the Hearing Examiner on a showing of error of law, fact or procedure, or the discovery of new evidence which was not available at the hearing. The request may also include direction to a specific issue that was inadvertently omitted from the Hearing Examiner's decision.

- 2.13.2 Each party is limited to one motion for reconsideration, even when the original decision is subsequently reversed or modified.
- 2.13.3 As required by the DMMC, motions for reconsideration must be filed within ten working days of the date of the Notice of the Hearing Examiner's decision on the appeal.
- 2.13.4 No party may file a response to a motion for reconsideration except at the request of the Hearing Examiner.
- 2.13.5 Reconsideration will not be granted to review prehearing orders.

SECTION 2.14. CLARIFICATION

- 2.14.1 Any party of record may request at any time clarification of the appeal decision upon notice to the other party.