

# **RULES OF MEDIATION**

Part Two of the

## **Rules of Procedure**

**of the**

## **King County Hearing Examiner**

An agency of the

## **Metropolitan King County Council**

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## XX. MEDIATION

### A. INTRODUCTION

#### 1. Authority and purpose

These rules for mediation are adopted pursuant to the authority of K.C.C. 20.24.330 as Part Two of the Rules of Procedure of the King County hearing examiner. Mediation is an entirely voluntary process by which two or more parties and/or interested persons, with the assistance of an impartial person (the mediator), attempt to reach a full or partial agreement on a disputed matter. Persons participate in the mediation process only if, and only to the extent, they choose to do so. A participant is bound by the outcome of the mediation process only if that person, or his or her duly authorized representative, approves the mediated agreement. (See Section "Q", below.)

In appropriate cases, mediation may assist in the resolution of land use issues at a substantial savings in time and money to the parties, interested persons, King County, and the general public. Mediation is also available as an alternative to a formal appeal hearing to resolve other disputes between individuals and agencies of King County.

#### 2. Interpretation

These rules shall be interpreted to facilitate and encourage use of the mediation process at the earliest practical time following the identification of a conflict or dispute which the affected parties or persons are unable to resolve through direct negotiation. Interpretation of these rules shall be consistent with all other applicable provisions, including definitions, of the Rules of Procedure of the King County Hearing Examiner.

### B. ADDITIONAL DEFINITION

"Parties to the mediation" means those persons who have requested or have agreed to participate in a mediation pursuant to Section "E", below.

### C. WHEN MEDIATION IS AVAILABLE

Mediation is available as set forth in the King County Code (see K.C.C. 20.24.330). Except to the extent inconsistent therewith, mediation can be requested by any party or interested person (see Section "E", below), or may be suggested by the responsible county agency, hearing examiner, or the county council. Mediation shall occur only when it is requested or accepted by at least one party and by one additional party or interested person with an opposing position. When the issue proposed for mediation involves the disposition or other action to be taken on an application, mediation shall occur only if the affected applicant agrees to be a participant in the mediation process.

Any objection to an inconsistency between a mediation proposed to be conducted pursuant to these rules and a procedural requirement of the code shall be raised by motion filed with the hearing examiner within ten (10) calendar days of the receipt of information that would apprise a reasonable person of such inconsistency. If not timely filed, such objection shall be deemed waived.

D. NOTICE OF AVAILABILITY OF MEDIATION

King County shall take reasonable steps to advise all persons who file applications or appeals which are within the jurisdiction of the hearing examiner that mediation of disputes is available. A "Notice of Availability of Mediation" shall be contained in or attached to application and appeal forms which are provided by King County, shall be contained in the initial mailing to surrounding property owners and the posted notice of every land use application within the jurisdiction of the hearing examiner. A similar notice also shall be incorporated in the first notice issued by the hearing examiner and/or responsible county agency announcing the scheduled opening date of examiner proceedings (hearing or pre-hearing conference) for which mediation is available to resolve disputed issues.

E. REQUEST FOR MEDIATION; RESPONSES

1. Request

a. Method

Mediation may be requested by any party or interested person. The request shall be in writing, unless made orally at a pre-hearing conference or hearing. A request for mediation should be made promptly following the determination that the disputed issues for which mediation is proposed cannot be resolved by direct negotiation between or among the affected parties and interested persons. A request for mediation made after a hearing has commenced will normally be granted only if all parties to the proceeding agree to participate in the mediation.

b. Cost allocation and tender

Unless otherwise agreed by the parties to the mediation, the opposing sides to a dispute shall each pay an equal share of the cost of mediation. A request for mediation shall be accompanied by a tender to the King County hearing examiner of not less than one-third of the anticipated cost for a half-day mediation. Until such time as mediation costs may be set by ordinance, it is expected that the cost of a half-day mediation will be \$450.00. Therefore, the minimum amount required to be tendered with a request for mediation shall be \$150.00.

The cost of mediation is not a fee to be paid to King County. The tender shall be delivered to the office of the hearing examiner solely for transmittal to the mediator if the request for mediation is accepted. The funds tendered, or any unexpended balance thereof, shall be returned in proportionate shares to the person(s) from whom received if the request for mediation is not accepted, or if the full amount tendered is not expended.

A request for mediation may propose an alternative allocation of the cost of mediation. If an alternative cost allocation is accepted, any excess of the mediation cost tendered will be promptly returned to the party making the request for mediation.

c. Substance of request

The request for mediation shall identify with reasonable specificity the application or appeal to which it applies, the scope of the mediation proposed (including a statement of the particular issues or questions to be addressed), and an estimate of the time likely to be required to conduct and complete the mediation proposed. The request for mediation may propose inclusion of matters or issues which are beyond the scope of the pending hearing, so long as those additional matters are reasonably related to the matters in dispute and are within the control of the parties who will participate in the mediation.

d. To whom transmitted

If made in writing, the request shall be transmitted to all other parties to the proceeding, and also may be addressed to any current or prospective interested persons known to the party making the request. A copy of the request shall also be filed with the office of the hearing examiner.

2. Response to request for mediation

a. Substance of Response

A response to a request for mediation may be made in the form of an agreement to participate in the mediation as proposed, or may propose either a more limited or an expanded mediation. The response may also propose a different allocation of the expense of mediation; time limits for the conduct of mediation; or other conditions.

b. Counter-proposals

Any response other than an agreement to participate in the mediation substantially as proposed by the person making the request shall be considered a counter-proposal and responded to in the same manner as an initial request for mediation.

c. Tender of cost

A positive response to a request for mediation shall be accompanied by a tender to the office of the hearing examiner of the respondent's share, if any, of the cost of a half-day mediation.

d. Response not required

No party or interested person is obliged to respond to a request for mediation. If there is no response made to a request for mediation within seven calendar days, the request shall be deemed refused. No inferences shall be drawn from a refusal to participate in mediation or a failure to respond to a request for mediation. Requests to mediate and responses thereto shall be privileged and not admissible into evidence under the same rules as apply to settlement negotiations.

e. To whom transmitted

Any response to a request for mediation shall be transmitted to the person who requested the mediation, to any other persons to whom that request was addressed, and to any other persons the respondent proposes to be a participant in the mediation. A copy of the response shall also be filed with the office of the hearing examiner.

f. Technical deficiencies not a bar

Failure of a request for mediation or a response to strictly comply with this rule shall not be a bar to mediation if the intent of the affected persons is clear and the costs of mediation are provided for adequately.

F. ATTENDANCE; REPRESENTATION

A party to the mediation shall be present in person or represented by a person or persons who have the requisite authority to enter into an agreement which implements or binds the party to the results of the mediation. A request to mediate, or acceptance of such request, shall constitute an agreement to attend in person or be represented at the mediation by an individual or individuals who shall possess the authority to enter into a binding agreement with respect to any matters within the scope of the issues agreed to be mediated.

Parties to a mediation may participate directly or through a designated representative. Two or more parties or interested persons who share substantially similar interests or concerns with respect to the matter being mediated may participate through a single representative designated or approved by them unless the mediator determines that individual participation will facilitate the making of a mediated agreement.

G. WHEN MEDIATION MAY OCCUR

1. As a matter of right

Mediation is available as a matter of right upon agreement by all parties to the proceeding to address through mediation all issues in dispute. Mediation shall also be approved as a matter of right upon agreement by all parties to mediate any one or more (but not all) issues in dispute, provided that the agreement to engage in mediation is executed and filed with the hearing examiner 14 or more days prior to the scheduled opening of the hearing.

2. At the examiner's discretion

Mediation may be approved by the hearing examiner if any party, and any one or more other parties or interested persons with an opposing position, agree to mediate any substantial issue in dispute. In acting upon a request to approve a partial mediation, the examiner shall consider, to the extent applicable, the following factors:

- a. Whether the issue(s) to be mediated affect primarily the private interests of the parties to the proposed mediation, or are matters of public interest;
- b. If the persons seeking mediation appear to represent substantially all of the persons likely to be affected by or interested in the matters proposed for mediation;

- c. Will the proposed mediation, if successful, be likely to expedite final action on the underlying application or appeal;
- d. Are the costs to the proposed parties to the mediation, as well as to other parties and interested persons, likely to be reduced if the mediation occurs;
- e. The timeliness of the request for mediation, and the effect which granting the request would have on previously established schedules of other parties, interested persons, and the office of the hearing examiner;
- f. The probability of participation by county staff in the mediation process, if such participation appears necessary to accomplish the purpose of the proposed mediation; and
- g. Such other facts or circumstances as bear upon the purposes and objectives of the office of the hearing examiner and these rules.

#### H. TIME OF MEDIATION

Mediation should normally be accomplished within a half day, and rarely exceed a full day, unless additional information or expertise which is not available that day is identified by the mediator as necessary to a successful mediation. Unless otherwise agreed by all parties to the mediation, as well as all parties to the pending proceeding and the hearing examiner, the mediation session shall occur within twenty-one calendar days of the execution of the agreement to mediate or the date of approval of the mediation by the hearing examiner, whichever is later, and the entire process shall be concluded within thirty (30) calendar days of its commencement.

#### I. WAIVER OF HEARING AND REVIEW TIME LIMITS

A request by a party for mediation, or agreement by a party to participate in mediation, shall constitute an agreement by such party (or parties) to stay all time limits applicable to the affected permit review and hearing processes from the date of the first proposal to mediate until the first business day following the receipt by King County and the hearing examiner of the mediator's report. If any party to the proceeding, who is not a participant in the proposed mediation, does not agree to a similar waiver of time limits, the examiner may deny or limit the proposed mediation to assure that applicable time limits for action on the affected application or appeal are not exceeded.

#### J. SELECTION OF MEDIATOR

##### 1. Selection by the parties

A mediator shall be selected by the parties to the mediation.

##### 2. List of available mediators

Solely as a convenience to the public at large, the office of the hearing examiner will maintain a list of mediators who appear to be qualified by training or experience to conduct mediation of matters which are within the jurisdiction of the hearing examiner. Any person who desires to be on the list shall submit a resume or other statement of qualifications to the hearing examiner. Inclusion of

a person on the list of mediators maintained by the office of the hearing examiner shall not constitute a warranty or representation by King County that such person is in fact qualified to conduct mediation in a particular proceeding or type of proceeding. The parties to the mediation shall be the sole judges of the qualifications of the person whom they select as a mediator, whether that person is or is not on the list maintained by the office of the hearing examiner.

The examiner's approval of the person selected as a mediator is not required. In no event, however, shall a current employee of King County or any person who is currently or contemporaneously acting as an agent or contractor for the county be designated as a mediator.

K. COSTS OF MEDIATION

King County shall have no responsibility for the payment of the costs of mediation, except for the transfer of funds deposited with the King County hearing examiner with a request for mediation or a response. King County shall pay the costs, if any, allocable to a King County agency which participates in the mediation and has agreed, in writing, to pay a specified proportion or amount of the costs of mediation.

L. NOTICE OF MEDIATION

1. Notice to parties to the mediation

It is the responsibility of the parties to the mediation and the mediator to assure that all parties to the mediation and the hearing examiner have reasonable notice of the time and place of the mediation session.

2. Notice to all other parties and interested persons

Upon receipt of notice by the hearing examiner that a mediator has been selected and of the time and place set for of the mediation session, the hearing examiner shall give notice to all other parties and known interested persons, if any, that a mediation session has been scheduled. The notice by the hearing examiner shall give the names of the parties to the mediation.

3. Notice of outcome

At the conclusion of the mediation, the hearing examiner (or the responsible county agency, if a public hearing or a pre-hearing conference has not yet been scheduled) shall give notice to all parties and known interested persons of the outcome of the mediation.

M. OBSERVATION OF PROCEEDINGS

Reasonable accommodations shall be provided by the mediator or King County for observation of the mediation by persons who are not participants, except that no observation shall be permitted of caucuses or conferences which do not include all of the parties to the mediation. The opportunity to observe parts of the mediation session does not establish or imply any right to participate by persons who are not parties to the mediation. In the event of any disruption, the mediator may move the mediation session to a private location or otherwise discontinue the opportunity for observation by persons who are not parties to the mediation.

N. AUTHORITY OF THE MEDIATOR

The mediator shall have the authority to:

1. Schedule, recess, adjourn and terminate mediation sessions;
2. Keep order;
3. Request information of the parties, experts or other persons who are present, and ask questions to clarify issues and positions;
4. Request the presence of additional persons; and
5. Generally conduct the mediation in a manner designed to resolve the controverted matters.
6. Resolutions to the matters in controversy may be proposed by the mediator, but no decision may be imposed by the mediator on participants.

O. USE OF EXPERTS

The mediator may determine, with or without request by a party, that a mediated agreement would be facilitated by the receipt of expert information during the mediation process. If requested by the mediator, the parties to the mediation shall make available expert reports, or arrange for the attendance of their anticipated expert witnesses to provide information at the mediation. Alternatively, one or more independent experts on issues relevant to the mediation may be identified by the mediator for that purpose. Experts provided by a party shall be compensated by that party; responsibility for payment of any independent experts shall be assigned in a manner determined by the mediator and agreed to by those parties to the mediation who will be obliged by that determination to contribute to the cost. No expert, whether provided by a party or independent, shall participate in the mediation with respect to any matter outside the scope of his or her expertise.

P. GENERAL ORDER OF MEDIATION

1. Unless otherwise determined by the mediator, the order of proceedings at the mediation shall be:
2. Introduction by mediator.
3. Introduction of participants.
4. Opening statements of interest and position by each participant.
5. After hearing initial statements of the interests of all parties to the mediation, the mediator may encourage the designation of a single representative by parties who share substantially similar interests or concerns. (See section "F" above.)
6. Questions by the mediator to clarify issues, interests and positions.
7. Identification of issues to be discussed.
8. Discussion of identified issues and other efforts to reach agreement. This may include individual caucuses by the mediator with the parties to the mediation in separate sessions, the written or oral conveyance of proposals by the mediator to

other parties to the mediation, the transmittal of responses, and the making of suggestions or proposals by the mediator to the parties separately or jointly.

9. Identification of matters agreed upon.
10. Clarification of agreement by mediator.
11. Written documentation of agreement prepared by the mediator.
12. Signature to agreement by the parties to the mediation who agree thereto.
13. Transmittal of report by the mediator to the hearing examiner and responsible county agency.

The foregoing order of proceedings may be modified at any time by agreement of the parties or order of the mediator.

**Q. AGREEMENTS RESULTING FROM MEDIATION**

**1. Execution and Notice**

All agreements resulting from mediation shall be reduced to writing by the mediator and signed by the persons who have agreed thereto or their authorized representatives. Fully executed copies shall be filed by the mediator with the responsible county agency and the hearing examiner.

**2. Effect of agreement**

**a. Appeals**

If the mediated agreement resolves all issues of all parties to an appeal, the mediated agreement shall include a stipulation and waiver of notice authorizing entry of an order dismissing the appeal. An order of dismissal incorporating the mediated agreement shall be promptly entered by the hearing examiner.

If the agreement is not executed by all parties to an appeal, the agreement shall be binding only upon those parties who have agreed thereto. For appeals not fully resolved, the mediator may, with the consent of the parties to the mediation, prepare and file a recommended pre-hearing order which may be adopted or modified by the hearing examiner to govern future proceedings.

**b. Applications and other matters**

With respect to matters other than appeals, for which the examiner is required to make findings and conclusions concerning the public health, safety and welfare as defined by applicable laws and ordinances, the mediated agreement shall be considered as a joint recommendation to the hearing examiner by the parties to the mediation. The mediated agreement shall be accorded substantial weight in resolving issues between or among the parties to the mediated agreement, and shall be applied to the agreeing parties unless it would be clearly erroneous to do so.

Except for an agreement by an applicant to withdraw or modify an application, a mediated agreement shall not be used to obviate the need for, nor limit the scope of, any public hearing required by law. Mediation is not a substitute for the lawful exercise of discretion by the King County council in performing its legislative and quasi-judicial responsibilities, nor for the performance of the duties and responsibilities of the King County hearing examiner and responsible county agencies. A mediated agreement concerning a land use proposal or any other matter which requires an action by the council shall in all instances be subject to review and recommendation by the hearing examiner and final action by the council in accordance with the purposes and provisions of K.C.C. Chapter 20.24.

c. Effect on other parties and persons

An agreement arrived at through mediation may be considered by the hearing examiner with respect to parties or persons who did not agree to the mediated agreement only as evidence that the mediated resolution of the disputed matter may be feasible or reasonable. This evidentiary use of the agreement does not preclude any party or interested person who is not bound by the agreement from introducing other evidence and argument which disputes the reasonableness or feasibility of the agreement or supports an alternative resolution of the dispute.