Exhibit "B"

MRSC FOCUS

Use of Hearing Examiners by Cities and Counties in Washington

What is a Hearing Examiner and Hearing Examiner System?

Local governments in Washington State have the option of hiring or contracting with a hearing examiner to conduct required quasi-judicial hearings, usually in place of local bodies such as the planning commission, the board of adjustment, the board of county commissioners, or the city council A hearing examiner is an appointive officer who acts in a manner similar to a judge and typically is an attorney The basic purpose of having a hearing examiner conduct these hearings is to have a professionally-trained individual make objective quasi-judicial decisions that are supported by an adequate record and that are free from political influences Using a hearing examiner system allows local legislative and advisory bodies that might otherwise conduct these hearings to better concentrate on policy-making, and it can reduce local government liability exposure

A board of county commissioners or a city council has considerable discretion in drafting an ordinance creating a local hearing examiner system. The position of hearing examiner, the type of issues the hearing examiner is authorized to consider and decide, the effect of the hearing examiner's decision, and whether an appeal of any final decision is provided should all determined by the local legislative body and set out in the enabling ordinance. A hearing examiner's decision, as defined by the local legislative body, can have the effect of either a recommendation to or a decision appealable to the ultimate decision-maker (typically the board of county commissioners or the city council), or it can be a final decision (appealable to superior court)

Counties and cities use hearing examiners, often in place of planning commissions, primarily for hearing and deciding land development project applications and/or administrative appeals of land use decisions Hearing examiners are particularly useful where the rights of individual property owners and the concerns of citizens require formal hearing procedures and preparation of an official record State land use planning and growth management laws provide cities and counties with specific

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authority to establish a hearing examiner system to conduct hearings and make recommendations or decide a variety of land use issues Hearing examiners may also conduct hearings and make recommendations or decisions on other local matters

This focus paper describes the use of a hearing examiner, the pros and cons of such systems, and options available to Washington counties and cities References are provided for further information available from the MRSC library and through our Web site.

Establishing a Hearing Examiner System

The office or position of hearing examiner must be established by ordinance That ordinance should identify what matters the examiner is empowered to hear and what will be the effect of the examiner's decision on those matters A common approach in such an ordinance is to establish the framework for the hearing examiner system, while leaving it to the examiner to adopt specific, detailed rules for the conduct of hearings. Hearing examiner ordinances typically address the appointment and term of the hearing examiner; qualifications of the examiner, conflicts of interest and freedom from improper influence; powers and duties, including matters heard, hearing requirements; effect of decisions; reconsideration of decisions, if allowed, and appeals. MRSC has many examples of hearing examiner ordinances and has a compilation of articles and ordinances relating to the hearing examiner system in this state See http://www.mrsc org/library/compil/cphearex.htm

Use of the Hearing Examiner System for Land Use, Environmental, and Related Decisions

Most commonly, hearing examiners are used to hear and decide land use project permit applications where a hearing is required, such as in the case of applications for subdivisions, shoreline permits, conditional use permits, rezones, and variances The recent trend in state law, particularly in conjunction with regulatory reform, has been to allow local governments to give more authority to the hearing examiner to make final decisions on quasi-judicial project permit applications For example, RCW 58 17 330, as amended by 1995 regulatory reform legislation, provides that the local legislative body can specify that the legal effect of a hearing examiner's decision on a preliminary plat approval is that of "a final decision of the legislative body"

The hearing examiner's role in the project permit process can include:

- open record hearings on project permit applications;

- appeals of administrative SEPA determinations, which in most cases are combined with the open record hearing on the application;

- closed record appeals of administrative decisions made by the local planning staff, including appeals of SEPA determinations where an administrative appeal is provided;

- land use code interpretations to satisfy the statutory requirement that cities and counties planning under the Growth Management Act adopt procedures for such "administrative interpretations" (RCW 36 70B.110(11)),

- land use code enforcement proceedings

Other Issues Assigned to Hearing Examiners

The local legislative body may, by ordinance, authorize a hearing examiner to hear other types of contested matters, in addition to land use permit applications and code enforcement Examples of other types of decisions and/or administrative appeals that could be handled by a local hearing examiner include·

- discrimination complaints under local personnel policies;

- employment decisions and personnel grievances;

- ethics complaints by citizens or employees,

- local improvement districts – formation hearing and/or assessment roll determinations;

- public nuisance complaints,

- civil infractions;

- property forfeiture hearings under the Uniform Controlled Substances Act (RCW 69 50.505(e)),

- tax and licensing decisions and appeals;

- whistleblower retaliation claims

Pros and Cons of Using Hearing Examiners

Pros

- More professional and timely decisions insuring fairness and consistency.

  A professional hearing examiner prepares for and conducts hearings in a manner insuring procedural fairness Hearings are less emotional and more expeditious Hearing examiners develop a high level of expertise and specialization, saving time in making decisions and improving their quality and consistency

- Time-saving for legislative body, freeing legislators to focus on legislative policy and other priority issues.

  Conducting public hearings and making quasi-judicial decisions is time-consuming Local legislators can free themselves from many of their hearing duties by delegating them to a hearing examiner The local legislative body can still choose to make final decisions or to hear appeals of the examiner's decisions, and those appeals will be facilitated by a thorough and organized record. The use of hearing examiners is especially time-saving for routine decisions and for complex land use decisions requiring formal hearings, citizen participation, and subject matter expertise

- Separation of policy-making or advisory functions from quasi-judicial functions.

  Use of hearing examiners for quasi-judicial hearings separates legislative and administrative functions from quasi-judicial functions This can improve decision-making by clarifying roles and avoiding conflicts. For jurisdictions with planning commissions, use of a hearing examiner system allows the planning commission to function as an advisory body The legislative body can focus on policy-making while the planning department concentrates on administration. For counties with three-member boards of commissioners, use of a hearing examiner to conduct quasi-judicial proceedings can greatly assist commissioners who already responsible for a number of legislative and administrative functions.

- Improved compliance with legal requirements, including due process, appearance of fairness, and record preparation.

  Hearing examiners have special expertise in managing legal procedural requirements and avoiding appearance of fairness and conflict of interest

issues. The hearing examiner assures procedural fairness, especially in cases where one side is represented by an attorney while the other side is not Participants are often more satisfied with the proceedings, regardless of the outcome A properly conducted hearing also results in a complete and well organized written record

- Reduced liability relating to land use decisions and/or procedural challenges to decisions.

  Using a hearing examiner system has been shown to reduce land use liability exposure Improved hearing procedures, better records, and more consistent and documented decisions are typical of professional hearing examiners. At least one local government insurance authority has officially endorsed the use of hearing examiners for land use decisions based on a survey providing evidence of a lower risk profile for jurisdictions using a hearing examiner system for land use proceedings

- Improved land development review integration under chapter 36.70B RCW (ESSB 1724).

  A number of jurisdictions have adopted hearing examiner systems since the 1995 regulatory reform legislation mandating integration and consolidation of environmental and land use regulatory review for development projects Use of a specialized land use hearing examiner is an effective method of consolidating and coordinating multiple review processes For jurisdictions with a mandatory board of adjustment, adoption of a hearing examiner system eliminates the requirement for a board of adjustment.

- Opportunity for feedback to improve plans and regulations from professional hearing officer familiar with comprehensive plans and development regulations.

  A professional hearing examiner has familiarity with the local comprehensive plan and development regulations and possibly those of other jurisdictions. Areas where plans, regulations, and policies are weak or inconsistent can be identified and referred to the planning staff, planning commission, or legislative body, providing feedback for continuous improvement.

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- Removal of quasi-judicial decision-making from the political arena.

  It may be difficult for elected local government officials to entirely eliminate political considerations from their quasi-judicial decision-making. Professional hearing examiners should be immune from political pressures.

Cons

- Cost to county or city for hiring a hearing examiner and staff.

  There are costs in hiring hearing examiners and, if necessary, support staff. Counties and cities should consider whether savings in council and commission time, improvements in decision-making, and reduced liability justify the costs Alternatives such as use of personal service contracts for hearing examiners can reduce costs

- Increased cost to the parties due to more formal decision-making procedures.

  Hearing examiners can increase the formality of the hearing process, although many of the procedural requirements and formalities are already required under state law. This formality can provide the advantage of increased appearance of fairness and impartiality in decision-making

- Lack of accountability to voters for appointed hearing examiner making decisions or hearing administrative appeals.

  Some people maintain that important decisions should be made by elected officials who are accountable to the voters However, these concerns can be addressed by making the hearing examiner's decision a recommendation to the council or commissioners or by providing for an administrative appeal to the legislative body.

Options for Efficient and Effective Use of Hearing Examiners for Smaller Counties and Cities

Smaller local governments may be reluctant to establish a hearing examiner system because of cost considerations and concerns about whether there will be enough occasions to justify using a hearing examiner Here are some ideas about addressing these concerns.

- Contract for hearing examiner services Counties and cities may establish a contractual relationship with a hearing examiner in which the examiner is compensated, on an hourly or other basis, only as needed

- Share use of a hearing examiner with other jurisdictions. Some local governments in the state have entered into interlocal agreements to contractually share the services of a hearing examiner.

- Increase the number of matters heard by hearing examiner. Doing this could reduce costs relating to use of staff that would otherwise be occupied with those matters.

- Fund the hearing examiner system from permit review fees. Local governments can add and/or increase permit fees and appeal fees to help cover the cost of maintaining a hearing examiner system

Qualifications of Hearing Examiners

There are no state statutes that establish the minimum qualifications of hearing examiners As noted above, hearing examiners are often attorneys; however, a law degree is not required A background in the area in which the examiner will perform would obviously be helpful. Since hearing examiners operate mostly in the land use arena, some local governments use examiners with a planning, rather than legal, background. Keep in mind that the land use decision-making process requires a thorough knowledge of legal procedures, and relevant statutes, local ordinances, and case law. In the ordinance establishing the office of hearing examiner, it is a good idea to identify the minimum qualifications that the legislative body deems necessary for a hearing examiner.

Support, Resources, and Training for Hearing Examiners

- Washington Association of Professional Hearing Examiners, Jim Driscoll, President, 101 Yesler, Suite 607, Seattle, WA 98104, (206) 628-0039 This organization provides periodic training conferences and maintains a list of hearing examiners in the state

MRSC Library Resources

The following MRSC Library resources provide more detailed information concerning use of hearing examiners and the land use hearing examiner system, including sample ordinances and rules of procedure:

- "Hearing Examiner System in Washington State. A Compilation of Articles and Ordinances," MRSC, July 1997.
- "A Citizen Guide to the Office of Hearing Examiner," City of Seattle, revised 1994.
- "The Hearing Examiner in Washington State: A Reference Manual for Local Government," Washington State Planning and Community Affairs Agency (no longer in existence), June 1980
- A Short Course on Local Planning, Planning Association of Washington and the Washington Department of Community, Trade and Economic Development, Version 3.2, March 1997.
- "You Be the Judge: A Handbook for the Land Use Decision Maker," by Jim Driscoll and Ted Hunter, prepared for the Association of Washington Cities (1993)
- Other MRSC Library resources, including sample ordinances establishing the office of hearing examiner, hearing examiner rules of practice and procedure, hearing examiner job descriptions, hearing examiner contracts, and citizens' guides to the hearing examiner process

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